



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

CORNELL UNIVERSITY LIBRARY



3 1924 061 102 830

**THE
COMMERCIAL LAWS OF THE WORLD**

**VOLUME VII
UNITED STATES OF AMERICA**

PARTS I—XII

ALL RIGHTS RESERVED
ALSO THE RIGHT OF TRANSLATION INTO FOREIGN LANGUAGES

AMERICAN EDITION

THE COMMERCIAL LAWS OF THE WORLD, EDITED BY
THE HON. SIR THOMAS EDWARD SCRUTTON,
JUDGE OF THE KING'S BENCH DIVISION OF THE HIGH
COURT OF JUSTICE, ENGLAND (CONSULTING EDITOR),
WILLIAM BOWSTEAD, OF THE MIDDLE TEMPLE,
BARRISTER AT LAW, LONDON (GENERAL EDITOR),
CHARLES HENRY HUBERICH, J. U. D. (HEIDEL-
BERG), D. C. L. (YALE), LL. D. (MELBOURNE), COUNSELLOR
AT LAW, BERLIN AND PARIS, PROFESSOR OF LAW IN THE
LAW SCHOOL OF THE LELAND STANFORD JUNIOR UNIVER-
SITY (CALIFORNIA)

BOSTON, MASS.
THE BOSTON BOOK CO.
83-91, FRANCIS STREET

FRENCH EDITION

LE DROIT COMMERCIAL DE TOUS LES PAYS CIVILISÉS
EDITÉ BY DR. LYON-CAËN, PROFESSOR AND DEAN
OF THE FACULTY OF LAW IN PARIS, PAUL CARPEN-
TIER, EDITOR AND MEMBER OF THE FRENCH BAR, LILLE,
AND FERNAND DAGUIN, MEMBER OF THE FRENCH
BAR, COURT OF APPEAL, PARIS, SECRETARY GENERAL OF
THE FRENCH LAW ASSOCIATION, SECRETARY OF THE
WORK, HENRI PRUDHOMME, JUDGE OF THE HIGH-
COURT AT LILLE

PARIS
LIBRAIRIE GÉNÉRALE DE DROIT
ET DE JURISPRUDENCE
F. PICHON & DURAND-AUZIAS

GERMAN EDITION

DIE HANDELSGESETZE DES ERDBALLS, ORIGINATED BY DR. OSKAR BORCHARDT, BERLIN, AND EDITED BY DR. JOSEF
KÖHLER, GEH. JUSTIZRAT (K. C.), PROFESSOR AT THE UNIVERSITY OF BERLIN, HEINRICH DÖVE, GEH. JUSTIZRAT (K. C.),
SYNDIC OF THE BERLIN CHAMBER OF COMMERCE, MEMBER OF THE REICHSTAG, GEH. JUSTIZRAT (K. C.) DR. FELIX MEYER,
JUDGE OF THE COURT OF APPEAL, BERLIN, AND DR. HANS TRÜMPLE, SYNDIC OF THE FRANKFORT CHAMBER OF COMMERCE

BERLIN (SW. 19)
R. v. DECKER'S VERLAG
G. SCHENCK
KÖNIGLICHER HOFBUCHHÄNDLER

THE COMMERCIAL LAWS OF THE WORLD

COMPRISING

THE MERCANTILE, BILLS OF EXCHANGE, BANKRUPTCY
AND MARITIME LAWS OF ALL CIVILISED NATIONS

TOGETHER WITH

COMMENTARIES ON CIVIL PROCEDURE,
CONSTITUTION OF THE COURTS, AND
TRADE CUSTOMS

IN THE ORIGINAL LANGUAGES INTERLEAVED
WITH AN ENGLISH TRANSLATION

CONTRIBUTED BY

NUMEROUS EMINENT SPECIALISTS OF ALL NATIONS

BRITISH EDITION

CONSULTING EDITOR:

THE HON. SIR THOMAS EDWARD SCRUTTON,
JUDGE OF THE KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE

GENERAL EDITOR:

WILLIAM BOWSTEAD,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW

LONDON
SWEET & MAXWELL LIMITED
3 CHANCERY LANE

THE COMMERCIAL LAW OF THE UNITED STATES OF AMERICA

BY

CHARLES HENRY HUBERICH

J. U. D. (HEIDELBERG), D. C. L. (YALE), LL. D. (MELBOURNE), COUNSELLOR
AT LAW, BERLIN AND PARIS, PROFESSOR OF LAW IN THE LAW SCHOOL
OF THE LELAND STANFORD JUNIOR UNIVERSITY (CALIFORNIA)

WITH THE COLLABORATION OF

JOSEPH RICHARDSON BAKER

A. B., OF THE SOLICITOR'S OFFICE OF THE DEPART-
MENT OF STATE, WASHINGTON

DONALD JOSEPH KISER

PH. B., ATTORNEY AND COUNSELLOR AT LAW,
CHICAGO

HENRY WINTHROP BALLANTINE

A. B., LL. B., ATTORNEY AND COUNSELLOR AT LAW,
SAN FRANCISCO

JAMES B. LICHTENBERGER

A. B., LL. B., ATTORNEY AND COUNSELLOR AT LAW,
PHILADELPHIA

FRANK ELLSWORTH CHIPMAN

ATTORNEY AND COUNSELLOR AT LAW,
BOSTON

JOSEPH WALKER MAGRATH

B. S., ATTORNEY AND COUNSELLOR AT LAW,
NEW YORK

ROBERT THOMAS DEVLIN

UNITED STATES ATTORNEY,
NORTHERN DISTRICT OF CALIFORNIA

ORRIN KIP MCMURRAY

A. B., LL. B., PROFESSOR OF LAW IN THE UNI-
VERSITY OF CALIFORNIA (BERKELEY)

CHARLES ANDREWS HUSTON

A. B., J. D., PROFESSOR OF LAW IN THE LAW SCHOOL
OF THE LELAND STANFORD JUNIOR UNIVERSITY
(CALIFORNIA)

WILLIAM UNDERHILL MOORE

A. M., LL. B., PROFESSOR OF LAW IN THE UNI-
VERSITY OF WISCONSIN (MADISON)

WILLIAM REYNOLDS VANCE

PH. D., LL. B., PROFESSOR OF LAW IN THE YALE
LAW SCHOOL (NEW HAVEN)

PARTS I—XII

LONDON

SWEET & MAXWELL LIMITED

3 CHANCERY LANE

B18407.



Table of Contents.

	Page
I. Introduction	4
I. Scope and arrangement of the work	4
II. The American Federal system	5
III. Law of the English Colonies in America	9
IV. Civil law in America	10
V. Sources of American law	12
VI. Special topics of Commercial law	15
VII. Codification and unification	19
II. Bibliography	22
III. Courts and Procedure	42
I. Organization of the Judiciary	42
II. Jurisdiction of the Federal Courts	44
III. Rights of aliens	55
IV. Procedure in Federal Courts	56
V. Appellate jurisdiction	62
VI. Writs of error to State Courts	62
VII. Award or arbitration of Consul or Commercial Agent of a Foreign Nation	67
IV. Contracts	70
I. Introductory	74
II. Formation and execution of contracts	75
III. Grounds of enforcement	80
IV. Duties of contracting parties	85
V. Discharge of contractual duties	95
VI. Remedies for enforcement of contractual duties	97
VII. Invalid contracts	100
VIII. Joint and several contracts	110
IX. Contracts for the benefit of third persons	112
X. Assignment of contracts	113
XI. Principal and agent	115
XII. Suretyship	116
XIII. Charter parties	118
XIV. Bottomry and respondentia	119
V. Banks and Banking	122
I. Scope of Article	123
II. Definitions	123
III. Persons who may be bankers: classification of banks	124
IV. Government regulation and control of commercial banks	125
V. The business of commercial banking	126
Federal Banking Statutes	136
Chap. II. Organization and powers	136
Chap. III. Obtaining and issuing circulating notes	144
Chap. IV. Regulation of the banking business	157
Chap. V. Dissolution and receivership	166
Chap. VII. Special Acts relating to national banks	173
VI. Commercial Papers	176
I. Scope of Article	178
II. History and sources of the law	179
III. Definitions	179
IV. Negotiable and non-negotiable instruments distinguished	181
V. Essentials of a negotiable instrument	181
VI. Consideration	184
VII. Construction of instrument	185
VIII. Delivery	185
IX. Negotiation, transfer and indorsement	186
X. Payment and discharge	187
XI. Acceptance	188
XII. Presentment for acceptance	190

	Page
XIII. Presentment for payment	191
XIV. Notice of dishonour	192
XV. Protest of bills of exchange	195
XVI. Liability of parties	196
XVII. Rights of holder	198
XVIII. Actions	199
XIX. Defenses	199
Uniform Negotiable Instruments Law	201
Statutes: New York	221
California	222
Georgia	230
Texas	235
Table as to days of grace, interest, and limitation of actions	237
VII. Bankruptcy	240
I. Legislation on the subject	244
II. Jurisdiction and powers of Courts	245
III. Referees	248
IV. Who may become bankrupts	250
V. Acts of bankruptcy	252
VI. Process, pleadings, and adjudication	255
VII. Receivers	259
VIII. Schedules	259
IX. Property exemptions of bankrupts	261
X. Duties of bankrupts	262
XI. Meetings of creditors	263
XII. Trustees	266
XIII. Administration of estate	269
XIV. Proof, allowance and payment of claims	271
XV. Liens	280
XVI. Preferences	282
XVII. Compositions	283
XVIII. Closing and re-opening estates	286
XIX. Exemption of bankrupt from arrest	286
XX. Detention of bankrupts	287
XXI. Discharge	287
XXII. Bankruptcy of partnership	293
XXIII. Effect of death or insanity of bankrupt	295
XXIV. Notices to creditors	295
XXV—XXVIII. Witnesses — Oaths and affirmations — Depositions — Computation of time	296
XXIX—XXX. Certified copies of proceedings — Offenses	297
Uniform Bankruptcy Act (Federal)	298
General Orders in Bankruptcy	318
Philippines Insolvency Law	324
VIII. Sale of Goods	346
I. Introductory note	347
II. Nature and formation	348
III. Transfer of property	358
IV. Performance of the contract	368
V. Remedies for non-performance	382
VI. Circumstances affecting validity of sales	392
Uniform Sales Act	396
Part. I. Formation of the contract	396
Part. II. Transfer of property as between seller and buyer	400
Part. III. Performance of the contract	405
Part. IV. Rights of unpaid seller against the goods	407
Part. V. Actions for breach of the contract	410
Part. VI. Interpretation	412
California Civil Code	414
Georgia (Code, 1911)	418
Louisiana Civil Code	421
Statutes as to Conditional Sales	433
Alabama	433
California: Connecticut	434
Columbia: Georgia	435
Illinois: Indiana: Massachusetts	436
Minnesota: New Hampshire	438
New Jersey: New York	439

TABLE OF CONTENTS.

IX

Page

Ohio	442
Oklahoma: Texas: Washington	443
Wisconsin	445
Statutes as to Sales in Bulk	445
California	445
Connecticut: Georgia	446
Louisiana: Massachusetts	447
Michigan: New Jersey	448
New York: Ohio	449
Pennsylvania	450
IX. Factors and other Commercial Agents	454
I. Definitions	454
II and III. Appointment and extent of authority	455
IV. Duties and liabilities of factor to principal	459
V. Rights of factor against principal	463
VI. Factor's rights against the goods	464
VII and VIII. Factor's rights and liability as regards third persons	465
IX and X. Principal's rights and liability as regards third persons	466
XI. Termination of authority	467
XII. Brokers	467
XIII. Auctioneers	468
Statutes on Factors: California: Georgia	469
Maine: Maryland	470
Massachusetts	473
New York: Ohio	474
Pennsylvania	475
Rhode Island	476
Wisconsin	477
X. Carriers and Warehousemen	480
I. Definition of common carrier: kinds of carriers	481
II. Duties of common carrier	481
III. Bills of lading	483
IV. Liability of common carrier	487
V. Termination of carrier's liability	500
VI. Rights of carriers	501
VII. Warehousemen	502
Statutes on Carriers and Warehousemen. — Introductory	503
Carriers: Acts of Congress	504
State Acts: Uniform Bills of Lading Act	528
California	539
Georgia	544
Washington	546
Warehouse Receipts: Uniform Law	552
Washington	561
XI. Marine Insurance	566
I. Scope of Article	567
II. Sources of American law	567
III. Statutory regulation of business	567
IV. Definitions	568
V. The contract	568
VI. Insurable interest	569
VII. Character and extent of risk assumed	570
VIII. Concealments, representations and warranties	575
IX. Measure of insurer's liability	578
XII. Partnership	584
I. Nature of partnerships	587
II. Relations of partners with persons dealing with the partnership	597
III. Liability	602
IV. Relations of partners to one another	611
V. Dissolution of partnership	616
VI. Liquidation	624
VII. Limited partnerships	629
Statutes on Partnership: New York	640
California	647
Montana, North and South Dakota, Oklahoma	652
Louisiana	654

	Page
Ohio	659
Massachusetts	665
Pennsylvania	666
Georgia	671
Statutes on Limited Partnerships	675
New York	675
California	677
Montana, North and South Dakota, Oklahoma	679
Louisiana	680
Ohio	681
Massachusetts	683
Pennsylvania	684
Georgia	692
Other States	694
Statutes on Partnership Associations	695
Pennsylvania	695
Ohio	703
New Jersey	706
Statutes on Registered Partnerships	708
Pennsylvania	708

I.

INTRODUCTION

Introduction.¹⁾

(By Charles Henry Huberich, Editor.)

Analysis.

- I. SCOPE AND ARRANGEMENT OF THE WORK, 4**
- II. THE AMERICAN FEDERAL SYSTEM, 5**
 - A. Powers of the Federal Government, 5*
 - 1. Foreign, Interstate, and Indian Commerce, 6*
 - 2. Bankruptcy, 7*
 - 3. Patents and Trade Marks, 8*
 - 4. Admiralty and Maritime Jurisdiction, 8*
 - 5. Other Express Powers, 8*
 - B. Powers of the State Governments, 9*
- III. THE LAW OF THE ENGLISH COLONIES IN AMERICA, 9**
- IV. THE CIVIL LAW IN AMERICA, 10**
 - A. Louisiana, 10*
 - B. Philippines, 11*
 - C. Porto Rico, 11*
 - D. Canal Zone, 11*
- V. SOURCES OF AMERICAN LAW, 12**
 - A. Constitution of the United States, 12*
 - B. Acts of Congress and Treaties, 12*
 - C. Enactments of Legislative Bodies Acting under a Delegation of Power from the Federal Government, 12*
 - D. Decrees and Regulations of Federal Executive Officers, 13*
 - E. State Constitutions, 13*
 - F. Acts of State Legislatures, 13*
 - G. Enactments of Legislative Bodies Acting under a Delegation of Power from the State Governments, 13*
 - H. Decrees and Regulations of State Executive Officers, 13*
 - I. Subsidiary Law, 13*
 - J. General Commercial Law, 14*
- VI. SPECIAL TOPICS OF COMMERCIAL LAW, 15**
 - A. Partnership, 15*
 - B. Corporations, 15*
 - C. Sales, Factors, Carriers, Bills of Lading, and Warehouse Receipts, 17*
 - D. Negotiable Instruments, 17*
 - E. Bankruptcy, 18*
- VII. CODIFICATION AND UNIFICATION, 19**

I. SCOPE AND ARRANGEMENT OF THE WORK. — The purpose of this work is to present the leading principles of the statutory and common law of the United States relating to commercial transactions.

The order of presentation of the topics is as follows:

- I. Introduction.**
- II. Bibliography.**
- III. Courts and Procedure.**

¹⁾ The Editor desires to express his indebtedness to the Bancroft-Whitney Company, San Francisco, for permission to use the captions to the sections reprinted from the Deering Codes of California, to Messrs. T. and J. W. Johnson, Philadelphia, for permission to reprint certain annotations to the partnership statutes of Pennsylvania, to the West Publishing Company, St. Paul, for permission to reprint the captions to the corpo-

ration laws of West Virginia, to the Commissioners for Uniform State Laws, for permission to reprint the notes to the uniform acts relating to sales, bills of lading, warehouse receipts, and stock transfers, to the Isthmian Canal Commission for information regarding the laws of the Canal Zone, and to the Secretaries of State of the several States for copies of the laws of their jurisdictions.

- IV. Contracts.
- V. Banks and Banking.
- VI. Commercial Paper¹).
- VII. Bankruptcy¹).
- VIII. Sale of Goods.
- IX. Factors and other Commercial Agents.
- X. Carriers and Warehousemen.
- XI. Marine Insurance.
- XII. Partnership.
- XIII. Commercial Corporations.
- XIV. Commercial Treaties and Consular Laws.

In the Introduction is set forth a brief historical sketch of the commercial law of the United States, the influence of the law of England and of the Civil law as developed in France and Spain on American law, the relation between the Federal law and laws of the several States and Territories, and the efforts to codify and render uniform the commercial law of the United States.

The Bibliography contains a list of the late compilations of Federal and State laws, and of the reports of the higher courts. The volumes of reports of inferior State courts and of courts having a special, non-commercial, jurisdiction are omitted. A list of the principal text-books relating to American commercial law is included.

The article on Courts and Procedure is designed to present the leading features of the American judicial organization, with special reference to the Federal courts, and a summary of the rules of procedure therein, together with a statement as to the rights of aliens in the courts, both State and Federal. In view of the great diversity of the laws relating to the organization and jurisdiction of the courts in the several States and Territories, it was impossible to give the details of the judicial organization of the States.

In the article on Contracts are set forth the leading principles of the law of contracts, with special reference to the common law, and also the law governing certain special contracts, such as those of agency, suretyship and guaranty, charter parties, bottomry, and respondentia, not treated of in special articles in this work.

The general scope of the remaining articles is sufficiently indicated by their titles. It may be noted, however, that the statutory law relating to monopolies and trusts is contained in the article on Commercial Corporations, although its provisions are in no wise confined to corporations.

Immediately following the systematic presentation of a topic the statutory enactments relating thereto are reprinted. The acts of the Federal Congress are given as in force on March 5, 1911. The laws of the several States and Territories are given as in force on January 1, 1911, with the exception of the laws of the Philippine Islands, which are given as in force on March 1, 1911. Laws specifically amending former laws are ordinarily not reprinted; the changes effected by them are incorporated in the original acts. Within the limits assigned to this work, it was obviously impossible to reprint all of the statutes. In the selection of statutes a two-fold purpose was kept in view: first, to present in full the principal statutes of those States and Territories whose commercial relations, especially with foreign countries, make a knowledge of their laws of compelling practical importance; secondly, to present such parts of the statutory law of the less important jurisdiction as may be of interest either to the foreign lawyer or to the student of comparative commercial law.

II. THE AMERICAN FEDERAL SYSTEM. — A. Powers of the Federal Government. — Under the constitution of the United States there is a division of governmental functions between the Federal government and the governments of the States composing the Union. The Federal government is one of delegated, enumerated

¹) Part VI. Commercial Paper, and Part VII. Bankruptcy, were prepared under the supervision of Mr. William Lawrence Clark, before the present Editor assumed charge of the work. These parts have, however, been supplemented by the present Editor by the addition, in the case of Part VI., of the modifications of the Uniform Negotiable Instruments Law as adopted in States other than New York, and

of the provisions of the Codes of California and Georgia, and certain other statutes, and, in the case of Part VII., by the addition of the act of Congress of June 25, 1910, amending the Bankruptcy Act, 1898, the General Rules in Bankruptcy, and of the Insolvency Act of the Philippine Islands. The text of Part VII. has also been modified so as to present the existing statutory law.

powers, but these powers extend not alone to those expressly conferred but also to such as arise by implication from the powers conferred.

1. FOREIGN, INTERSTATE, AND INDIAN COMMERCE. — Congress is given the power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes"¹). Commerce with the Indian tribes may be dismissed with a brief statement. The Indians living in distinct communities, even within the territorial limits of a State, are subject to Federal regulation, and trade with Indians on the reservations, as well as trade with the individual members of an Indian tribe outside of such reservation, is subject to the control of the Federal government²).

The power of the Federal government is confined to the regulation of commerce with foreign nations, and among the several States, and with the Indian tribes. It does not extend, except in the case of Indian commerce, to purely intrastate transactions. The power is one to regulate, but the extent of regulation is within the discretion of Congress, and may extend to absolute prohibition of commerce³).

Commerce with foreign countries and among the States strictly considered consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale, and exchange of commodities⁴).

Commerce is a broader term than traffic. In the earliest case before the Supreme Court of the United States⁵), involving the interpretation of this clause of the constitution, it was held that the term commerce includes navigation, and it is now unquestioned that it includes the transportation of persons and property. The means of such transportation is immaterial, — the sailing vessel and the steamer, the stage coach, the railroad, and the street railway, the pipe line and the pneumatic tube, the tunnel and the airship, are equally within the scope of the power to regulate.

Though once questioned⁶), it is now settled that commerce includes the transportation of persons. It extends not alone to the transportation of tangible property but also to the transmission of telegraphic and telephonic messages⁷), and by a parity of reasoning to wireless messages.

But the term commerce, as here employed, does not extend to the manufacture of commodities, even though the products are destined for transportation to another State or to a foreign country⁸). Commerce succeeds to manufacture, and is not a part of it⁹). Neither the business of insurance¹⁰) nor the buying and selling of foreign bills of exchange¹¹) is commerce within this clause of the constitution.

In the early cases the important question was raised whether the Federal power to regulate commerce was an exclusive one, or whether, in the absence of congressional legislation, the States were free to make regulations. The question was not finally decided until 1851¹²), when the United States Supreme Court distinguished between subjects national in their scope and requiring uniformity of regulation, in which cases the power of the Federal government is declared to be exclusive, and subjects of a local character, where the States may legislate until Congress acts. The principle is thus stated: "Where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, or improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regul-

¹) U. S. Const. art. 1, sec. 8 (3). — ²) The Federal government may prohibit the sale of certain commodities (e. g., liquor) to members of Indian tribes, even where the sale takes place within the territorial limits of a State. *United States v. Holliday*, (1865) 3 Wall. 407. — ³) *Brig "Williams,"* (1808) 2 Hall's Am. Law Jour. 255. It must be kept in mind that Federal authority over foreign commerce can also be exercised under the power to lay and collect duties and the general control over foreign relations vested in the National government. — ⁴) *County of Mobile v. Kimball*, (1880) 102 U. S. 691. — ⁵) *Gibbons v. Ogden*, (1824) 9 Wheat. 1. — ⁶) *New York v. Miln*, (1837) 11

Pet. 102. See now *Champion v. Ames*, (1902) 188 U. S. 321. — ⁷) *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 1. — ⁸) *Coe v. Errol*, (1885) 116 U. S. 517. — ⁹) *United States v. E. C. Knight Co.*, (1895) 156 U. S. 1; *Willoughby*, Constitution, sec. 298. — ¹⁰) *Paul v. Virginia*, (1868) 8 Wall. 168, (fire insurance); *Hooper v. California*, (1894) 155 U. S. 648, (marine insurance); *N. Y. Ins. Co. v. Cravens*, (1899) 178 U. S. 389, (life insurance). — ¹¹) *Nathan v. Louisiana*, (1850) 8 How. 73. But cf. *People v. Raymond*, (1868) 34 Cal. 492. — ¹²) *Cooley v. Port Wardens*, (1851) 12 How. 299.

ated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but when the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free¹)."

The right to engage in foreign and interstate commerce is a right under the constitution of the United States, the exercise of which may not be prohibited or restricted by a State²). Thus, though a State may prohibit the manufacture and sale of liquors within its borders³), it cannot prohibit the sale of liquor in the original packages⁴) in which it was imported⁵), nor the importation of liquor⁶).

A state cannot prevent a foreign corporation from carrying on interstate or foreign commerce within its borders, but it may, within limits, prohibit such corporation from carrying on an intrastate business unless it complies with the conditions as to registration, license, and taxation imposed by the local law. But where the conditions imposed on doing a local business are in fact a burden on the interstate or foreign business they are unconstitutional⁷).

The questions of State control frequently arise in reference to license taxes. A license tax on the business of importing goods and selling them in the original packages is unconstitutional⁸). Nor can a State prohibit the soliciting of orders for goods by agents, where such goods are in another State, nor impose a tax on such agent⁹). But State regulation of pedlers is valid, as the sale by a pedler of goods not in the original packages is a transaction of intrastate commerce¹⁰).

The States may exclude things that are not legitimate articles of commerce or are not merchantable. Such are diseased cattle, decayed provisions, infected rags, etc.¹¹).

In the exercise of its power to regulate foreign and interstate commerce¹²) Congress has passed, inter alia, an act establishing the Interstate Commerce Commission (1887), the so-called Sherman Anti-Trust Act (1890), an act requiring interstate carriers to be equipped with certain safety appliances (1893), an act for the suppression of the lottery traffic (1893), an act for the regulation of charges of interstate transportation (1906), an act limiting the hours of labor of employees of interstate railways (1907), and an act relating to the liability of employers for accidents to employes on interstate carriers (1908). Under the commerce clause in part may be sustained the various acts of Congress relating to the transcontinental railroads, the licensing and inspection of vessels, Federal quarantine measures, and the building of the Panama Canal¹³).

The exercise of the power to regulate commerce is subject to the special limitation that "no preference shall be given by an regulation of commerce or revenue to the ports of one State over those of another¹⁴)."

2. **BANKRUPTCY.** — The constitution gives to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States¹⁵). The

¹) *Bowman v. R. R. Co.*, (1887) 125 U. S. 465. — ²) The right of natural persons to engage in intrastate commerce is subject to the police power of the State. Unless sustainable under the police power such regulation may be in violation of the Fourteenth Amendment. — ³) *Mugler v. Kansas*, (1887) 123 U. S. 623. — ⁴) The original package is the case or bail in which the goods are imported. *May v. New Orleans*, (1899) 178 U. S. 496. But, *semble*, the package must be of the size used ordinarily for the shipment of the particular commodity. Small packages of cigarettes carried in baskets or shoved into or out of a car are not original packages. *Austin v. Tennessee*, (1900) 179 U. S. 343; *Cook v. Marshall*, (1905) 196 U. S. 261. — ⁵) *Leisy v. Hardin*, (1889) 135 U. S. 100. — ⁶) *Bowman v. R. R. Co.*, (1887) 125 U. S. 465. By the so-called *Wilson Act* (26 U. S. Stats. L. 313,

held constitutional in *In re Rahrer*, (1890) 140 U. S. 545) liquor is subjected to State control upon its arrival in the State. — ⁷) *Western Union Tel. Co. v. Kansas*, (1910) 216 U. S. 1. — ⁸) *Brown v. Maryland*, (1827) 12 Wheat. 419. — ⁹) *Brennan v. Titusville*, (1893) 153 U. S. 289; *Rearick v. Pennsylvania*, (1906) 203 U. S. 507. — ¹⁰) *Emert v. Missouri*, (1894) 156 U. S. 296. — ¹¹) *Bowman v. R. R. Co.*, (1887) 125 U. S. 465; *Rasmussen v. Idaho*, (1900) 181 U. S. 198. — ¹²) Some of the acts here mentioned are also sustainable under other provisions of the constitution. — ¹³) *Wilson v. Shaw*, (1906) 204 U. S. 24. — ¹⁴) U. S. Const. art. 1, sec. 9 (6). A mere incidental advantage given to one State is not a violation of this provision. *Pennsylvania v. Bridge Co.*, (1855) 18 How. 421. — ¹⁵) U. S. Const. art. 1, sec. 8 (4).

term bankruptcy as here used includes insolvency, and grants the power to legislate in reference to non-traders¹). It may apply to voluntary as well as to involuntary bankruptcy. The Federal law while in force may suspend the operation of all State laws dealing with bankruptcy²).

The constitution requires that the law shall be uniform throughout the United States. The uniformity required is a geographical one. The law must in all its provisions be equally applicable to all of the States and to the incorporated Territories³). It seems, however, that the law need not be made applicable to the unincorporated Territories⁴). Nor is the requirement of uniformity infringed by provisions such as those of the Act of 1898 allowing to bankrupts the exemptions in force in the State where they had their domicile for the six months, or the greater part thereof, immediately preceding the filing of the petition⁵).

3. PATENTS AND TRADE MARKS. — The constitution gives to Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries⁶)." The grant of a patent right does not give to the patentee the right to dispose of the commodity manufactured under it in violation of State law⁷), nor exempt him from payment of a license tax for the sale of such commodity⁸).

Trade mark legislation is not sustainable under the grant of power to protect authors and inventors. The Federal government, therefore, has power to legislate in this regard only under the power to regulate commerce, and consequently cannot extend the application of its trade mark legislation to intrastate commerce⁹). The Federal Trade Marks Acts now in force are expressly limited in their operation to foreign and interstate commerce and commerce with the Indian tribes¹⁰).

4. ADMIRALTY AND MARITIME JURISDICTION. — The exercise of admiralty and maritime jurisdiction of the Federal courts¹¹) is interpreted as giving to these courts exclusive jurisdiction in all cases where the proceeding is in rem¹²). Following English precedents, it was first held that such jurisdiction was confined to waters subject to the ebb and flow of the tide, but this view was later abandoned and the test of navigability applied¹³). It is now established beyond question that the Federal jurisdiction extends to all waters actually navigable, and which are by themselves, or in connection with other navigable waters, highways of commerce to foreign countries or between the States of the Union¹⁴). The States, however, retain a limited maritime jurisdiction in cases where the remedy is one afforded by the common law¹⁵).

5. OTHER EXPRESS POWERS. — Congress is given power "to coin money, regulate the value thereof, and of foreign coin, and to fix the standard of weights and measures"¹⁶). The States are expressly denied the power to coin money, to emit bills of credit, or to make anything but gold or silver legal tender in the payment of debts¹⁷). The Federal government may, however, attach the quality of legal tender to paper currency¹⁸). In the absence of congressional legislation, the States have power to legislate in respect to weights and measures¹⁹).

The power to levy and collect taxes, duties, imposts, and excises²⁰) should be mentioned here as of importance in commercial law. Subject to the limitations of the constitution, this power may be exercised not alone for the purpose of raising

¹) Cp. *Sturges v. Crowninshield*, (1819) 4 Wheat. 123. — ²) As to the effect of the Bankruptcy Act of 1898 on the laws of the States, see *infra*. The legislation of 1898 and its amendments constitute due process of law within the Fifth Amendment, even though the law does not require notice to creditors of the filing of the petition. *Hanover Bank v. Moyses*, (1901) 186 U. S. 181. — ³) *Willoughby*, Constitution, sec. 382. — ⁴) A contrary holding would render inoperative most of the provisions of the Philippine Insolvency Law of May 20, 1909, (reprinted in another part of this work). — ⁵) Bankruptcy Act, (1898) sec. 6; *Hanover Bank v. Moyses*, (1901) 186 U. S. 181. — ⁶) U. S. Const. art. 1, sec. 8

(8). — ⁷) *Patterson v. Kentucky*, (1878) 97 U. S. 501. — ⁸) *Webber v. Virginia*, (1880) 103 U. S. 344. — ⁹) *Trade Mark Cases*, (1879) 100 U. S. 82. — ¹⁰) Their validity has been sustained. *Ryder v. Holt*, (1888) 128 U. S. 525. — ¹¹) U. S. Const. art. 3, sec. 2. — ¹²) *The Moses Taylor*, (1866) 4 Wall. 411. — ¹³) *The Genesee Chief*, (1851) 12 How. 443. — ¹⁴) *Leory v. United States*, (1899) 177 U. S. 621. — ¹⁵) In general, where the proceeding is in personam and not in rem. — ¹⁶) U. S. Const. art. 1, sec. 8 (5). — ¹⁷) U. S. Const. art. 1, sec. 10 (1). — ¹⁸) *Legal Tender Cases*, (1870) 12 Wall. 457; overruling *Hepburn v. Griswold*, (1869) 8 Wall. 603. — ¹⁹) *Willoughby*, Constitution, sec. 386. — ²⁰) U. S. Const. art. 1, sec. 8 (1).

revenue but also for the purpose of protecting industries¹⁾ or prohibiting certain acts²⁾.

In the exercise of its powers, the Federal government is subject to all the express limitations placed upon it by the Federal constitution³⁾, and to such implied limitations as arise from the general nature of the American federal system⁴⁾.

B. Powers of the State Governments. — The powers not granted, expressly or impliedly, to the Federal government, nor prohibited by the constitution to the States, are reserved to the States respectively, or to the people⁵⁾. Where a power has not been granted to the Federal government, nor prohibited to the States by the Federal constitution, it may be exercised by the governmental powers of the States subject, however, to any limitations that may be imposed by the constitution of the particular State.

The Federal constitution was framed to meet the conditions of a small, decentralized, agricultural community. It is a written instrument, and as such its meaning does not alter. But it was intended to endure, and was framed in general language. As changes come in the social and political life it must be applied to the new conditions, but always within the scope of the powers conferred⁶⁾. This does not mean, however, that all powers which are national in their scope are impliedly vested in the Federal government⁷⁾. The warrant for the exercise of any power by the Federal government must be found in an express or implied power granted by the constitution. The position of the United States as a world power and the ever-increasing commerce with foreign nations and among the States of the Union necessitates the extension of Federal control. But the authority granted by the constitution is ample if the principles of interpretation formulated by the great Chief Justice are adhered to. No amendment of the fundamental law is required; the provisions of the constitution of the United States, as at present framed, can, in the hands of a second Marshall, be made to meet the new conditions of the new United States.

III. THE LAW OF THE ENGLISH COLONIES IN AMERICA.⁸⁾ — The accepted legal theory is that the law of England, both statutory and common law, was brought by the settlers to the English colonies, and, so far as applicable, was from the first given full force in all cases where it had not been superseded by local enactments. It has been pointed out, however, by an eminent authority⁹⁾, that this theory is not borne out by the facts of early colonial history. Simple codes, adapted to the needs of the colonists, supplemented by popular law (*Volksrecht*) took the place of English law. This is especially true of the New England colonies. As early as 1636, a resolve was passed by the General Court of Massachusetts entreating the government to make a draft of laws "agreeable to the word of God," to serve as the fundamental law, and in the meantime the magistrates are to determine all causes according to the existing laws, and where there is no law "then as near the law of God as they can."

The Body of Liberties (1641), which was not formally adopted as law but which was sent to all persons in authority with the request of the General Court that it be considered as law, contains a similar provision. The early records of Massachusetts contain abundant evidence that the Scriptures were frequently cited and their rules applied by the magistrates, while the English common law was regarded rather as an illustration of the principles of the law of God. The General Court as late as 1681 expressly denied the applicability of the English law to the colonies, and it was not until the beginning of the eighteenth century that English law books are cited with any frequency.

In Connecticut and New Haven a similar development is to be noted. "If possible, these Colonies departed even further from the common law than Massa-

¹⁾ The constitutionality of protective tariffs is sustainable not alone under the power to levy import duties but also under the power to regulate foreign commerce. — ²⁾ The excise tax of ten per cent. on the note issues of State banks is in effect prohibitory, yet it is constitutional. *Veezie Bank v. Fenno*, (1869) 8 Wall. 533. — ³⁾ *Monongahela Co. v. United States*, (1892) 148 U. S. 312; *Adair v. United States*, (1907) 208 U. S. 161. — ⁴⁾ *Willoughby, Constitution*, sec. 40. — ⁵⁾ U. S. Const. Am. 10.

— ⁶⁾ *South Carolina v. United States*, (1905) 199 U. S. 437. — ⁷⁾ *Kansas v. Colorado*, (1907) 206 U. S. 46. — ⁸⁾ See the excellent monograph on the English Common Law in the Early American Colonies, by Professor Paul S. Reinsch, published in *Bulletins of the University of Wisconsin*, Vol. 2, and reprinted in *Select Essays in Anglo-American Legal History*, Vol. 1. The writer is indebted throughout this section to this essay. — ⁹⁾ Professor Reinsch.

chusetts in their system of popular courts, absence or radical modification of the jury trial, discretion of the magistrates, and in the case of New Haven, the clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters."

New Hampshire and Vermont appear to have given greater authority, at least outwardly, to the English statutory and common law, while the Rhode Island Code of 1647 cites English statutes to some extent.

In New York the heterogeneous character of the population prevented to some extent the development of a popular law. A compilation known as the Duke of York's Laws was promulgated at an informal assembly at Hampstead in 1665, and early in the eighteenth century the common law seems to have been generally applied, though its complete binding force was not declared until 1761.

In East Jersey the conditions were similar to those in New York, though the early laws are founded largely on scriptural authority, while West Jersey was under Quaker influence.

The most complete early system of codes is to be found in Pennsylvania (1682 and following years). These early laws sought to cover all cases likely to arise, and from the first there is discernible a desire to have justice administered by trained lawyers and to circumscribe the discretion of the judges. But there are frequent deviations from the principles of English law.

In Maryland it was enacted (1642) that civil-causes should be determined according to the law and usage of the Province. In the absence of local law resort could be had to equity, good conscience, and the law of England. In 1662 the law of England in so far as suitable to local conditions was given subsidiary force.

In Virginia the early view seems to have been that English laws were not operative, but after the Restoration the colony appears to have fully recognized the binding force of English law. In the Carolinas the example of South Carolina (1712) in adopting the English common law was followed by North Carolina (1715).

Professor Reinsch thus sums up the legal situation in the colonies: "The process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles. This is but natural; the common law was a technical system adapted to a settled community; it took the colonies some time to reach the stage of social organization which the common law expressed; then gradually more and more of its technical rules were received."

IV. THE CIVIL LAW IN AMERICA. — A. Louisiana. — In 1664 the territories of France in the Western Hemisphere were given to the West India Company, and the *Coutume de Paris* was declared to be in force, together with the by-laws and ordinances of the realm. Whether the *grandes ordonnances* of Louis XIV., including the *Ordonnance du commerce* (1673) and the *Ordonnance de la marine* (1681), were extended to Louisiana is a disputed point. These *ordonnances* were not registered in any of the colonies, and it is not clear that their registration by the Parliament of Paris was sufficient to extend their application to the colonies. The French colonial courts commonly accepted their provisions as binding¹).

In 1763 the portion of Louisiana lying west of the Mississippi, together with the City of New Orleans and the island on which it stands, were ceded by France to Spain, while the remaining territory of France in Louisiana was ceded to England. During the Spanish regime it seems that Spanish law was enforced. At the close of the eighteenth century Spain retroceded the Louisiana territory to France, but there was no formal transfer of possession until November 30, 1803. On December 20, 1803, the United States took formal possession of the Louisiana territory.

The territory now known as the State of Louisiana was erected into the Territory of Orleans (1804). The remainder of the territory acquired from France was first erected into the District of Louisiana, then into the Territory of Louisiana (1805), and finally into the Territory of Missouri (1812).

¹) Cp. Walton, *Scope and Interpretation of the Civil Code of Lower Canada*; Munro, *Genesis of Roman Law in America*, in 23 *Harv. Law Rev.* 579.

In the Territory of Orleans the civil law, as established during the French and Spanish domination, continued to be applied, while in the remaining territory embraced in the Louisiana Purchase the common law of England and America was gradually established by custom or legislation. In 1805 the common law was adopted in Orleans as the basis of criminal law and procedure. In 1808 the Orleans legislature adopted a civil code based largely on the Code Napoleon. This was revised in 1825, and again in 1870. No code of commerce was ever adopted in Louisiana, and in mercantile matters the law of Louisiana does not differ materially from the law prevailing in the other American States¹).

B. Philippines. — The Philippine Islands were acquired by cession, and consequently the law in force at the time of acquisition remains operative in so far as it is not inconsistent with the changed political conditions, and has not been amended or repealed by competent legislative authority since that time¹). The basis of the civil and commercial law is the Civil Code and the Code of Commerce of Spain as in force in 1898. The provisions of the latter code have been amended in important respects by the adoption of the Corporation Law and the Insolvency Law, reprinted below. The Federal Bankruptcy Act is not in force. Procedure is regulated by an enactment modeled upon that of California²). In 1909 a commission was authorized to revise the codes and laws of the Philippines³).

C. Porto Rico. — Porto Rico was acquired by cession, and consequently the law in force at the time of the acquisition remained operative, except in so far as it was inconsistent with the changed political conditions⁴).

The Foraker Act (April 12, 1900) expressly provides for the continuance of the existing laws: "The laws and ordinances of Porto Rico, now in force, shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military decrees when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States, not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States⁵)."

The same Act vests the legislative power in the Insular legislature. The law as it existed at the time of the cession has been modified in many particulars but the fundamental law remains Spanish, and the civil code and code of commerce regulate the bulk of ordinary transactions. Those portions of the code of commerce which relate to corporations have been superseded by a local enactment, modeled upon the laws of New Jersey. The provisions relating to bankruptcy are rendered obsolete by the application of the Federal Bankruptcy Act to the Island. The Spanish penal code, code of criminal procedure, and code of civil procedure have been repealed and replaced by codes adapted from those of California.

D. Canal Zone. — At the time that the Republic of Panama declared its independence (November 3, 1903) the Colombian Civil, Commercial, Penal, Fiscal,

¹) Howe, Roman and Civil Law in America, in 16 Harv. Law Rev. 342. See also the Introduction to Saunders' Civil Code of Louisiana, (1909), Howe, Law in the Louisiana Purchase, in 14 Yale Law Jour. 77, and Semmes, The Civil Law as Transplanted in Louisiana, in 5 Reports Am. Bar. Assn. 243. — ²) See Lobingier, A Decade of Judicial Fusion in the Philippines, in Annual Bulletin of the Comparative Law Bureau of the American Bar Association, 1910; Tracey, Law in the Philippines, in 33 Reports of the New York Bar Association, 334. — ³) Lobingier, Codification in the Philippines, in Annual Bulletin of the Comparative Law Bureau of the American Bar Association, 1910. — ⁴) Marimon v. Pelegri, (1902) 1 P. R. Dec. 225. An important qualification is made by Rodey, J., in Rivera v. Cadierno, (1907) 3 P. R. Fed. 43: "We are not, as at present advised, prepared to subscribe to a whole to the doctrine that all the laws not strictly unconstitutional or

wholly inconsistent with our system of government left by Spain in Porto Rico, and not since repealed by Congress itself or by the local legislature, are still in force There may be policies of Spanish and civil law so un-American in the sense of being contrary to our national customs and policy, and that of the several States and Territories of the nation, that courts of the United States, at least, even in the absence of prohibitive legislation by Congress would not feel authorized to enforce them." It has been held that the Sherman Anti-Trust Act is in force. Peck S. S. Line v. N. Y. & P. R. S. S. Co., (1906) 2 P. R. Fed. 109. The National banking laws are extended, (23 Op. Atty.-Gen. 169), and also the Trade Mark Act, (23 Op. Atty.-Gen. 634). The Federal Bankruptcy Act is in force, Dominguez, Americanizing an Old System of Law, 17 Case and Comment, 219. — ⁵) 31 Stat. L. 77, sec. 8.

Judicial, Military, and Mining Code, and the Código de Fomento were in force in the former Department of Panama. The United States acquired jurisdiction over that portion of the Republic of Panama now known as the Canal Zone by the ratification of the Hay-Bunau-Varilla Treaty. Congress delegated the entire control and direction of the Canal Zone to the President of the United States, or to the person or persons who may be designated by him. By a letter of May 9, 1904, the President directed that the laws which were in force on February 26, 1904, should continue to be operative in the Canal Zone. The Penal Code, the Code of Criminal Procedure, and the Judicial Code (Code of Civil Procedure) have been superseded by codes modeled upon those in force in the American States. The remaining law has been modified from time to time, but the basis of the civil and commercial law of the Canal Zone is the same as that of Colombia¹).

V. SOURCES OF AMERICAN LAW. — The sources of American law are:

A. The constitution of the United States; B. Acts of Congress and treaties; C. Enactments of legislative bodies acting under a delegation of power from the Federal government; D. Decrees and regulations of Federal executive officers; E. State constitutions; F. Acts of the State legislatures; G. Enactments of legislative bodies acting under a delegation of power from the State governments; H. Decrees and regulations of State executive officers; and I. The subsidiary law.

A. The Constitution of the United States. — The constitution of the United States is the supreme law of the land. All acts of the legislative and executive branches of the Federal government and all acts of the State governments in order to be valid must not be in conflict with the Federal constitution. The power of the courts, both Federal and State, to determine the constitutionality under the Federal constitution of any governmental acts, not purely political, is unquestioned.

The constitution of the United States is in full force in all of the States of the Union, in the District of Columbia, and in all the so-called incorporated Territories, whether organized (Arizona, Hawaii, New Mexico) or unorganized (Alaska). The unincorporated or appurtenant Territories (the Canal Zone, the Philippines, Porto Rico) are from an international point of view a part of the United States; but from a strict constitutional point of view, they do not constitute a part of the United States as that term is used in the constitution, and not all of the constitutional provisions are operative therein²).

B. Acts of Congress and Treaties. — The second source of law is the legislation of Congress and the treaties made by the United States. Both of these classes of law are from the standpoint of municipal law of equal validity. A subsequent treaty will supersede an act of Congress, and vice versa. An act of Congress may expressly or impliedly be operative throughout the United States, including all places subject to the jurisdiction thereof, or it may be passed in the exercise of the power of Congress to legislate in respect of territories and other places subject to the exclusive jurisdiction of the Federal government. In the latter case the Federal Congress fulfils the functions of a State legislature, and acting in this capacity its powers are not confined to those expressly or impliedly granted to the Federal Congress acting as a national legislature. Acts of Congress may be confined in their operation to a limited territory. Of this type are the acts of Congress applying to Alaska and the District of Columbia³), in both of which Territories there are no local legislative bodies.

C. Enactments of Legislative Bodies Acting under a Delegation of Power from the Federal Government. — In the organized Territories (Arizona, New Mexico, Hawaii) the territorial legislatures exercise the function of state legislatures, but they act by virtue of a delegation of power from the Federal government. The Federal Congress can at any time revoke the powers of a territorial legislature to make laws, or may itself legislate for the Territory. So also in the Philippines and Porto Rico the local legislature acts by virtue of a delegated authority.

¹) Hinkley, Canal Zone Laws and Judiciary, 17 Case and Comment, 220—222. For the law of Colombia and the Republic of Panama, see the volumes of this work dealing with the laws of these States. — ²) Downes v. Bidwell, (1900) 182 U. S. 244; Dooley v. United States, (1900) 182 U. S. 222; Dooley v. United States, (1901) 183 U. S. 151; The

Diamond Rings, (1901) 183 U. S. 176; De Lima v. Bidwell, (1900) 182 U. S. 1; Dorr v. United States, (1903) 195 U. S. 138; Gonzales v. Williams, (1904) 192 U. S. 1. — ³) U. S. Const. art. 1, sec. 8 (17). See Hodgkin, Constitutional Status of the District of Columbia, in 25 Political Science Quarterly, 257.

D. Decrees and Regulations of Federal Executive Officers. — To a limited extent administrative ordinances of certain executive officers and boards are a recognized source of law. Thus, in the Canal Zone legislation is effected by the decrees of the President of the United States. Of special importance in commercial law are the Customs Regulations, dealing with the details of customs entries, shipments in bond, bonded warehouses, drawbacks, etc., the Consular Regulations relating to consular invoices, and the Regulations of Navigation.

E. State Constitutions. — In all of the States there exist written constitutions. In the Territories and Dependencies, the place of the constitution is taken by an organic act passed by Congress in the exercise of its power to govern the territories of the United States. These constitutions and organic acts are the fundamental law of the States or Territories, and all governmental acts of the local authorities must be done in conformity therewith.

F. Acts of the State Legislatures. — The legislation enacted by the local legislative bodies in the several States, Territories, and Dependencies is the most important source of the written law of the United States. Under this head come the various codifications of State civil and commercial law.

G. Enactments of Legislative Bodies Acting under a Delegation of Power from the State Governments. — Under this head are included the ordinances and regulations of the minor political subdivisions of States and Territories. These enactments are made by virtue of a delegation of legislative power from the State or Territory. They relate chiefly to matters of sanitation and police, and contain no substantive commercial law of any importance.

H. Decrees and Regulations of State Executive Officers. — As in the case of the Federal government (*supra* D) there is a limited amount of legislation in the States and Territories by means of administrative ordinances. The regulations of pilotage and of State harbor boards may be regarded as typical.

I. Subsidiary Law. — The above embrace the chief sources of the written law. Subsidiary thereto in the States and Territories where the civil law is not in force is the American common law. The common law has been broadly defined as "those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any expressed and positive declarations of the will of the legislature"¹).

We have seen that before the Revolution the common law of England was in force in the thirteen Colonies that became the United States. After the Declaration of Independence this law continued in force, except in so far as it was not inconsistent with the new political conditions. It was expressly adopted in some of the States²). By the Ordinance of 1787 the common law was declared to be in force over that portion of the United States known as the Northwest Territory³). In Florida, acquired by cession from Spain (1819), the common law of England soon (1829) replaced the territorial law⁴). In Texas, where the Mexican law was in force until the establishment of the Republic of Texas, the common law was adopted (1840) and was continued in force after Texas became one of the States of the Union. The other Territories over which Mexican law prevailed are California, Arizona, and New Mexico. In all of these it has been replaced by the common law⁵). In Alaska, acquired by cession from Russia (1867), the common law is in force⁶). In the District of Columbia the common law was part of the territorial law at the time of the creation of the District, and continues in force⁷).

A difficult question arises as to what is comprehended under the term "common law." In England the term in its ordinary acceptance includes the general customs of the realm and particular laws, which by custom are used by particular courts of pretty general and extensive jurisdiction, but does not include particular customs

¹) 1 Kent Comm. 469. — ²) Delaware, Const. 1776; *Clawson v. Primrose*, (1873) 4 Del. Ch. 643. New York, Const. 1777; *Burtis v. Burtis* (1825) Hopk. (N. Y.) 557. Pennsylvania, Act January 28, 1777. Massachusetts, Const. c. 6, art. 6. Virginia, Act of 1776; *Scott v. Lunt*, (1833) 7 Pet. 596. — ³) *Johnson v. Chambers*, (1859) 12 Ind. 102; *O'Ferrall v. Simplot*, (1857) 4 Ia. 381. — ⁴) See Rev. Stat. 1906, sec. 59; *Hart v. Bostwick*, (1872) 14 Fla. 162.

— ⁵) In California: by Laws, 1850, c. 95. In Arizona: by Laws 1885, No. 68; see *Luhrs v. Hancock*, (1901) 181 U. S. 567. In New Mexico: see *Browning v. Browning*, (1886) 3 N. M. 371; *Albright v. Territory*, (1905) 79 Pac. 714. — ⁶) 31 Stat. L. 552, sec. 367; see *Valentine v. Roberts*, (1902) 1 Alaska, 536. — ⁷) *De Forrest v. U. S.*, (1897) 11 App. D. C. 458; *U. S. v. Guiteau*, (1882) 1 Mackey, 498.

affecting only the inhabitants of particular districts¹). It is in this general sense that the term is employed in the United States²). The authorities are agreed that it includes the law merchant³).

It is in regard to the adoption of English acts of Parliament that the greatest diversity of rules exists. The generally received rule is that acts of Parliament passed prior to 1607, in aid or amendment of the common law, are in force as parts of the common law⁴). In most of the States only the acts of Parliament passed prior to the fourth year of James I. (1607) are adopted, this being the date of the establishment of the first English settlement in America⁵). Other States adopt the Declaration of Independence (July 4, 1776) as the date when English acts ceased to be a part of the received law⁶). A few States adopt other dates⁷).

All of the authorities agree that only such portions of the law of England became a part of the American common law as are adapted to the political, social, and economic conditions of the State adopting it⁸). "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition"⁹).

The California Civil Code, and those of the western code States (Idaho, Montana, North Dakota, South Dakota) based upon it, aim to contain a complete presentation of the general principles of the civil law in force. They provide, however, that the sections of the code so far as they are substantially the same as the statutes that are consolidated or the common law, must be construed as continuations thereof and not as new enactments¹⁰), and in fact resort is constantly had to the common law authorities for the purpose of interpreting the provisions of the codes. In all cases the common law of England so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the State, is the rule of decision¹¹).

J. General Commercial Law. — It has been broadly stated that there is no common law of the United States as contradistinguished from the law of the individual States¹²). Under the constitution of the United States, the Federal courts are given jurisdiction, *inter alia*, in suits between citizens of different States and between citizens of a State of the United States and aliens¹³). Under the Judiciary Act of 1911 such jurisdiction is exercisable concurrently with that of the State courts where the amount involved is three thousand dollars exclusive of interests and costs.

Beginning with the Act of 1789, the Federal Acts have provided that the law of the several States except where the treaties, constitution, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. In effect the Federal courts in exercising jurisdiction by virtue of the diversity of citizenship of the parties litigant perform the functions of a State court. Where the constitution or statutes of a State expressly cover the point at issue the Federal courts will apply the State law, and will, in general¹⁴), follow the judicial interpretations by the State courts of such laws. But in *Swift v. Tyson*¹⁵), decided in

1) 1 Bl. Comm. 68. — 2) 6 Am. & Eng. Enc. of Law (2d Ed.) 273. — 3) *Donegan v. Wood*, (1873) 49 Ala. 242; *Cook v. Renick*, (1858) 19 Ill. 598; *Piatt v. Eads*, (1820) 1 Blackf. 80; *Forepaugh v. Delaware, etc., Railroad Co.*, (1889) 128 Pa. St. 217. — 4) *Commonwealth v. Knowlton*, (1807) 2 Mass. 530. — 5) *Penny v. Little*, (1841) 4 Ill. 301; *Crawford v. Chapman*, (1848) 17 Ohio, 452. — 6) *Florida, Rev. Stat. 1906*, sec. 59; *Rhode Island, Gen. Laws, 1909*, c. 366, sec. 4; *Ex parte Blanchard*, (1874) 9 Nev. 101; *Coburn v. Harvey*, (1864) 18 Wis. 148, but *cp. Spaulding v. Chicago, etc., R. Co.*, (1872) 30 Wis. 110. — 7) *Pennsylvania: the date of the settlement of that colony. Morris v. Vanderen*, (1782) 1 Dall. 64. *New Hampshire: the organization of the provincial government. State v. Rollins*, (1837) 8 N. H. 550. *New York: May 1, 1788. Cons. Laws, 1909*, c. 27, sec. 70. *Iowa: the union of England and Scotland*

(1707). *O'Ferrall v. Simplot*, (1857) 4 Ia. 381. — 8) *Harrington v. Miles*, (1873) 11 Kas. 480; *Reno Smelting, etc., Works v. Stevenson*, (1889) 20 Nev. 269. — 9) *Per Story, J.*, in *Van Ness v. Pacard*, (1829) 2 Pet. 137. See also *Williams v. Williams*, (1853) 8 N. Y. 525; *McDill v. McDill*, (1782) 1 Dall. 63; *Clark v. Goddard*, (1863) 39 Ala. 164; *Browning v. Browning*, (1886) 3 N. M. 371. — 10) *Cal. Civ. Code*, sec. 5. — 11) *Cal. Pol. Code*, sec. 4468; See *Lux v. Haggin*, (1886) 69 Cal. 255. *Idaho, Rev. Codes, 1908*, sec. 18. *Montana, Rev. Codes, 1907*, sec. 3552; see *Thorp v. Freed*, (1872) 1 Mont. 651. *North Dakota, Rev. Codes, 1905*, sec. 4006. *South Dakota, Civil Code, 1908*, sec. 6. — 12) *People v. Folsom*, (1855) 5 Cal. 373; *Dawson v. Shaver*, (1822) 1 Blackf. 204. — 13) *U. S. Const. art. 3*, sec. 1. — 14) *Cp. Gelpcke v. Dubuque*, (1863) 1 Wall. 175. — 15) (1842) 16 Pet. 1.

1842, Mr. Justice Story said that the true intendment and construction of the section of the Judiciary Act of 1789 was to limit the meaning of the word law as used therein "to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

The view thus announced, though often criticised, has never been repudiated¹). Obviously it is open to the practical objection that the decision of a case in favor of the plaintiff or of the defendant may be determined by the chance circumstance of the particular court obtaining jurisdiction of the case, but it has been an important factor in rendering more uniform a branch of the law where uniformity is of the highest practical value²).

VI. SPECIAL TOPICS OF COMMERCIAL LAW. — A. Partnership. — Even prior to the Revolution the form of association known as partnership was well recognized. One of the earliest of these associations was the Undertakers of the Iron Works, which received certain special privileges from Massachusetts in 1643 and 1645. In 1686 a banking partnership was sanctioned by Governor Dudley of Massachusetts. About the same time the Frankfort Company was organized to operate in Pennsylvania. The Bank of New York did a large business until 1791 without a charter³).

Fundamentally the American law, whether codified or not, relating to general partnerships is the same as that of England. Greater differences exist in the several States and Territories in regard to the law of limited partnerships, which is a statutory institution adopted from the civil law. The registered partnerships authorized by statute in several States are analogous to the English joint stock association. A uniform partnership act is under consideration by the Commissioners for Uniform State Laws, and several draft acts have been submitted.

In Louisiana the law relating to partnership is based on the French law. In the Philippines and in Porto Rico the provisions of the Spanish Code of Commerce, as amended, are in force.

B. Corporations.⁴) — The beginnings of American corporation law must be sought in the law of public corporations applicable to the colonies existing under

¹) *Railroad Co. v. Prentice*, (1893) 147 U. S. 101; *Railroad Co. v. Lockwood*, (1873) 17 Wall. 357; *W. U. Tel. Co. v. Call Publishing Co.*, (1901) 181 U. S. 92. In *Kuhn v. Fairmont Co.*, (1910) 215 U. S. 349, the Federal court held that it was competent to decide for itself a question relating to real property within a State, the State courts not having decided the point before suit was brought, but having decided it before the Federal case was decided. On the equity side of the Federal courts there has been developed a system of equity sometimes at variance with that of the State in which the Federal court is exercising juris-

diction. — ²) Nor does it impair the theory of the singleness of law in a particular jurisdiction. The conflict is one that can arise in any State where two sets of courts with no common superior exercise of jurisdiction over the same subject matter. Beale, *Cases on the Conflict of Laws*, Summary, secs. 12, 13. — ³) Baldwin, in *Two Centuries' Growth of American Law*, pp. 268—271. — ⁴) This section is based on the valuable chapter on Private Corporations, in *Two Centuries' Growth of American Law*, contributed by Governor Simeon E. Baldwin. The essay is also reprinted in *Select Essays in Anglo-American Legal History*, Vol. 3.

charters granted by the English Crown. The colonial governments insisted not only that they were themselves public corporations, but that they had an implied power to create other corporations for political and governmental purposes. Massachusetts, in 1639, incorporated a military company, and in 1650 granted a charter to Harvard College. This latter act was, however, regarded as a clear violation of the royal prerogative, and the colony was called to account for this act a few years later. In 1741 Parliament intervened and forbade any further grants of corporate privileges by the American assemblies. During the whole of the eighteenth century, including the period subsequent to the date of Declaration of Independence, there were probably less than two hundred and fifty charters granted. Most of these were to corporations of a quasi-public nature.

A few private corporations operated in the colonies under charters received directly from the Crown. Of this nature were the Ohio Company and the Indiana Company. One of the earliest moneyed corporations chartered by the colonies was the New London Society United for Trade and Commerce in Connecticut, which received a charter in 1732. Pennsylvania incorporated a fire insurance company in 1768.

After the colonies had obtained their independence charters were granted more liberally. The Bank of North America received a charter from the United States Congress in 1781, from Pennsylvania and New York in 1782, and from Delaware in 1786, thus acquiring a legal existence under the laws of several distinct sovereignties. The first general incorporation law was enacted in New York in 1784. Then followed Delaware in 1787, and Pennsylvania in 1791. The first general act for the incorporation of trading companies was that of New York (1811).

During the first half of the nineteenth century incorporation under special acts was the rule. The abuses arising from this procedure led a number of States to prohibit by constitutional provision the granting of special charters by the corporations, and at the present time, even where no constitutional provisions exist, the incorporation of trading companies is generally effected under general laws.

General incorporation laws are in force in all the States and Territories. The principle of free incorporation was early established, and as a corollary thereto the principle of strict construction of corporate rights and privileges.

As the result of a decision of the Supreme Court of the United States¹⁾ that a charter of a private corporation is a contract protected by that clause of the Federal constitution which prohibits a State from impairing the obligation of a contract, it is now generally provided either in the State constitution or in the general corporation law or the special act that the charter is granted subject to the exercise of the power of the States to alter, amend, or repeal the same.

A few corporations of a quasi-public nature have been organized under special acts of Congress, and there is a general act for the incorporation of national banks under the Federal law. Bills have been introduced in Congress for the enactment of a Federal law for the incorporation of companies engaged in interstate and foreign commerce, but no act of this nature has ever been passed. A limited amount of control is exercised by the Federal government over certain corporations engaged in interstate and foreign commerce under the Interstate Commerce Act and the so-called Sherman Anti-Trust Act, as well as under the Corporation Tax Law of 1909, but on the whole trading corporations are exclusively subject to State control.

An uniform corporation law has been suggested, and some work has been done toward the formulation of a draft law. But in view of the great divergence of local laws and policies on the subject this much needed unification is hardly to be expected for many years. An uniform act relating to stock transfers has, however, received the assent of five States.

Owing to the great divergence in the laws of the several States and Territories it is almost impossible to characterize the American law of corporations and to compare it with the modern law of England. An attempt to group the several jurisdictions is made in the article on Commercial Corporations. The English law forms the basis of the American legislation, even in Louisiana, the Philippines, and Porto Rico. The American law is characterized by a greater ease in obtaining the charter, greater freedom from responsibility on the part of promoters and directors, and a smaller measure of control by the state in the matter of audit and reports, resulting

¹⁾ Dartmouth College v. Woodward, (1819) 4 Wheat. 518.

in a diminished protection of the individual shareholders. On the other hand, there may be observed a tendency on the part of the American courts to give a less liberal construction to the powers of the corporation itself.

C. Sales, Factors, Carriers, Bills of Lading, and Warehouse Receipts. — The common law relating to sales is in force, except in Louisiana, the Canal Zone, and the territory acquired from Spain in 1898. In a number of States and Territories an Uniform Sales Act, based on the English Sale of Goods Act, 1893, has been adopted, and in a few States (Georgia, California, and the States that have adopted the California law) fairly complete codifications of the law of sales exist. In most of these States the provisions of the 17th section of the English Statute of Frauds (29 Chas. 2, c. 3) have been adopted. The language of the American Statutes of Fraud is not uniform and sometimes varies considerably from the English act. In several States and Territories there are special statutory provisions in regard to sales in bulk and conditional sales.

The law relating to factors is statutory¹⁾, and in a few States Factors Acts have been passed, following in the main the English statutes of 1824²⁾, 1826³⁾, and 1844⁴⁾.

The rights and duties of common carriers are governed in part by common law, in part by State and Federal statutes. The Federal legislation covers certain parts of the law relating to interstate and foreign shipments, navigation, etc., especially the question of rate regulation and of the responsibility of the carrier for loss of shipments. In most of the States and Territories there are local statutes regulating internal traffic.

The law relating to bills of lading and warehouse receipts does not differ essentially from that prevailing in England. In regard to both topics uniform acts, proposed by the Commissioners for Uniform State Laws, have been adopted in a number of States.

D. Negotiable Instruments. — The uniform Negotiable Instruments Law as proposed by the Commissioners for Uniform State Laws has been adopted, with slight amendments, in forty States and Territories. The basis of this Act was the English Bills of Exchange Act, 1882, and many of the provisions of the latter Act were adopted verbatim. The American Act is confined to negotiable instruments, and requires that the instrument be expressly made payable to order or to bearer. It contains no provisions in reference to crossed checks, nor provisions corresponding to those of section 57 of the Bills of Exchange Act regarding damages and re-exchange. It affords no protection to a banker who in good faith and in the ordinary course of business pays a check held under a forged indorsement, and contains no rules relating to conflict of laws.

On the other hand, the American Act provides that the addition of a clause stipulating for the payment of costs of collection or attorney's fees in case payment is not made at maturity shall not invalidate the instrument, and that the giving of an election to the holder to require something to be done in lieu of payment in money does not affect the negotiability of an instrument.

In regard to fictitious or non-existing payees the American Act provides that the instrument is payable to bearer if it is payable to the order of a fictitious or non-existing payee, and such fact was known to the person making it so payable, or where the name of the payee does not purport to be the name of any person. A person signing in a representative capacity incurs no responsibility if he was in fact duly authorized, but the mere addition of words indicating that he signs as agent or in a representative capacity, without disclosing his principal, does not exempt him from personal liability. The American Act furthermore places the indorser "without recourse" in the same legal position as the person who transfers by mere delivery an instrument payable to bearer.

The American Act deals specifically with the case of presentment for payment to partners. It abolishes days of grace, although some of the States in adopting the uniform Act have retained this institution. When an instrument matures on a holiday it is payable on the succeeding business day. In all of the States, except Illinois and Nebraska, it is provided that where an instrument is payable at a bank it is, so far as the rights and duties of the bank are concerned, a check drawn on such bank by the acceptor or maker.

¹⁾ The first English Factors Act was not passed until 1824. — ²⁾ 4 Geo. 4, c. 87. —

³⁾ 6 Geo. 4, c. 94. — ⁴⁾ 5 & 6 Vic. c. 39.

The American Act allows an acceptance to be written on a paper other than the bill itself, and an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance. In either case, however, the acceptor is bound only in favor of persons who upon the face thereof received a bill for value. A destruction of the bill or a refusal to return the same within twenty-four hours is deemed an acceptance¹).

Besides the States where the uniform Negotiable Instruments Law has been adopted, codifications on this topic are in force in California and Georgia, while in most of the other States there exist statutory provisions in reference to this topic.

E. Bankruptcy. — Four Bankruptcy Acts have been enacted by the Federal Congress in the exercise of the constitutional power "to establish uniform laws on the subject of bankruptcies throughout the United States²). The first was the Act of April 4, 1800. This Act was modeled upon the then existing English bankruptcy laws, was limited in its application to traders, and provided only for involuntary bankruptcy. The title of the assignee related back to the date of the act of bankruptcy. The bankrupt was entitled to an allowance, and, with the consent of the commissioners and of two-thirds in number and value of the creditors who had proved claims in excess of fifty dollars, to a certificate of discharge. This Act was repealed December 19, 1803.

The second of the Federal Acts was passed August 19, 1841. It provided for the involuntary bankruptcy of traders and for the voluntary bankruptcy of all persons provided the debt was not created by defalcation. The title of the assignee to the bankrupt's property dated from the decree, and did not extend to after-acquired property. A bankrupt who was not guilty of fraudulent acts was entitled to a certificate of discharge, unless a majority in number and value of the creditors who had proved their claims filed a written dissent. The Act of 1841 was repealed March 3, 1843³).

The third Act was passed March 2, 1867, and was frequently amended. This Act provided for both voluntary and involuntary bankruptcy, and was not confined in its operation to traders. The title of the assignee to the bankrupt's property related back to commencement of the proceedings in bankruptcy. Under the amendment made June 22, 1874, an involuntary bankrupt was entitled to discharge from all his provable debts, with certain exceptions, and a voluntary bankrupt was so entitled, provided that the assets amounted to thirty per cent. of the debts proved against the estate, or that at least one-fourth in number and one-third in value of his creditors assented. The Act of 1867, together with its amendments, was repealed June 7, 1878.

The Act at present in force was enacted July 1, 1898, and has been amended by the Acts of February 5, 1903, of June 15, 1906, and of June 25, 1910.

In the absence of Federal legislation, the States have full power to pass bankruptcy and insolvency acts, subject, however, to the provisions of the Federal constitution prohibiting a State from passing laws impairing the obligations of contracts, and laws in violation of the Fourteenth Amendment. Consequently a State cannot under such an act provide for the discharge of a debt contracted before the law went into effect, or of a contract made in another State or in a foreign country⁴).

At the time when the present Bankruptcy Act was passed most of the States had laws dealing with the subject of bankruptcy and insolvency. The state of this legislation is thus summarized by Professor Williston⁵):

Some States had what may be called a real bankrupt law; that is, provision was made for involuntary as well as voluntary distribution of a debtor's property, and a discharge from all provable debts was granted. These States are California, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, North Dakota, Rhode Island. In the other States the insolvency laws were in general merely regulations and changes of more or less importance of the law of assignments in trust for creditors. In Kentucky, New

¹) See an interesting comparison between the American Act and the English Bills of Exchange Act by Sir Mackenzie Chalmers in a paper read before the Institute of Bankers on January 13, 1909, and reprinted in Senate Document No. 768, 61st Cong., 3d Session. The writer is indebted to this address for the

comparisons between the American and the English acts. — ²) U. S. Const. art. 1, sec. 8 (4).

— ³) Williston, *Cases on Bankruptcy*, pp. 4—6.

⁴) *Ogden v. Saunders*, (1827) 12 Wheat. 213; *Hanover v. Moyses*, (1901) 186 U. S. 181. —

⁵) *Cases on Bankruptcy*, p. 6.

Mexico, Tennessee, and Wisconsin a preference by an insolvent debtor operated itself as an assignment or afforded ground for the appointment of a receiver. But with this exception no involuntary proceedings were provided for. A few States belonging to this class allowed a debtor making a voluntary assignment a discharge from all provable debts; namely, Colorado, Idaho, New York, Oregon, Washington, Wisconsin. Others allowed such a debtor a discharge from debts actually proved; namely, Arizona, Arkansas, Indian Territory, New Jersey, South Carolina, Texas (if creditors received 33 $\frac{1}{3}$ per cent), Wyoming. A majority of the States of this class forbade assignments with preferences, but a considerable minority allowed them, namely, Arkansas, Georgia, Indian Territory, Mississippi, Montana, New York (only to the extent of one-third of the estate), North Carolina, Utah, Virginia. In many other States there was nothing to prevent a debtor from giving preferences when insolvent, and then making a general assignment of such property as remained.

The better view is that the present Federal Act covers the whole subject of bankruptcy, and suspends the operation of all State laws dealing with that topic. The fact that the Act does not apply to the involuntary bankruptcy of wage-earners and farmers, nor to the voluntary bankruptcy of certain corporations or the involuntary bankruptcy of certain non-trading corporations does not indicate an intention on the part of Congress to give to the State acts a limited application¹). But the contrary view has been upheld by some courts²).

The American Act does not provide for the distribution of the insolvent estates of deceased or insane debtors, and the State laws relating to these matters remain in force³). So, too, the right to make a general assignment for the benefit of creditors remains subject to State regulation. But in so far as the State laws seek to attach the incidents of a bankruptcy to such assignments (e. g., the discharge of the debtor) they are inoperative⁴). The ordinary power of courts of equity to appoint receivers of insolvent corporations is not affected⁵).

VII. CODIFICATION AND UNIFICATION. — The early attempts at codification in the colonies have been noted above. The New York constitution of 1846 contained a provision for the appointment of three commissioners "to reduce into a written and systematic code" the whole body of the law of the State. A commission was appointed in the following year, but ceased to exist in 1850. In 1857 new commissioners were appointed, and draft codes submitted to the legislature during the following years. The draft civil code was chiefly the work of David Dudley Field, and was submitted to the legislature in 1865. This code was adopted at the session of 1878—79, but was vetoed by the governor. In the succeeding sessions of the legislature further efforts to secure the adoption of the proposed code were made, but the decided opposition of a large number of the members of the New York bar, and notably of the Association of the Bar of the City of New York, prevented legislative action on the matter.

By an Act of December 9, 1858, provision was made for the election of three commissioners for the codification of the laws of Georgia. The code drafted by the commissioners was adopted by Act of December 19, 1860, to go into effect on January 1 1862. The commencement of the code was afterward extended one year. It was ratified by the constitution of 1865, and was revised in 1865, 1872, 1882, 1895, and 1910.

The history of the adoption of the civil code of Louisiana is briefly given in another part of this introduction. The draft civil code of New York was, with slight modifications, adopted in California in 1872. The California civil code in turn has formed the basis of the codes of Idaho, Montana, North Dakota, and South Dakota.

While general codifications of the civil law have been few, there is a growing tendency toward codification of special topics of commercial law. It has been said by a high authority⁶) that: "While any branch of the law is in process of formation

¹) Harbaugh v. Costello, (1900) 184, Ill. 110; Moody v. Port Clyde Co., (1907) 102 Me. 365; Parmenter Mfg. Co. v. Hamilton, (1898) 172 Mass. 178. See an excellent review of the authorities in an article by Professor Willison, *The Effect of a National Bankruptcy Law upon State Laws*, in 23 Harv. Law Rev. 547. — ²) Old Town Bank v. McCormick, (1903) 96 Md. 341; R. H. Herron Co. v. Supreme Court.

(1902) 136 Cal. 279; Keystone Driller Co. v. Supreme Court, (1903) 138 Cal. 738; Miller v. Jackson, (1907) 34 Pa. Super. Ct. 31. — ³) Hawkins v. Learned, (1874) 54 N. H. 333. — ⁴) Boese v. King, (1883) 108 U. S. 379. — ⁵) Williston, *Effects of a National Bankruptcy Law*, in 23 Harv. Law Rev. 547. — ⁶) Chalmers, *Codification of Mercantile Law*, in 25 Reports of Am. Bar Assn., p. 282.

it is unwise to attempt to codify it. A code should be founded on a firm basis of experience A practical and working code cannot spring from the head of the draftsman, as Pallas Athene is fabled to have sprung, fully equipped from the head of her father Zeus When the principles of the law are well settled, and when the decided cases that accumulate are rare illustrations of accepted general rules, then the law is ripe for codification."

It is submitted that the leading topics of commercial law in the United States have reached this stage. The beginning has been made in the Negotiable Instruments Law, the Sales Act, and the Bill of Lading Act, as proposed by the Conference of Commissioners for Uniform State Laws. The law of bankruptcy is embodied in a statute. The law of partnership, of marine insurance, and of carriers has reached a point in its development that it can be made appropriately the subject of codification and of uniform legislation throughout the United States. The great bulk of the law of corporations is statutory, and the mass of judicial decisions is certainly a sufficient basis for a more complete statutory presentation than is contained in the general corporation laws of the States. Whatever the attitude of the American bar to the question of codification as a whole, there is no question that the next quarter century will witness a substantial codification of the commercial law.

In 1889 the American Bar Association appointed a committee on uniform State legislation, and in 1892 seven States sent representatives to a conference held at Saratoga to consider the feasibility of uniform State laws on certain topics. New York was the first State to provide for the appointment of official representatives (1890). At present fifty States, Territories, and Possessions are represented at the annual conferences. On topics of commercial law, the conference of Commissioners for Uniform State Laws has drafted and submitted to the States five acts. Of these the Negotiable Instruments Laws has been adopted by forty States and Territories, the Warehouse Receipts Act by twenty-two, the Sales Act by eight, the Bills of Lading Act by six, and the Stock Transfer Act by five. The conference has under consideration an uniform partnership act and an uniform corporation law.

Absolute uniformity has not been secured. For example, a number of the States in adopting the Negotiable Instruments Law have modified in important particulars the draft act submitted by the Commissioners. The courts of the different States have in certain cases also placed different interpretations upon the same provisions of the law. These difficulties are unavoidable under the federal system.

II.

BIBLIOGRAPHY

Bibliography.

(By **Frank E. Chipman**, Attorney-at-Law, Boston.)

I. General Works.

A. Legal Bibliography.

Berry, W. J. C.: Catalogue of the Library of the Association of the Bar of the City of New York. New York. 1892.

Bishop, J. P.: First Book of the Law. Boston. 1868.

Crane, A. N.: Catalogue of the Books in the Library of the Law Library Association of St. Louis. St. Louis. 1895.

Finch, James A.: Catalogue of the Library of the Department of Justice to Sept. 1, 1904. Washington. 1904.

Harvard University; Catalogue of the Library of the Law School. 2 vols. Cambridge. 1909.

Hoffman, David: Course of Legal Study. 2 vols. 2d ed. Baltimore. 1836.

Marvin, J. G.: Legal Bibliography, or a Thesaurus of American, English, Irish and Scotch Law Books, together with some continental treatises, with critical observations upon their various editions and authority. Philadelphia. 1847.

Moak, N. C.: Subject-Index of Elementary Law Books. Albany. 1880.

Ram, Jas.: Science of Legal Judgments. Townshend ed. New York. 1871.

Soule, Charles C.: The Lawyer's Reference Manual of Law Books and Citations. Boston 1883.

B. Treaties. Treaty-making Power.

Butler, C. H.: Treaty-Making Power of the United States. 2 vols. New York. 1902.

Devlin, R. T.: The Treaty-Making Power, or Commentaries on the Treaty Clauses on the Constitution of the United States. San Francisco. 1910.

Herod, J. R.: Favored Nation Treatment; An Analysis of the Most Favored Nation Clause with commentaries on its uses in treaties of commerce and navigation. New York. 1901.

C. Collection of Statutes.

1. *United States.*

Statutes at Large, 1789—1910, 36 vols.

Revised Statutes 2d ed. 1878.

Supplement vol. 1 1874—1891.

Supplement vol. 2 1891—1901.

Compiled Statutes, 3 vols. 1901.

Supplement to 1909.

Federal Statutes Annotated. 10 vols. 1903—8.

Pierce's Federal Code, 1910.

Scott & Beaman's Federal Laws Indexed, 1873—1907. 1909.

2. *Compilations of Statutes of the States and Territories.*

Alabama: Code. 3 vols. 1908.

Alaska: Carter's Laws. 1900.

Arizona: Revised Statutes. 1901.

Arkansas: Kirby's Digest of the Laws. 1904.

California: Deering's Codes. 5 vols. 1909.

Canal Zone: Laws. 1906.

Colorado: Code. 1909.

Connecticut: General Statutes. 1902.

Delaware: Revised Code. 1893.

District of Columbia: Ford's Annotated Code of Law. 1910.

Florida: Revised Statutes. 1906.

Georgia: Code, 2 vols. 1910.

Hawaii: Revised Laws. 1904.

Idaho: Revised Code. 2 vols. 1908.
Illinois: Hurd's Revised Statutes. 1909.
Indiana: Burn's Annotated Statutes, 3 vols. 1908.
Indian Territory: Carter's Statutes. 1899.
Iowa: Revised Code, 1897; Supplement. 1907.
Kansas: Dassler's General Statutes. 1909.
Kentucky: Carroll's Statutes, 4th ed. 1909.
Louisiana: Wolff's Revised Laws. 2 vols. 1904; Supplement, 1910.
Maine: Revised Statutes. 1903.
Maryland: Poe's General Code. 2 vols. 1904.
Massachusetts: Revised Laws. 3 vols. 1902; Supplement, 1910.
Michigan: Annotated Compiled Laws. 3 vols. and Index, 1897.
Minnesota: Revised Laws. 1905. Supplement, 1909.
Mississippi: Revised Code. 1906.
Missouri: Revised Statutes. 5 vols. 1906.
Montana: Revised Code. 2 vols. 1907.
Nebraska: Compiled Statutes. 1909.
Nevada: Compiled Laws. 1900.
New Hampshire: Chase's Public Statutes. 1901.
New Jersey: General Statutes. 3 vols. 1895.
New Mexico: Compiled Laws. 1898.
New York: Consolidated Laws. 7 vols. 1909.
North Carolina: Code, 2 vols. 1905.
North Dakota: Revised Code. 1905.
Ohio: General Code. 1910.
Oklahoma: Code. 1909.
Oregon: Bellinger & Cotton's Annotated Code. 2 vols. 1902.
Pennsylvania: Purdon's Digest of Laws, 4 vols. 1910.
Philippine Islands: Acts of Philippine Commission. 1901—1910.
Rhode Island: General Laws. 2 vols. 1909.
South Carolina: Revised Laws, 2 vols. 1902.
South Dakota: Revised Code. 2 vols. 1908.
Tennessee: Shannon's Code, 1897; Supplement, 1904.
Texas: Sayles' Civil Statutes. 3 vols. 1906. Supplement, 1910.
Utah: Revised Statutes. 1907.
Vermont: Revised Statutes. 1906.
Virginia: Revised Code Annotated. 2 vols. 1904.
Washington: Ballinger's Code. 1910.
West Virginia: Code, 1906; Supplement, 1909.
Wisconsin: Annotated Statutes, 2 vols. 1898; Supplement, 1906.
Wyoming: Compiled Statutes. 1910.

D. Reports and Leading Cases.

1. United States Reports.

Supreme Court Reports.	Vols.	How cited	Serial No.	Period covered.
Dallas	4	Dal.	1— 4, U. S.	1790—1800
Cranch	9	Cr.	5— 13, U. S.	1801—1815
Wheaton	12	Wheat.	14— 25, U. S.	1816—1827
Peters	16	Pet.	14— 25, U. S.	1828—1842
Howard	24	How.	26— 41, U. S.	1843—1860
Black	2	Black	42— 65, U. S.	1861—1862
Wallace	23	Wall.	66— 67, U. S.	1863—1874
Otto	17	Otto	68— 90, U. S.	1875—1882
United States	110	U. S.	108—217, U. S.	1882—1910

Circuit and District Courts.	Vols.	How cited.	Period covered.
United States Appeals Reports	63	U. S. App.	1891—1899
Circuit Court of Appeals Reports	100	C. C. A.	1891—1910
Federal Cases	31	Fed. Cas.	1789—1879
Federal Reporter	178	Fed. Rep. or Fed.	1880—1910
Court of Claims			
Devereux	1	Dev. C. C.	1855—1856
Court of Claims Reports	44	Ct. Claims	1863—1909
Treasury Reports			
United States Treasury Decisions	53	T. D. no. G. A. no.	1868—1910
Bankruptcy Reports			
National Bankruptcy Register	19	Nat. Bkcy. Reg.	1867—1880
American Bankruptcy Reports	26	Am. Bkcy.	1899—1910
Interstate Commerce			
Reports	15	Interst. Com.	1887—1909
Myer, Wm. G.: Federal Decisions, 30 vols. St. Louis, 1884—9. (Cited: Fed. Dec.)			

2. State Reports.

Supreme and District Courts.	Vols.	How cited.	Period covered.
Alabama:			
Minor	1	Minor	1820—1826
Stewart	3	Stew.	1827—1831
Stewart and Porter	5	Stew. & P.	1831—1834
Porter	9	Port.	1834—1839
Alabama	162	Ala.	1840—1910
Alaska:			
Reports	3	Alaska	1867—1910
Arizona:			
Reports	11	Ariz.	1866—1910
Arkansas:			
Reports	93	Ark.	1837—1910
California:			
Supreme Court Reports	156	Cal.	1850—1910
Appellate Reports	12	Cal. App.	1905—1910
Canal Zone:			
Reports	1	C. Z.	1906—1910
Colorado:			
Supreme Court Reports	47	Colo.	1864—1910
Court of Appeals Reports	20	Colo. App.	1891—1906
Connecticut:			
Kirby	1	Kirby	1785—1788
Root	2	Root	1764—1797
Day	5	Day	1802—1813
Connecticut	82	Conn.	1814—1909
Dakota:			
Reports	6	Dak.	1866—1889
Delaware:			
Harrington	5	Harr.	1832—1855
Houston	9	Houst.	1855—1892
Marvel	2	Marv.	1893—1897
Pennewill	6	Pennewill	1897—1910
Chancery	8	Del. Ch.	1814—1908
District of Columbia:			
Cranch	6	Cr. C. C. (1—6 D. C.)	1801—1840
Hayward and Hazelton	2	Hay. & Haz.	1840—1863
Mackey	2	D. C. (6—7)	1863—1872
Mac Arthur	3	MacAr. (8—10 D. C.)	1873—1879
Mac Arthur & Mackey	1	MacAr. & M. (11 D. C.)	1879—1880
Mackey	9	Mackey (12—20 D. C.)	1880—1892
D. C. Reports, vol. 21	1	D. C. (21)	1892—1893
Appeal Cases D. C.	34	App. D. C.	1893—1910
Florida:			
Reports	57	Fla.	1846—1909

Supreme and District Courts.	Vols.	How cited.	Period covered.
Georgia:			
Charlton, T. U. P.	1	T. U. P. Charlton.	1805—1811
Charlton, R. M.	1	R. M. Charlton.	1811—1837
Dudley	1	Dud.	1831—1833
Georgia Decisions	1	Ga. Dec.	1841—1843
Georgia Reports	133	Ga.	1846—1910
Georgia Appeal Reports	7	Ga. App.	1907—1910
Idaho:			
Reports	17	Ida.	1866—1909
Illinois:			
Supreme Court Reports	244	Ill.	1819—1910
Appellate Reports	151	Ill. App.	1877—1910
Indian Territory:			
Reports	7	Ind. Ty.	1896—1908
Indiana:			
Blackford	8	Blackf.	1817—1847
Smith	1	Smith Ind.	1848—1849
Supreme Court Reports	172	Ind.	1847—1910
Appellate Court Reports	43	Ind. App.	1891—1910
Iowa:			
Morris	1	Mor.	1839—1846
Greene	4	G. Gr.	1847—1854
Iowa Reports	142	Ia.	1855—1910
Kansas:			
McCahon	1	McCahon	1858—1868
Supreme Court Reports	82	Kas.	1862—1910
Appeals Reports	10	Kas. App.	1895—1901
Kentucky:			
Hughes (1 Ky)	1	Hugh. Ky.	1785—1801
Sneed (2 Ky)	1	Snd. or Ky. Dec.	1801—1805
Hardin (3 Ky)	1	Hard.	1805—1808
Bibb (4—7 Ky)	4	Bibb	1808—1817
A. K. Marshall (8—10 Ky)	3	A. K. Mar.	1817—1821
Littell (11—15 Ky)	5	Littell	1822—1824
Littell Select Cases (16 Ky)	1	Lit. Sel. Cas.	1795—1821
Monroe (17—23 Ky)	7	T. B. Mon.	1824—1828
J. J. Marshall (24—30 Ky)	7	J. J. Mar.	1829—1832
Dana (31—39 Ky)	9	Dana	1833—1840
B. Monroe (40—57 Ky)	18	B. Mon.	1840—1857
Metcalfe (58—61 Ky)	4	Met. Ky.	1858—1863
Duvall (62—63 Ky)	2	Duv.	1863—1866
Bush (64—77 Ky)	14	Bush	1866—1879
Kentucky, vols 78—137		Ky.	1879—1910
Louisiana:			
Martin	12	Mart. La.	1809—1823
Martin (new series)	8	Mart. n. s.	1823—1830
Louisiana	19	La.	1830—1841
Robinson	12	Rob. La.	1841—1846
Louisiana Annual	52	La. An.	1846—1900
Louisiana, vols. 104—125		La.	1900—1910
Maine:			
Greenleaf	9	Greenl. or Me. 1—9	1820—1832
Fairfield	3	Fairf. or Me. 10—12	1833—1835
Maine, vols. 13—105		Me.	1836—1909
Maryland:			
— Harris and M'Henry	4	H. & M'H.	1658—1799
Harris & Johnson	7	H. & J.	1800—1826
Harris & Gill	2	H. & G.	1826—1829
Gill & Johnson	12	G. & J.	1829—1842
Gill	9	Gill	1843—1851
Maryland Reports	112	Md.	1851—1909
Chancery:			
Bland	3	Bland's Ch.	1811—1832
Maryland Chancery Decisions	4	Md. Ch.	1847—1854
Massachusetts:			
Massachusetts	17	Mass.	1804—1822

Supreme and District Courts.	Vols.	How cited.	Period covered.
Pickering	24	Pick.	1822—1840
Metcalf	13	Met.	1840—1847
Cushing	12	Cush.	1848—1853
Gray	16	Gray	1854—1860
Allen	14	Allen	1861—1867
Massachusetts vols. 97—205		Mass.	1867—1910
Michigan:			
— Douglass	2	Doug. Mich.	1843—1847
Michigan Reports	160	Mich.	1847—1910
Chancery			
Harrington	1	Harr. Mich.	1836—1842
Walker	1	Walk. Mich.	1842—1845
Minnesota:			
Reports	110	Minn.	1851—1910
Mississippi:			
Walker	1	Walk. Miss. (1 Miss.)	1818—1832
Howard	7	How. Miss. (2—8 Miss.)	1834—1843
Smedes and Marshall	14	S. & M. (9—22 Miss.)	1843—1850
Mississippi vols. 23—94		Miss.	1851—1910
Chancery			
Freeman	1	Fr. Miss. Ch.	1839—1843
Smedes and Marshall	1	S. & M. Ch.	1840—1843
Missouri:			
Supreme Court Reports	226	Mo.	1821—1910
Appeals Reports	143	Mo. App.	1877—1910
Montana:			
Reports	40	Mont.	1868—1910
Nebraska:			
Reports	86	Nebr.	1855—1910
Nevada:			
Reports	30	Nev.	1865—1910
New Hampshire:			
Smith	1	Smith, N. H.	1802—1816
New Hampshire	20	N. H.	1816—1850
Foster	11	Fost. (21—31 N. H.)	1850—1855
New Hampshire vols. 32—74.		N. H.	1855—1908
New Jersey:			
Law Reports	77	N. J. Law	1790—1910
Equity Reports	74	N. J. Eq.	1830—1910
New Mexico:			
Reports	14	N. M.	1852—1910
New York:			
Supreme Court			
Coleman's Cases	1	Cole. Cas.	1794—1800
Coleman and Caine's Cases	1	C. & C. Cas.	1794—1805
Johnson's Cases	3	Johns. Cas.	1799—1803
Caine's Reports	3	Cai.	1803—1805
Caine's Case	2	Cai. Cas.	1804—1805
Johnson	20	John.	1806—1823
Cowen	9	Cow.	1823—1829
Wendell	26	Wend.	1828—1841
Hill	7	Hill	1841—1844
Denio	5	Denio	1845—1848
Lalor's Supplement to Hill & Denio	1	Lalor	1842—1844
Chancery			
Johnson	7	Johns. Ch.	1814—1823
Hopkins	1	Hopk. Ch.	1823—1826
Paige	11	Paige	1824—1845
Barbour	3	Barb. Ch.	1845—1848
Edwards	4	Edw. Ch.	1831—1850
Hoffman	1	Hoff. Ch.	1839—1840
Clarke	1	Clarke	1839—1841
Sandford	4	Sandf. Ch.	1843—1847
Court of Appeals			
Reports	198	N. Y.	1847—1910
New Supreme Court			

Supreme and District Courts.	Vols.	How cited.	Period covered.
Barbour	67	Barb.	1847—1877
Lansing	7	Lans.	1869—1873
Thompson & Cook	6	Th. & C.	1873—1875
Hun	92	Hun	1873—1895
Silvernail	5	Sil. S. C.	1889—1890
Appellate Division	136	App. Div. or N. Y. App. Div.	1896—1910
New York Miscellaneous	66	N. Y. Misc.	1892—1910
New York Supplement	124	N. Y. Supp.	1892—1910
North Carolina:			
Martin	2	Mart. (N. C.)	1778—1797
Taylor	1	Tay. (N. C.)	1798—1802
Conference	1	N. C. Conf.	1800—1804
Haywood	2	Hayw. (N. C.)	1789—1806
Carolina Law Repository	2	Car. L. R.	1813—1816
N. C. Term Reports (Taylor)	1	N. C. Term (4 N. C. Rep.)	1816—1818
Murphey	3	Murph. (5—7 N. C.)	1804—1819
Hawks	4	Hawks (8—11 N. C.)	1820—1826
Devereux	4	Dev. (12—15 N. C.)	1826—1834
Devereux Equity	2	Dev. Eq. (16—17 N. C.)	1826—1834
Devereux & Battle's Law	4	Dev. & Bat. (18—20 N. C.)	1834—1839
Devereux & Battle's Equity	2	Dev. & Bat. Eq. (21—22 N. C.)	1834—1839
Iredell	13	Ired. (23—35 N. C.)	1840—1852
Iredell's Equity	8	Ired. Eq. (36—43 N. C.)	1840—1852
Busbee's Law	1	Busb. (44 N. C.)	1852—1853
Busbee's Equity	1	Busb. Eq. (45 N. C.)	1852—1853
Jones	8	Jones (46—53 N. C.)	1853—1862
Jones Equity	6	Jones Eq. (54—59 N. C.)	1853—1863
Winston	1	Winst. (60 N. C.)	1863—1864
Winston's Equity	1	Winst. Eq.	1864
Phillips' Law	1	Phil. (61 N. C.)	1866—1868
Phillips' Equity	1	Phil. Eq. (62 N. C.)	1866—1868
North Carolina vols. 63—152.		N. C.	1868—1910
North Dakota:			
Reports	17	N. Dak.	1890—1910
Ohio:			
Reports	20	Ohio	1821—1871
State Reports	81	Ohio St.	1871—1910
Circuit Court Reports	30	Ohio C. C.	1885—1909
Nisi Prius Reports	14	Ohio N. P.	1982—1908
Oklahoma:			
Reports	23	Okla.	1890—1910
Oregon:			
Reports	54	Oreg.	1853—1910
Pennsylvania:			
Supreme Court			
Dallas (Pa. & U. S.)	4	Dal.	1754—1806
Addison	1	Add. Pa.	1791—1799
Yeates	4	Yeates	1791—1808
Binney	6	Binn.	1791—1814
Sergeant & Rawle	17	S. & R.	1814—1828
Rawle	5	Rawle	1828—1835
Penrose & Watts	3	P. & W.	1829—1832
Watts	10	Watts	1832—1840
Wharton	6	Whart.	1835—1841
Watts & Sergeant	9	W. & S.	1841—1845
Pennsylvania State	227	Pa. St.	1845—1910
County Court Reports	37	Pa. C. C.	1885—1910
Superior Court Reports	41	Pa. Super.	1885—1910
District Reports	18	Pa. Dist. Ct.	1892—1910
Philippine Island:			
Reports	14	Phil.	1901—1910
Porto Rico:			
Decisiones	3	P. R. Dec.	1906—1908
Federal Reports	5	P. R. Fed.	1906—1910
Rhode Island:			
Reports	30	R. I.	1828—1910

Supreme and District Courts.	Vols.	How cited.	Period covered.
South Carolina:			
Law			
Bay	2	Bay	1783—1801
Brevard	3	Brev.	1793—1816
Treadway	2	Tread.	1812—1816
Mill	2	Mill	1817—1818
Nott & M'Cord	2	N. & M'C.	1817—1820
McCord	4		1821—1828
Harper	1	Harp.	1823—1826
Bailey	2	Bail.	1828—1832
Hill	3	Hill, S. C.	1833—1837
Riley Law	1	Riley	1836—1837
Dudley	1	Dud. S. C.	1837—1838
Rice	1	Rice	1838—1839
Cheves	1	Chev.	1839—1840
McMullan	2	McMull.	1840—1842
Speers	2	Speers	1842—1844
Strobhart	4	Strobh.	1846—1850
Richardson	15	Rich.	1844—1868
Equity			
Desaussure	4	Desauss.	1784—1816
Harper	1	Harp. Eq.	1824
M'Cord	2	M'Cord Eq.	1825—1827
Bailey	1	Bail. Eq.	1830—1831
Richardson's Equity Cases	1	Rich. Eq. Cas.	1831—1832
Hill	2	Hill, Eq.	1833—1837
Riley	1	Riley, Eq.	1836—1837
Dudley	1	Dud. Eq.	1837—1838
Rice	1	Rice, Eq.	1838—1839
Cheves	1	Chev. Eq.	1839—1840
McMullan	1	McMull. Eq.	1840—1842
Speers	1	Speers Eq.	1842—1844
Strobhart	4	Strobh. Eq.	1846—1850
Richardson	14	Rich. Eq.	1844—1868
New Series South Carolina Reports	84	S. C.	1878—1910
South Dakota:			
Reports	22	S. Dak.	1890—1910
Tennessee:			
Overton	2	Over. (1—2 Tenn.)	1791—1817
Cooke	1	Cooke, Tenn. (3 Tenn.)	1811—1814
Haywood	3	Hayw. Tenn. (4—6 Tenn.)	1816—1818
Peck	1	Peck (7 Tenn.)	1822—1824
Martin & Yerger	1	Mart. & Yerg. (8 Tenn.)	1825—1828
Yerger	10	Yerg. (9—18 Tenn.)	1818—1837
Meigs	1	Meigs (19 Tenn.)	1838—1839
Humphreys	11	Humph. (20—30 Tenn.)	1839—1851
Swan	2	Swan (31—32 Tenn.)	1851—1853
Sneed	5	Sneed (33—37 Tenn.)	1853—1858
Head	3	Head (38—40 Tenn.)	1858—1859
Coldwell	7	Cold. (41—47 Tenn.)	1860—1870
Heiskell	12	Heisk. (48—59 Tenn.)	1870—1874
Baxter	9	Baxt. (60—66 Tenn.)	1872—1878
Lea	16	Lea (69—84 Tenn.)	1878—1886
Tennessee vols. 85—121		Tenn.	1886—1910
Texas:			
Dallam	1	Dall. Tex.	1840—1844
Supreme Court Reports	102	Tex.	1846—1910
Court of Appeals, Civil Cases	4	Tex. Civ. Cas.	1877—1892
Civil Appeals Reports	50	Tex. Civ. App.	1892—1910
Utah:			
Reports	35	Utah	1850—1910
Vermont:			
Chipman, N.	1	N. Chip.	1789—1791
Chipman, D.	2	D. Chip.	1789—1824
Tyler	2	Tyl.	1800—1803
Brayton	1	Bray.	1815—1819

Supreme and District Courts.	Vols.	How cited.	Period covered.
Aiken	2	Aik.	1825—1827
Vermont	81	Vt.	1826—1909
Virginia:			
Jefferson	1	Jeff.	1730—1772
Wythe's Chancery	1	Wythe	1788—1799
Washington	2	Wash. Va.	1790—1796
Call	6	Call	1779—1818
Hening & Mumford	4	Hen. & M.	1806—1810
Mumford	6	Mumf.	1810—1820
Gilmer	1	Gilmer	1820—1821
Randolph	6	Rand.	1821—1828
Leigh	12	Leigh	1829—1842
Robinson	2	Rob. Va.	1842—1844
Gratton	33	Grat.	1844—1880
Virginia, vols. 75—110		Va.	1881—1910
Washington:			
Washington Territory	3	Wash. Ter.	1854—1888
Washington	56	Wash.	1889—1910
West Virginia:			
Reports	66	W. Va.	1863—1910
Wisconsin:			
Pinney	3	Pinn.	1839—1852
Wisconsin	142	Wis.	1852—1910
Wyoming:			
Reports	17	Wyo.	1870—1910

3. Selected Cases.

Allen, Charles: Telegraph Cases decided in the Courts of America, Great Britain and Ireland. New York. 1873.

American Corporation Cases. 10 vols. Chicago. 1872—1887.

American Decisions (1754—1869). 100 vols. San Francisco. 1878—1888.

American Reports (1868—1887). 60 vols. Albany. 1871—1888.

American State Reports, 1886—1910. 134 vols. (current) San Francisco. 1888—1910.

American Railway Cases. With notes by Chauncey Smith and S. W. Bates. 2 vols. Boston. 1856—1857.

American Railway Reports. By J. H. Truman, J. A. Mallory, H. A. Shipman, W. W. Ladd, Jr. and G. C. Clemens. 21 vols. New York. 1873—1881.

American and English Annotated Cases. 16 vols. (Current) Northport, L. I. 1904—1910.

American and English Corporation Cases. 48 vols. 1883—1896; new series, 19 vols. 1896—1906.

American and English Railway Cases. 61 vols. 1881—1896; new series, 56 vols. (current) 1896—1910.

Banking Cases. 5 vols. 1900—1905.

Lawyers Reports Annotated. 70 vols. 1888—1906; new series (current) 27 vols. 1906—1910.

McMaster, J. S.: Summary of Special Commercial Decisions affecting the Banker. 13 vols. (current) 1896—1910.

National Bank Cases. (1864—89) vol. 1, By Thompson; vols. 2 and 3, By Browne. 3 vols. Albany and San Francisco. 1878—98.

National Reporter System. Reports of all the current Decisions of the Supreme, Circuit and District Courts of the United States and the Courts of Last Resort of all the States and Territories.

Atlantic Reporter, 76 vols. 1885—1910. (Cited: Atl.)

Pacific Reporter, 110 vols. 1884—1910. (Cited: Pac.)

Northeastern Reporter, 91 vols. 1885—1910. (Cited: N. E.)

Northwestern Reporter, 127 vols. 1879—1910. (Cited: N. W.)

Southeastern Reporter, 68 vols. 1887—1910. (Cited: S. E.)

Southwestern Reporter, 130 vols. 1887—1910. (Cited: S. W.)

Southern Reporter 52 vols. 1887—1910. (Cited: So.)

New York Supplement, 124 vols. 1888—1910. (Cited: N. Y. Supp.)

Supreme Court Reporter, 30 vols. 1883—1910. (Cited: S. C. R.)

- Federal Cases, 31 vols. (1789—1880). 1894—1897. (Cited: Fed. Cas.)
 Federal Reporter, 180 vols. 1880—1910. (Cited: Fed.)
 Ames, J. V.: Cases on the Law of Admiralty. Cambridge, Mass. N. D.
 Ames, J. B.: Selection of Cases on the Law of Bills and Notes and other Negotiable Paper. 2 vols. Boston. 1881.
 Ames, J. B.: Cases on the Law of Partnership. Cambridge, Mass. 1894.
 Ames, J. B.: Cases on the Law of Suretyship. Cambridge, Mass. 1896.
 Baldwin, S. E.: Cases on Railway Law. St. Paul. 1896.
 Beale, J. H.: Cases on the Law of Carriers. Cambridge, Mass. 1909.
 Bigelow, M. M.: Reports of Life and Accident Insurance Cases. 5 vols. New York. 1874—77.
 Burdick, F. M.: Selected Cases on the Law of Partnership. Boston. 1898.
 Burdick, F. M.: Selected Cases on Sales of Personal Property. 2d. ed. Boston. 1901.
 Dean, M. B.: Corporation Cases. New York. 1906.
 Erwin, F. A.: Cases on Sales. New York. 1898.
 Gilmore, E. A.: Cases on Partnership. St. Paul. 1909.
 Hecker, G. W.: Law Reports of Cases argued and determined in England and the United States on Warranty on the Sale of Personal Property. Meadville, Pa. 1874.
 Huffcut, Ernst W.: Cases on the Law of Agency. 3d ed. by F. D. Colson. Boston. 1907.
 Huffcut, E. W.: Negotiable Instruments Cases, Statutes and Authorities. New York. 1898.
 Keener, W. A.: A Selection of Cases on the Law of Contracts. 2 vols. New York. 1981.
 Keener, Wm. A.: A Selection of Cases on the Law of Private Corporations. 2 vols. New York. 1899.
 Langdell, C. C.: Selection of Cases on the Law of Contracts. 2d ed. 2 vols. Boston. 1879.
 Langdell, C. C.: Selection of Cases on Sales of Personal Property. Boston. 1872.
 McClain, Emlin: Cases on the Law of Carriers. 2d. ed. Boston. 1896.
 Redfield, Isaac F.: Leading American Railway Cases. 2 vols. Boston. 1870—72.
 Smith, H. L., and Moore, W. U. Cases on the Law of Bills and Notes. St. Paul. 1910.
 Tompkins, L. J.: A Selection of Cases on the Law of Private Corporations. New York. 1909.
 Wambaugh, Eugene: Cases on Agency. Cambridge, Mass. 1896.
 Wambaugh, Eugene: Cases on Insurance (Marine, Fire and Life). Cambridge, Mass. 1902.
 Warren, Edward H.: Cases on the Private Corporations. Cambridge, Mass. 1909.
 Wilgus, H. L.: Cases on the General Principles of the Law of Private Corporations. 2 vols. Indianapolis. 1902.
 Williston, Samuel: Cases on the Law of Bankruptcy. Cambridge, Mass. 1906.
 Williston, Samuel: A Selection of Cases on Contracts, 2 vols. 2d. ed. Boston. 1903.
 Williston, Samuel: Cases on Sales. 2d ed. Cambridge, Mass. 1905.
 Woodruff, E. H.: Cases on the Law of Insurance. New York. 1900.
 Wyman, Bruce: Cases on Public Service Companies, Public Carriers, etc. Cambridge, Mass. 1909.
 Wyman, Bruce: Cases on Restraint of Trade. Cambridge, Mass. 1902.

E. Journals.

- Albany Law Journal. 70 vols. Albany, New York. 1870—1909.
 American Law Record. 15 vols. Cincinnati, 1872—1887.
 American Law Register and University of Pennsylvania Law Review, 58 vols. (current). Philadelphia. 1852—1910.
 American Law Review. 43 vols. (current). Boston and St. Louis. 1866—1910.
 Central Law Journal. 71 vols. (current). St. Louis. 1874—1910.
 Columbia Law Review. 10 vols. (current). New York. 1901—1910.
 Harvard Law Review. 23 vols. (current). Cambridge, Mass. 1887—1910.
 Illinois Law Review. 5 vols. (current). Chicago. 1906—1910.
 Insurance Law Journal. 38 vols. (current). New York. 1871—1910.
 Internal Revenue Record and Customs Journal. 40 vols. New York. 1865—1894.
 Michigan Law Review. 8 vols. (current). Ann Arbor, Mich. 1902—1910.
 New Jersey Law Journal. 33 vols. (current). Somerville, N. J. 1878—1910.
 Pacific Coast Law Journal. 12 vols. San Francisco. 1878—1884.
 Railway and Corporation Law Journal. 12 vols. New York. 1887—1892.

- Virginia Law Register.** 15 vols. (current). Richmond and Charlottesville. 1895—1910.
Washington Law Reporter. 38 vols. (current). Washington. 1874—1910.
Weekly Law Bulletin. 54 vols. (current). Cincinnati and Norwalk. 1876—1910.
Yale Law Journal. 19 vols. (current). New Haven, Conn. 1892—1910.

F. Systematic Views and Introductions of Law. Encyclopædia, Dictionaries.

- Abbott, Benj. Vaughan:** Dictionary of Terms and Phrases used in American or English jurisprudence. 2 vols. Boston. 1879.
American and English Encyclopædia of Law. (Cited: Am. & Eng. Encycl. of Law.) 2d ed. 32 vols. Northport, L. I. 1896—1905. Supplements, 5 vols. 1906—1909.
Anderson, William C.: Dictionary of Law. Chicago. 1889.
Black, Henry C.: Dictionary of Law; containing definitions of the terms and phrases of American and English jurisprudence, ancient and modern. St. Paul. 1891.
Bouvier, J.: Law Dictionary. An Encyclopædic Dictionary of American and English Law Terms and Phrases. New and enlarged edition. By Francis Rawle. 2 vols. Boston. 1897—1898.
Bryce, James: Studies in History and Jurisprudence. New York. 1901.
Burrill, Alexander M.: Law Dictionary and Glossary; containing full definitions of the principal terms of the common and civil law, together with translations of the various technical phrases in different languages. 2 vols. New York. 1850—1851.
Cyclopedia of Law and Procedure. (Cited "Cyc".) 35 vols. New York. 1901—1910. (To be completed in about 40 vols.)
Demarest, T. F. C.: Studies in American Jurisprudence. New York. 1906.
Dillon, John F.: Laws and Jurisprudence of England and America. Boston. 1894.
Encyclopaedia of Forms and Precedents. 18 vols. Northport, L. I. 1896—1904.
Encyclopaedia of Pleading and Practice. 23 vols. Northport, L. I. 1895—1902.
English, Arthur: Dictionary of Words and Phrases used in Ancient and Modern Law. Washington. 1899.
Hughes, H. T.: Datum Posts of Jurisprudence. Chicago. 1907.
Kinney, J. K.: Law Dictionary and Glossary. Chicago. 1893.
Lawson, John D.: Concordance of Words and Phrases construed in the Judicial Reports and of Legal Definitions contained therein. St. Louis. 1883.
Lee, G. C.: Historical Jurisprudence; an introduction to the systematic study of the development of law. New York. 1900.
Merrill, George: Studies in Comparative Jurisprudence and the Conflict of Laws. Boston. 1886.
Peloubet, S. S.: Collection of Legal Maxims in Law and Equity; with English translations. New York. 1880.
Rapalje, Stewart, and Lawrence, Robert L.: Dictionary of American and English Law, with definitions of the technical terms of the Canon and Civil Laws. 2 vols. Jersey City. 1883.
Robinson, William C.: Elements of American Jurisprudence. Boston. 1900.
Shumaker, Walter A. and Longsdorf, Geo. F.: Cyclopedic Dictionary of Law. St. Paul. 1901.
Stimson, Frederic J.: American Statute Law. 2 vols. Boston. 1886—92.
Stimson, Frederic J.: Glossary of Technical Terms, Phrases and Maxims of the Common Law. 2d ed. Boston. 1910.
Taylor, Thomas: Law Glossary; being a selection of the Greek, Latin, Saxon, French, Norman and Italian sentences, phrases and maxims found in English and American reports, etc. 9th ed. New York. 1871.
Taylor, Hannis: The Science of Jurisprudence. New York. 1908.
Winfield, Chas. H.: Adjudged Words and Phrases. Jersey City. 1882.
Words and Phrases Judicially Defined. 8 vols. St. Paul. 1904—1905.

G. Jurisdiction of Courts.

- Alderson, W. A.:** Practical Treatise on the Law of Judicial Writs and Process in Civil and Criminal Cases. New York. 1895.
Bailey, W. F.: Law of Jurisdiction, including Impeachment of Judgments, Liability for Judicial Acts, and Special Remedies. 2 vols. Chicago. 1899.
Brown, Timothy: Commentaries on the Jurisdiction of Courts. 2d ed. Chicago. 1901.
Carter, H. M.: Jurisdiction of Federal Courts as limited by the Citizenship and Residence of the Parties. Boston. 1899.

Field, G. W.: Treatise on the Constitution and Jurisdiction of the Courts of the United States. Philadelphia. 1883.

Foster, Roger: Treatise on Federal Practice. 4th ed. 3 vols. Chicago. 1909.

Garland, A. H. and Ralston, R.: Treatise on the Constitution and Jurisdiction of the United States Courts. 2 vols. Philadelphia. 1898.

Holt, G. C.: Concurrent Jurisdiction of the Federal and State Courts. New York. 1888.

Richardson, W. A.: History, Jurisdiction and Practice of the Court of Claims (United States). 2d ed. Washington. 1885.

Spear, S. T.: Law of the Federal Judiciary; a treatise on the jurisdiction of, and practice and pleading in, the Federal Courts. New York. 1883.

Taylor, H.: Jurisdiction and Procedure of the Supreme Court of the United States. Rochester, N. Y. 1905.

Van Fleet, J. M.: Law of Collateral Attack on Judicial Proceedings. Chicago. 1892.

Wells, J. C.: Treatise on the Jurisdiction of Courts. St. Paul. 1880.

H. Contracts.

Beach, C. F., Jr.: Modern Law of Contracts. 2 vols. Indianapolis. 1896.

Bishop, J. P.: Commentaries on the Law of Contracts. Chicago. 1887.

Clark, Wm. L.: Hand-Book of the Law of Contracts. St. Paul. 1894.

Greenhood, E.: Doctrine of Public Policy in the Law of Contracts. Chicago. 1886.

Hammon, Louis L.: General Principles of the Law of Contract. St. Paul. 1902.

Hare, J. I. C.: Law of Contracts. Boston. 1887.

Hilliard, Francis: Law of Contracts. 2 vols. Philadelphia. 1872.

Hollingsworth, S. S.: Law of Contracts. Philadelphia. 1896.

Jones, Dwight A.: Treatise on the Construction or Interpretation of Commercial and Trade Contracts. New York. 1886.

Metcalf, Theron: Principles of the Law of Contracts, as applied by Courts of Law. 2d ed. by F. F. Heard. Boston. 1888.

Page, W. H.: Law of Contracts. 3 vols. Cincinnati. 1905.

Parsons, T.: Law of Contracts. 9th ed. by John M. Gould. 3 vols. Boston. 1904.

Pingrey, D. H.: Extraordinary Industrial and Interstate Contracts. Albany, N. Y. 1905.

Ray, C. A.: Contractual Limitations. Rochester, N. Y. 1892.

Story, Wm. W.: Treatise on the Law of Contracts. 5th ed. By M. M. Bigelow. 2 vols. Boston. 1874.

Street, T. A.: Foundations of Legal Liability. 3 vols. Northport, N. Y. 1906.

Thornton, W. W.: The Law Relating to Oil and Gas. Cincinnati. 1904.

Walt, J. C.: Law of Engineering and Architectural Contracts. New York. 1907.

Waterman, T. W.: Treatise on the Law relating to the Specific Performance of Contracts. New York. 1881.

Wharton, Francis: Commentary on the Law of Contracts. 2 vols. Philadelphia. 1882.

I. Limitation.

Angell, J. K.: Treatise on Limitations of Actions at Law and Suits in Equity and Admiralty. 6th ed. By John W. May. Boston. 1876.

Buswell, H. F.: Statutes of Limitations and Adverse Possession, with an appendix containing the English acts of limitation. Boston. 1889.

Kelly, J. F.: Code Statute of Limitations. St. Paul. 1903.

Wood, H. G.: Treatise on the Limitation of Actions at Law and in Equity. 3d ed. By J. M. Gould. Boston. 1901.

J. Suretyship.

Baylies, Edwin: Rights, Remedies and Liabilities of Sureties and Guarantors, and the application of the principles of suretyship to persons other than sureties, and to property liable as surety for the payment of money. New York. 1881.

Brandt, Geo. W.: The Law of Suretyship and Guaranty, as Administered by Courts of Countries where the Common Law Prevails. 2d ed. Chicago. 1891.

Childs, F. H.: Handbook of the Law of Guaranty and Suretyship. St. Paul. 1907.

Decolyar, H. A.: Treatise on the Law of Guaranties and of Principal and Surety. By James A. Morgan. New York. 1875.

Pingrey, D. H.: Treatise on the Law of Suretyship and Guaranty. Albany. 1901.

Stearns, A. A.: Law of Suretyship. Cincinnati. 1903.

II. Special Literature on the Commercial Law.

Handbooks and Treatises.

Barbour, Oliver L.: Summary of the Law of Payment. New York. 1888.

Bateman, Wm. O.: General Commercial Law, as recognized in the Jurisprudence of the United States. Philadelphia. 1860.

Blunt, Joseph: Shipmaster's Assistant and Commercial Digest. New York. 1848.

Parsons, T.: Laws of Business. Rev. ed. Scranton, Pa. 1908.

Pulling, Alexander: Practical Compendium of the Law and Usage of Mercantile Accounts; describing the various rules of law affecting them. Philadelphia. 1847.

Smith, John W.: Equitable Remedies of Creditors in relation to Fraudulent Conveyances, Transfers, Mortgages, Judgments and Assignments. Chicago. 1899.

Stickney, Albert: State Control of Trade and Commerce by National or State Authority. New York. 1897.

Throop, M. H.: Treatise on the Validity of Verbal Agreements, as affected by the Statute of Frauds. Albany. 1870.

Wait, F. S.: Treatise on Fraudulent Conveyances and Creditors' Bills. 3d ed. New York. 1897.

Waples, Rufus: Law of Debtor and Creditor relative to the Situs of Debt. Chicago. 1898.

Special Essays.

1. *Merchants, Ledgers, Goodwill, Restraint of Trade.*

Eddy, Arthur, J.: Law of Combinations, embracing Monopolies, Trusts, and Combinations of Labor and Capital; Conspiracy and Contracts in Restraint of Trade, together with Federal and State Anti-Trust Legislation. 2 vols. Chicago. 1901.

Hopkins, J. L.: Law of Unfair Trade, including Trade Marks, Trade Secrets, and Good Will. Chicago. 1900.

Patterson, G. S.: Contracts in Restraint of Trade. Philadelphia. 1891.

Paul, A. C.: Law of Trade-Marks, including Trade-Names and Unfair Competition. St. Paul. 1903.

2. *Partnership.*

Bates, Clement: Law of Limited Partnership. Boston. 1886.

Bates, Clement: Law of Partnership. 2 vols. Chicago. 1888.

Burdick, F. M.: Law of Partnership. 2d ed. Boston. 1906.

Collyer, John: Practical Treatise on the Law of Partnership. 6th Am. ed. By H. G. Wood. 2 vols. Albany. 1878.

Conyngton, T.: Partnership Relations. New York. 1906.

Freedly, Angelo T.: Limited Partnership Association Law of Pennsylvania. Philadelphia. 1883.

George, William: Partnership. St. Paul. 1897.

Gilmore, E. A.: Partnership. St. Paul. 1911.

Mechem, Floyd R.: Partnership. Chicago. 1899.

Parsons, James: Exposition of the Principles of Partnership. Boston. 2d ed. 1899.

Parsons, T.: Treatise on the Law of Partnership. 4th ed. By J. H. Beale. Boston. 1893.

Shumaker, W. A.: Partnership. 2d ed. St. Paul. 1905.

Story, Joseph: Commentaries on the Law of Partnership. 7th ed. By W. F. Wharton. Boston. 1881.

Troubat, Francis: Law of Commendatory and Limited Partnerships. Philadelphia. 1853.

3. *Corporations.*

Alger, A. M.: Promoters and Promotion of Corporations. Boston. 1897.

Angell, J. K. and Ames, S.: Treatise on the Law of Private Corporations Aggregate. 11th ed. By John Lathrop. Boston. 1882.

Beach, C. F., Jr.: Law of Private Corporations whether with or without capital stock; also of Joint-Stock Companies and of all the various Voluntary Unincorporated Associations organized for pecuniary profit or mutual benefit. Purdy's ed. 3 vols. Chicago. 1905.

Beale, Joseph, Jr.: Foreign Corporations. Boston. 1904.

Boisot, L.: By-Laws of Private Corporations. 2d ed. St. Paul. 1901.

Clark, W. L.: Handbook of the Law of Private Corporations. 2d ed. St. Paul. 1907.

- Clark, W. L. and Marshall, W. L.:** Treatise on the Law of Private Corporations. 4 vols. St. Paul. 1901—1908.
- Conyngton, Thos.:** Manual of Corporate Management, containing forms, directions, etc. New York. 1909.
- Conyngton, Thos.:** Organization and Management of Business Corporations, with special reference to the Law of New York, New Jersey, Delaware, West Virginia. New York. 1908.
- Clephane, W. C.:** Organization and Management of Business Corporations. St. Paul. 1905.
- Cook, Wm. W.:** Corporations. 6th ed. 4 vols. Chicago. 1909.
- Cooper, Fs.:** Financing an Enterprise. 2d ed. 2 vols. New York. 1906.
- Cumming, Gilbert and Woodward's** Annotated Corporation Laws of all States to 1902. 5 vols. Albany. N. Y. 1903.
- Dill, J. B.:** Statutory and Case Law applicable to Private Companies under the General Corporation Act of New Jersey. 4th ed. New York. 1902.
- Eastman, F. M.:** Corporation Law in Pennsylvania. 2d ed. 2 vols. and Supp. Philadelphia. 1909.
- Elliott, C. B.:** Private Corporations. 3d ed. Chicago. 1900.
- Fletcher, W. M.:** Incorporation, Organization and Management of General Business Corporations in Illinois. Chicago. 1910.
- Frost, T. G.:** Incorporation and Organization of Corporations. 4th ed. Boston. 1910.
- Helliwell, A. L.:** Treatise on Stocks and Stockholders, covering watered stock, trusts, consolidations and holding companies. St. Paul. 1903.
- Hirschl, Andrew J.:** Combination, Consolidation and Succession of Corporations. Chicago. 1896.
- Joyce, J. A.:** Actions by and against Corporations. New York. 1909.
- Jones, S. W.:** Insolvent and Failing Corporations. Kansas City. 1908.
- Lowell, A. L. and F. C.:** Transfer of Stock in Private Corporations. Boston. 1884.
- Machen, A. W.:** Modern Law of Private Corporations. 2 vols. Boston. 1908.
- Morawetz, Victor:** Treatise on the Law of Private Corporations. 2d ed. 2 vols. Boston. 1886.
- Murfree, William L.:** Law of Foreign Corporations. St. Louis. 1893.
- Noyes, W. C.:** Intercompany Relations. 2d ed. Boston. 1909.
- Overland, M. U.:** Classified Corporation Laws of all the States. New York. 1909.
- Parker, J. S.:** When and How, Handbook of Incorporations. New York. 1903.
- Potter, P.:** Treatise on the Law of Corporations; General and Local, Public and Private, Aggregate and Sole. 2 vols. New York. 1879.
- Reid, W. A.:** Treatise on the Law pertaining to Corporate Finance, including the Financial Operations and Arrangements of Public and Private Corporations. 2 vols. Albany. 1886.
- Reese, R. A.:** Ultra Vires. Chicago. 1897.
- Reno, Conrad:** Non-residents and Foreign Corporations. Chicago. 1892.
- Smith, T. E.:** Business Corporations in Delaware. 2d ed. Rochester, N. Y. 1904.
- Spelling, T. C.:** Treatise on the Law of Private Corporations. 2 vols. New York. 1892.
- Spelling, T. C.:** Corporate Management and By-Laws. San Francisco. 1904.
- Taylor, Henry O.:** Treatise on the Law of Private Corporations. 3d ed. Philadelphia. 1894.
- Thompson, S. D.:** Commentaries on the Law of Private Corporations. 2d ed. 7 vols. Indianapolis. 1909—10.
- Wait, F. S.:** Treatise on Insolvent Corporations, including the liquidation, reorganization, forfeiture, dissolution, and winding-up of corporations. New York. 1888.
- Waterman, Thos. W.:** Treatise on the Law of Corporations other than municipal. 2 vols. New York. 1888.
- White, Frank:** New York Corporations. 7th ed. Albany. 1911.
- Wilgus, H. L.:** Study of the United States Steel Corporation in its Industrial and Legal Aspect. Chicago. 1901.
- Wood, W. A.:** Modern Business Corporations. Indianapolis. 1905.

4. Sale of Goods.

- Baker, John F.:** Treatise on the Law of Sales of Goods, Wares and Merchandise as affected by the Statute of Frauds. Chicago. 1887.
- Benjamin, R. M.:** General Principles of the American Law of the Sale of Goods. 2d ed. Indianapolis. 1901.
- Browne, Irving:** Elements of Sales of Personal Property. Boston. 1894.

- Burdick, F. M.:** Sales of Personal Property. 2d ed. Boston. 1901.
- Freeman, A. C.:** Void Execution, Judicial and Probate Sales. 4th ed. San Francisco. 1902.
- Haring, F. B.:** Law of Conditional Sales. New York. 1907.
- Hilliard, Francis:** Law of Sales of Personal Property. 2d ed. Philadelphia. 1860.
- Kleber, J. C.:** Void Judicial and Execution Sales. New York. 1899.
- Mechem, F. R.:** Treatise on the Law of Sales of Personal Property. 2 vols. Chicago. 1901.
- Miller, C. R.:** Treatise on the Law of Conditional Sales of Personal Property. Cincinnati. 1888.
- Morrill, W. W.:** Law of Conditional Sales and Bailments. Albany, N. Y. 1901.
- Rorer, David:** Treatise on the Law of Judicial and Execution Sales. 2d ed. Chicago. 1878.
- Story, W. W.:** Treatise on the Law of Sales of Personal Property. 4th ed. By E. H. Bennett. Boston. 1871.
- Tiedeman, C. G.:** Treatise on the Law of Sales of Personal Property, including the Law of Chattel Mortgages. St. Louis. 1891.
- Tiffany, Francis:** Handbook of the Law of Sales. 2d ed. St. Paul. 1908.
- Travis, J.:** Commentaries on the Law of Sales and Collateral Subjects. 2 vols. Boston. 1892.
- Williston, Samuel:** Law concerning Sales of Goods at Common Law and Uniform Sales Act. New York. 1909.

5. Agents.

- Clark, W. L.:** and **Skyles, H. H.** The Law of Agency. 2 vols. St. Paul. 1905.
- Huffcut, E. W.:** Agency. 2d ed. Boston. 1981.
- Mechem, Floyd R.:** Treatise on the Law of Agency, including special chapters on Attorneys, Auctioneers, Brokers and Factors. Chicago. 1889.
- Reinhard, George L.:** Treatise on the Law of Agency in Contract and Tort. Indianapolis. 1902.
- Story, Joseph:** Commentaries on the Law of Agency. 9th ed. By Chas. P. Greenough. Boston. 1882.
- Tiffany, F. B.:** Principal and Agent. St. Paul. 1903.
- Wharton, Francis:** Commentary on the Law of Agency and Agents. Philadelphia. 1876.

6. Negotiable Instruments; Bills of Exchange; Promissory Notes and Checks.

- Bigelow, M. M.:** Law of Bills, Notes and Checks. Illustrated by leading cases. 2d ed. Boston. 1880.
- Brannan, J. D.:** Negotiable Instruments Law, Annotated. 2d ed. Cincinnati. 1911.
- Colebrooke, Wm.:** Treatise on the Law of Collateral Securities as applied to Negotiable, Quasi-Negotiable and Non-negotiable Choses in Action. Chicago. 1883.
- Crawford, J. J.:** Negotiable Instruments Law, Enacted in N. Y., Mass., R. I., Conn., Penn., D. C., Md., Va., N. C., Tenn., Fla., Wis., N. Dak., Colo., Utah, Ore., and Wash. New York. 1908.
- Daniel, John W.:** Treatise on the Law of Negotiable Instruments, including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. 2 vols. 5th ed. New York. 1903.
- Eaton, T. W. and Gilbert, F. B.:** Commercial Paper. Albany, N. Y. 1903.
- Edwards, Isaac:** Treatise on Bills of Exchange and Promissory Notes. 3d ed. 2 vols. New York. 1882.
- Jones, L. A.:** Treatise on the Law of Corporate Bonds and Mortgages. Being the 2d ed. of "Railroad Securities," revised. Boston. 1890.
- Joyce, T. A. and H. C.:** Defences to Commercial Paper. Indianapolis. 1907.
- Knox, J. J.:** United States Notes; a history of the various issues of paper money by the Government of the United States. New York. 1884.
- Lewis, Francis A.:** Law relating to Stocks, Bonds and other Securities in the United States. Philadelphia. 1881.
- Mills, J. W.:** Negotiable Instruments Law. Denver. 1898.
- Norton, Chas. P.:** Bills and Notes. 3d ed. St. Paul. 1900.
- Ogden, J. M.:** Negotiable Instruments. Chicago. 1910.
- Parsons, T.:** Treatise on the Law of Promissory Notes and Bills of Exchange. 2d ed. 2 vols. Philadelphia. 1875.
- Randolph, J. F.:** Treatise on the Law of Commercial Paper. 2d ed. 3 vols. St. Paul. 1899.

- Selover, A. W.:** Negotiable Instruments Law for N. Y., Mass., Conn., R. I., Md., Tenn., Va., N. C., Fla., Wis., Colo., Wash., Ore., Utah, N. Dak., D. C. St. Paul. 1900.
- Short, E. L.:** Law of Railway Bonds and Mortgages in the United States. Boston. 1897.
- Story, Joseph:** Commentaries on the Law of Bills of Exchange. 4th ed. Boston. 1860.
- Story, Joseph:** Commentaries on the Law of Promissory Notes, and Guaranties of Notes, and Checks on Banks and Bankers. 3d ed. Boston. 1851.
- Tiedeman, C. G.:** Treatise on the Law of Bills, Notes and Checks. St. Louis. 1898.
- Tiedeman, C. G.:** Treatise on the Law of Commercial Paper. St. Louis. 1889.
- Van Schaack, H. C.:** Law of Bank Checks. Denver. 1892.

7. *Banking.*

- Ball, F. Q.:** Law of National Banks; containing the National Bank Act, as amended, with forms of procedure and notes. Chicago. 1881.
- Bolles, A. S.:** Law Relating to Bank Collections. New York. 1893.
- Bolles, A. S.:** Banks and their Depositors. New York. 1887.
- Bolles, A. S.:** National Bank Act and its Meaning. 4d ed. New York. 1900.
- Bolles, A. S.:** Modern Law of Banking. 2 vols. Philadelphia. 1907.
- Boone, C. T.:** The Law of Banks and Banking. San Francisco. 1892.
- Ellis, Howard:** Case Law of Banks and Banking. 2 vols. New York. 1905.
- Gould, J. M.:** The National Bank Act. Boston. 1904.
- Magee, H. W.:** Banks and Banking. 1910.
- Morse, John T., Jr.:** Treatise on the Law relating to Banks and Banking. 4th ed. By Frank Parsons. 2 vols. Boston. 1903.
- Newmark, Nathan:** Law relating to Bank Deposits. St. Louis. 1888.
- Paine, W. S.:** Banking Laws, including the Statutes of New York on Banking, the National Bank Act, and a complete history of the banking system. 5th ed. 1903. Supp. to 1907. Rochester. 1907.
- Pratt's Digest,** comprising the laws relating to National Banks. Washington. 1898.
- Rae, Geo.:** The Country Banker, His Clients, Care and Work. Rochester. 1888.
- Selover, Arthur W.:** Law of Bank Collections. St. Paul. 1901.
- Smith, H. H.:** Digest of all the Decisions of all the Courts relating to National Banks, from 1864 to 1898. Chicago. 1899.
- Terrell, H.:** Crimes by National Bank Officers and their Agents. Chicago. 1906.
- Watson, A. R.:** Law of the Clearing House. New York. 1902.
- Welldon, S. A.:** Vigest of State Banking Statutes. Washington. 1910.
- Zane, John M.:** Law of Banks and Banking. Chicago. 1900.

8. *Stock Exchange Market.*

- Biddle, A. and G.:** Law of Stock Brokers. Philadelphia. 1882.
- Dewey, T. H.:** Treatise on Contracts for Future Delivery and Commercial Wagers. New York. 1886.
- Dewey, T. H.:** Legislation against Speculation and Gambling. New York. 1905.
- Dos Passos, John R.:** Treatise on the Law of Stock-Brokers and Stock-Exchangers. 2d ed. New York. 1905.
- Manual of Statistics, Stock Exchange Hand-Book.** New York. 1899.

9. *Law of Insurance.*

- Beach, C. J., Jr.:** Law of Insurance, Life, Fire, etc. 2 vols. Boston. 1895.
- Beckwith, O. R.:** Statutory Requirements relating to Insurance in the United States, Canada and Cuba. To Nov. 1903. Hartford, Conn. 1904.
- Berryman, John R.:** Digest of the Law of Insurance, including Mutual Benefit Societies. (Continuation of Sansum's Digest.) 3 vols. Chicago. 1888—1901.
- Clement, G. A.:** Fire Insurance. 2 vols. New York. 1905.
- Cooke, F. H.:** Law of Life Insurance, including Accident Insurance, and Insurance by Mutual Benefit Societies. New York. 1891.
- Cooley, R. W.:** Insurance Briefs. 5 vols. St. Paul. 1905.
- Duer, John:** Law and Practice of Marine Insurance. 2 vols. New York. 1846.
- Elliott, C. B.:** Treaties on the Law of Insurance, including Fire, Life, Accident, Casualty, Title, Credit and Guaranty Insurance in every form. Indianapolis. 1902.

- Frost, T. G.:** *Guaranty Insurance*. 2d ed. Boston. 1908.
- Hildyard, Francis:** *Treatise on the Principles of the Law of Marine Insurance*. Harrisburg. 1847.
- Joyce, J. A.:** *Insurance, Life, Fire, Marine and Accident*. 4 vols. New York. 1897.
- Kerr, W. A.:** *Insurance, Life, Fire, Accident and Guarantee*. St. Paul. 1902.
- May, J. W.:** *Law of Insurance, as applied to Fire, Life, Accident, Guarantee, and other Non-Maritime Risks*. 4th ed. By J. M. Gould. 2 vols. Boston. 1900.
- Ostrander, D.:** *Fire Insurance*. 2d ed. St. Paul. 1896.
- Parsons, T.:** *Treatise on the Law of Marine Insurance and General Average*. 2 vols. Boston. 1868.
- Phillips, W.:** *Treatise on the Law of Insurance*. 2 vols. 5th ed. New York. 1867.
- Richards, Georg:** *Insurance Law in all its branches*. 3d ed. New York. 1909.
- Sansum, O. B.:** *Digest of the Law of Insurance; Fire, Marine, Life and Accident*. Chicago. 1881.
- Sherman, Henry:** *Analytical Digest of the Law of Marine Insurance*. New York. 1841.
- Vance, W. R.:** *Handbook of the Law of Insurance*. St. Paul. 1904.
- Wolff, L. H.:** *Law of Insurance Agency*. Indianapolis. 1905.
- Wood, H. G.:** *Fire Insurance*. 2 vols. New York. 1886.

10. *Law of Carriers, Railways, Telegraphs, Warehousemen.*

(*Interstate Commerce Acts.*)

- Angell, Jos. K.:** *Treatise on the Law of Carriers of Goods and Passengers by Land and Water*. 4th ed. By John Lathrop. Boston. 1868.
- Baldwin, S. E.:** *Treatise on American Railroad Law, including Street Railroads*. Boston. 1904.
- Beach, C. F.:** *Modern Law of Railways as determined by the courts and statutes of England and the United States*. 2 vols. San Francisco. 1890.
- Beach, C. F.:** *Annual Digest of Railway Decisions and Statutes, American and English, from Jan. 1, 1889 to Jan. 1, 1890*. Jersey City. 1890.
- Beale, J. H. and Wyman, B.:** *Railroad Rate Regulation*. Boston. 1906.
- Bonney, Chas. C.:** *Rules of Law for the Carriage and Delivery of Persons and Property by Railway*. Chicago. 1864.
- Browne, Irving:** *Law of Carriers*. Albany, N. Y. 1883.
- Calvert, T. H.:** *Regulation of Commerce under the Federal Constitution*. Northport, N. Y. 1907.
- Cooke, F. H.:** *Commerce Clause of the Federal Constitution*. New York. 1908.
- Daish, J. B.:** *Procedure in Interstate Commerce Cases*. Washington. 1909.
- Davis, G. and Browne, G. M., Jr.:** *Car Trusts in the United States. A brief statement of the law of contracts of conditional sale of rolling stock to railroads*. New York. 1894.
- Demarest, T. F. C.:** *Elevated Railroad Law*. New York. 1894.
- Drinker, H. S. Jr.:** *The Interstate Commerce Act*. 2 vols. Philadelphia. 1909.
- Dunmore, W. T.:** *Federal Regulation of Railway Rates*. Boston. 1908.
- Elliott, B. K. and W. F.:** *Treatise on the Law of Railroads*. 2d ed. 5 vols. Indianapolis. 1907.
- Fetter, Norman:** *Carriers of Passengers*. 2 vols. St. Paul. 1897.
- Gray, Morris:** *Treatise on Communication by Telegraph*. Boston. 1885.
- Hadley, A. T.:** *Railroad Transportation, its history and its laws*. New York. 1902.
- Haines, H. S.:** *Restrictive Railway Legislation*. New York. 1905.
- Hale, Wm. B.:** *Bailments and Carriers*. St. Paul. 1896.
- Hamlin, Chas. S.:** *Digest of Interstate Commerce Acts*. Boston. 1907.
- Hartshorne, F. C.:** *Railroads and the Commerce Clause*. Philadelphia. 1883.
- Hutchinson, Robert:** *Treatise on the Law of Carriers as administered in the Courts of the United States and England*. 3d ed. 3 vols. Chicago. 1906.
- Jones, S. W.:** *Telegraph and Telephone Companies*. Kansas City. 1906.
- Joyce, J. A.:** *Franchises, Public Service Corporations*. New York. 1909.
- Judson, F. N.:** *Law of Interstate Commerce Law and its Federal Regulation*. Chicago. 1907.
- Lawson, John D.:** *Treatise on the Contracts of Common Carriers*. St. Louis. 1880.
- Lewis, Wm. D.:** *Federal Power over Commerce, and its effect on State Action*. Philadelphia. 1892.

- Meyer, B. H.: Government Regulation of Railway Rates. Chicago. 1907.
- Mohun, Barry: Warehousemen. Compilation of Warehouse Laws and Decisions, State and Federal. New York. 1904.
- Moore, D. C.: Treatise on the law of Carriers. Albany, N. Y. 1906.
- Nellis, A. J.: Law of Street Surface Railways. Albany, N. Y. 1902.
- Nelson, K.: Interstate Commerce Commission. Washington. 1908.
- Noyes, W. C.: American Railroad Rates. Boston. 1905.
- Parsons, Fk.: The Heart of the Railroad Problem. Boston. 1906.
- Pierce, E. L.: Treatise on American Railroad Law. Boston. 1881.
- Porter, William W.: Treatise on the Law of Bills of Lading. Philadelphia. 1891.
- Prentice, E. P. and Egan, J. G.: Commerce Clause of the Federal Constitution. Chicago. 1898.
- Ray, Chas. A.: Negligence of Imposed Duties, Carriers of Passengers. Rochester. 1893.
- Ray, Chas. A.: Negligence of Imposed Duties, Carriers of Freight. Rochester. 1895.
- Redfield, Isaac F.: Law of Carriers of Goods and Passengers, the Duty of Telegraph Companies and Innkeepers, and the Law of Bailments. Cambridge, Mass. 1869.
- Redfield, Isaac F.: Practical Treatise on the Law of Railways. 6th ed. by J. K. Kenney. 2 vols. Boston. 1888.
- Reeder, R. P.: Rate Regulation as Affected by the Constitution. Philadelphia. 1909.
- Rorer, David: Treatise on the Law of Railways. 2 vols. Chicago. 1884.
- Schouler, James: Law of Bailments and Carriers. 3d ed. Boston. 1897.
- Scott, W. L. and Jarnagan, M. P.: Treatise on the Law of Telegraphs. Boston. 1868.
- Smith and Bates: Cases relative to the Law of Railways. U. S. and State Courts. 2 vols. Boston. 1854—56.
- Snyder, W. L.: Interstate Commerce Act and Federal Anti-Trust Laws, with Supplement. New York. 1906.
- Thompson, S. D.: Law of Electricity; a treatise on the rules or law relating to telegraphs, telephones, electric lights, electric railways, and other electric appliances. St. Louis. 1891.
- Thornton, W. W.: Railway Fences and Private Crossings. Indianapolis. 1892.
- Van Zile, P. T.: Law of Bailments and Carriers. 2d ed. Chicago. 1908.
- Watkins, Edgar: Railroad Rate Bill of 1910. Chicago. 1910.
- Watkins, Edgar: Shippers and Carriers of Interstate Freight. 1910.
- Webb, J. A.: Law of Passenger and Freight Elevators. 2d ed. St. Louis. 1905.
- Wheeler, E. P.: Modern Law of Carriers. New York. 1890.
- Wood, H. G.: Treatise on the Law of Railroads. 2d ed. By H. D. Minor. 3 vols. Boston. 1894.

11. Maritime Law. Admiralty.

- Benedict, Erastus C.: American Admiralty, its Jurisdiction and Practice, with practical forms and directions. 3d ed. By Robert D. Benedict. New York. 1894.
- Cohen, M. M.: Admiralty Jurisdiction, Law and Practice. Boston. 1883.
- Conkling, Alfred: Admiralty Jurisdiction, Law and Practice of the Courts of the United States. Albany. 1848.
- Curtis, Geo. T.: Treatise on the Rights and Duties of Merchant Seamen, according to the general maritime law and the statutes of the United States. Boston. 1841.
- Desty, Robert: Manual of the Law relating to Shipping and Admiralty as determined by the Courts of England and the United States. San Francisco. 1879.
- Dunlop, Andrew: Treatise on the Practice of Courts of Admiralty in Civil Causes of Maritime Jurisdiction. 2d ed. New York. 1850.
- Flanders, Henry: Treatise on Maritime Law. Boston. 1852.
- Hall, John E.: Practice and Jurisdiction of the Court of Admiralty. Baltimore. 1809.
- Henry, Morton P.: Jurisdiction and Procedure of the Admiralty Courts of the United States in Civil Causes (on the instance side). Philadelphia. 1885.
- Heyl, Lewis: Statutes of the United States relating to Revenue, Commerce, Navigation and the Currency. (Digest.) Boston. 1868.
- Houck, Louis: Treatise on the Law of Navigable Rivers. Boston. 1868.
- Hughes, Robert M.: Handbook of Admiralty Law. St. Paul. 1901.
- Jacobsen, F. J.: Laws of the Sea, with reference to Maritime Commerce, during Peace and War. Translated by W. Frick. Baltimore. 1818.
- Overton, D. Y.: Treatise on the Law of Liens: at common law, equity, statutory and maritime. Albany. 1883.

Parsons, Theophilus: Treatise on the Law of Shipping and the Law and Practice of Admiralty. 2 vols. Boston. 1869.

Puch, Edward F.: Forms of Procedure in the Courts of Admiralty of the United States of America. Philadelphia. 1890.

Roberts, David: Treatise on Admiralty and Prize. New York. 1869.

Spencer, Herbert R.: Treatise on the Law of Marine Collisions. Chicago. 1895.

Thatcher, Erastus: Digest of Statutes, Admiralty Rules and Decisions, upon the Jurisdiction, Pleadings and Practice of the District Courts of the United States. Boston. 1884.

Tyler, R. H.: Treatise on the Law of Usury, Pawns or Pledges and Maritime Loans. Albany. 1873.

12. Bankruptcy and Insolvency.

Avery, Edward and Hobbs, Geo. M.: Bankrupt Law of the United States, approved March 2, 1867. Boston. 1868.

Beach, C. F.: Law of Receivers, with particular reference to the application of that law to Railway Corporations. 2d ed. By W. A. Alderson. New York. 1897.

Bishop, J. L.: Insolvent Debtors, Assignments and Insolvency. 3d ed. New York. 1895.

Black, Henry C.: Handbook of Bankruptcy Law. St. Paul. 1898.

Brandenburg, Edwin C.: Law of Bankruptcy, including the National Bankruptcy Law of 1898, Rules, Forms, etc. 3d ed. Chicago. 1903.

Bump, O. F.: Fraudulent Conveyances. A treatise on conveyances made by debtors to defraud creditors. 4th ed. By J. M. Gray. Washington. 1896.

Bump, O. F.: Law and Practice in Bankruptcy. 11th ed. By Eugene Williams. Washington. 1898.

Burrill, Alex. M.: Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors. 2d ed. New York. 1858.

Bush, J. A.: National Bankruptcy Act of 1898. New York. 1899.

Collier, William M.: Law of Bankruptcy and the National Bankruptcy Act of 1898. 8th ed. Albany. 1910.

Eastman, S. C.: Bankrupt Law. Chicago. 1903.

Frank, Nathan: Bankrupt Law of 1898. St. Louis. 1898.

Gluck, J. F. and Becker, A.: Law of Receivers of Corporations, including National Banks. 2d ed. New York. 1896.

Gould, J. M. and Blakemore, A. W.: Bankruptcy Act of 1898, annotated and explained, with amendments, etc. Boston. 1904.

High, J. L.: Treatise on Law of Receivers. 4th ed. Chicago. 1910.

Hilliard, Francis: Treatise on the Law of Bankruptcy and Insolvency. Philadelphia. 1863.

Isaac, Max.: Conditional Sales in Bankruptcy. Atlanta, Ga. 1905.

Loveland, Frank O.: Treatise on the Law and Proceedings in Bankruptcy. 3d ed. Cincinnati. 1907.

Lowell, John and Lowell, James A.: Treatise on the Law of Bankruptcy. Boston. 1899.

Remington, H.: Law of Bankruptcy. 3 vols. Charlottesville, Va. 1908—1910.

Smith, J. W.: Law of Receivers, with Procedure and Forms. Rochester. 1897.

U. S. Bankruptcy Law of July 1, 1898, and amendments thereto. Feb. 5, with General Orders and Forms. Washington. 1903.

Woodman, A. S.: Trustees in Bankruptcy. Boston. 1909.

13. Consular Law.

Hinekley, J. E.: American Consular Jurisdiction in the Orient. Washington. 1906.

Seldmore, G. H.: United States Ministerial and Consular Courts in Japan. Washington. 1887.

Stowell, E. C.: Consular Cases and Opinions, from the Decisions of the English and American Courts and the Opinion of the Attorneys General. Washington. 1909.

Wood, A. B.: Regulations prescribed for the use of the Consular Service of the United States. Washington. 1881.

III.

COURTS AND PROCEDURE

Courts and Procedure.

(By Robert Thomas Devlin, United States Attorney for the Northern District of California, U. S. A.)

Analysis.

I. ORGANIZATION OF THE JUDICIARY, 42

- A. Courts of the United States. Federal Courts Established, 43*
- B. State Courts, 43*

II. JURISDICTION OF THE FEDERAL COURTS, 44

- A. Supreme Court of the United States, 44*
- B. Circuit Courts, 44*
- C. District Courts, 46*
- D. Jurisdiction of the District Courts under the Judiciary Act of 1911, 47*
- E. Federal Jurisdiction is Based upon the Character of Parties or Character of the Suit, 49*
- F. Local Jurisdiction of the Federal Courts, 50*
- G. Exclusive Jurisdiction of the Federal Courts, 51*
- H. Concurrent Jurisdiction with State Courts, 51*
- I. Removal of Causes to the Federal Courts, 51*
- J. Duties of Officers on Removal Proceedings, 53*
- K. Right to Remove Case from State to Federal Courts, 53*
- L. Amount in Controversy, 54*
- M. General Provisions of the Judiciary Act of 1911; 54*

III. RIGHTS OF ALIENS

- A. Right of Aliens to Sue in Court, 55*
- B. Property Rights of Aliens under Treaties, 56*

IV. PROCEDURE IN FEDERAL COURTS

- A. Distinction between Procedure at Common Law and in Equity, 56*
- B. Procedure at Common Law, 56*
 - 1. Common Law Rights, 56*
 - 2. Common Law Procedure, 57*
- C. Pleadings in Equity, 57*
- D. Practice in Admiralty, 58*
- E. Bankruptcy Proceedings, 59*
- F. Writs of Injunction, 59*
- G. Writs of Habeas Corpus, 60*
- H. Contempts, 61*
 - I. Qualification of Jurors, 61*

V. APPELLATE JURISDICTION, 62

VI. WRITS OF ERROR TO STATE COURTS, 62

VII. COURTS OF SPECIAL JURISDICTION

- A. Commerce Court, 63*
- B. Court of Claims, 64*
- C. Court of Custom Appeals, 65*
- D. Interstate Commerce Commission, 66*

VIII. AWARD OR ARBITRATION OF CONSULS OR COMMERCIAL AGENTS OF FOREIGN NATION, 67

I. ORGANIZATION OF THE JUDICIARY. — A. Courts of the United States. —

Prior to the adoption of the constitution of the United States the thirteen original States were independent sovereignties. The constitution coming into existence some thirteen years after the colonies had acquired their independence provided for a Federal judicial system. This constitution is one of granted, and, therefore, limited, powers. There exists in the United States a dual system of government, certain powers being exercised by the States as independent units; certain others by the Federal government exclusively, and still certain others in which the Federal and

State governments have concurrent jurisdiction. When the Federal government was instituted it became necessary to establish judicial tribunals to protect the rights and privileges of the government, construe and enforce its laws, and also to protect the rights of aliens and non-residents where it was feared they might be made the victims of local prejudice. Accordingly, the constitution of the United States provides that:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

FEDERAL COURTS ESTABLISHED. — Pursuant to the authority conferred by the constitution, Congress in 1789 divided the United States into districts and established in each district a District Court and a Circuit Court, both having original jurisdiction. The litigation arising from the common business of life including cases at common law and suits in equity and cases in which capital punishment might be inflicted was conferred upon the Circuit Court, and to this Court was also given the appellate jurisdiction of many of the subjects of which the District Court had original jurisdiction. The District Court by this statute was given jurisdiction over cases of a peculiar or special character, such, for instance, as admiralty and bankruptcy cases, suits for penalties and criminal cases not punishable with death. A district judge was appointed for each district who was authorized to hold both the District and the Circuit Court. The number of circuits was equal to the number of judges of the Supreme Court, and during the recess of that Court each Supreme Court justice went to his circuit. Many cases arising in the District Court were heard on appeal by the Circuit Court. In 1869 an additional judge was provided for each circuit known as the circuit judge, and he was allowed to hold the Circuit Court in any district in his circuit. In 1891 the appellate jurisdiction of the Circuit Court was abolished and an additional circuit judge was appointed for each circuit. A Circuit Court of Appeals was constituted for each circuit composed of the circuit judges and a district judge when necessary to make a full court.

B. State Courts. When it is remembered that the Federal courts exercise a limited jurisdiction dependent either upon the subject matter of the controversy or the citizenship of the parties, it will be sufficient to say that jurisdiction to hear and determine the controversies that arise in the ordinary business of life is vested in the State Courts. As before the adoption of the Federal constitution, all jurisdiction was vested in these courts, they still retain it, except in so far as the Federal constitution has conferred it upon the Federal courts, either exclusively or acting concurrently with the State courts. At the time when the constitution was adopted, the courts throughout the various States, exercised the common law and equity jurisdiction then exercised by similar courts in England, and they continue to exercise such jurisdiction now, to the same extent as then, except of course where such

jurisdiction, in the cases specified, is placed in the Federal courts. In some States there are separate courts of common law jurisdiction, and others exercising equity powers, but, quite generally, the reformed code of procedure has been adopted in which the same tribunal exercises both common law and equity jurisdiction and grants such relief as the evidence may warrant. In such States, while the rules that formerly prevailed in common law and equity pleading are abolished, and the plaintiff is required to state the facts constituting his cause of action in plain and concise language, yet from the very nature of things, many of the principles recognized when equity was administered by a separate court are still recognized and adopted. At common law actions the parties are entitled to a trial by jury. While a jury may be allowed by the court in an equity case, its verdict is not binding on the court, but simply advisory. Where the same court has both common law and equity jurisdiction, it may, in the same case, grant both common law and equitable relief. Thus, under the reformed procedure, a suit may be entertained to reform an instrument, because it does not correctly state the contract agreed upon and then to enforce it by a judgment for a sum of money or otherwise. It is not, however, to be understood where the same tribunal possesses equity and common law jurisdiction that the rules of evidence are changed, but simply that the court may grant the relief that formerly could be given only by the court of equity and the court of common law acting separately.

Each State may adopt any system of courts that it may decide upon, so long as the rights guaranteed by the constitution of the United States are not infringed. Therefore, while there is a general similarity in the different State systems, of trial and appellate courts, there is not complete uniformity. In some States, matters relating to the probate of wills, the care and disposition of the property of minors and absent persons are entrusted to a separate tribunal having jurisdiction over such matters exclusively, while in other States, courts of general jurisdiction have control also of probate and similar proceedings. The right of appeal is universally recognized and every State has its appellate court, and in some States intermediate appellate courts are provided for the purpose of expediting litigation. A non-resident or alien may resort to the State courts for the enforcement of his right in all cases where a resident may. Personal service must be had upon the defendant to authorize the court to give judgment against him, except where the controversy relates to an interest in land or to the status of a person or where the court by attachment or similar process has the actual custody of the property. In the cases last mentioned, the service may be made by publication in some newspaper when the defendant cannot be found, or is absent from the jurisdiction, but the judgment can go no further than to affect the subject or the status of the person. When there is no personal service the judgment cannot be for any money in excess of that over which the court has control. This is true likewise of the Federal courts, as a defendant cannot be deprived of his property without personal service upon him, except in those cases where the proceeding is one in rem or similar to one in rem.

II. JURISDICTION OF THE FEDERAL COURTS. — A. Supreme Court of the United States. — The Supreme Court of the United States has both original and appellate jurisdiction. It has original jurisdiction, both legal and equitable, in all cases affecting ambassadors, other public ministers, and consuls. It also has original jurisdiction in all cases in which a State is a party, except where a citizen of that State is a party, and in suits of this character it adopts the equity practice. A bill in equity cannot be maintained by a State to enforce a right which is purely political. The practice in all suits against a State is extremely liberal. A State cannot maintain a suit to collect a judgment for penalties secured in the State court against a foreign corporation. A State is not to be deemed a party to a suit because it is a stockholder in a corporation either acting as plaintiff or defendant. While the Supreme Court has adopted some rules of practice, yet its practice as a court of original jurisdiction is modeled after that formerly prevailing in the Court of Chancery and of the King's Bench in England. One State may file a bill against another State to settle and establish a disputed boundary line.

B. Circuit Courts. — The original jurisdiction of the Circuit Court of the United States as defined by the Revised Statutes, and as existing at this writing, (sec. 629) is as follows:

First. Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sums or value of two thousand¹⁾ dollars, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State: Provided, That no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

Second. Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.

Third. Of all suits at common law where the United States, or any officer thereof suing under the authority of any act of Congress, are plaintiffs.

Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.

Fifth. Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels.

Sixth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title "Insurrection."

Seventh. Of all suits arising under any law relating to the slave-trade.

Eighth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States.

Tenth. Of all suits by or against any banking association established in the district for which the Court is held, under any law providing for national banking associations.

Eleventh. Of all suits brought by, (or against) any banking association established in the district for which the Court is held, under the provisions of title "The National Banks," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title.

Twelfth. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Thirteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the States.

Fourteenth. Of all proceedings by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Fifteenth. Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several States.

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation,

¹⁾ The amount required to give jurisdiction has been raised from time to time so that it is at the present writing two thousand

dollars. After January 1, 1912, the amount will be three thousand dollars. See section D. subdivision 1, following.

custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Seventeenth. Of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, title "Civil Rights."

Eighteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Nineteenth. Of all suits and proceedings arising under section fifty-three hundred and forty-four, title "Crimes," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offenses cognizable therein¹).

C. District Courts. — The jurisdiction conferred upon the District Courts of the United States is as follows:

First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, title "Crimes."

Second. Of all cases arising under any act for the punishment of piracy, when no Circuit Court is held in the district of such Court.

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Fourth. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.

Fifth. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal-revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest.

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, title "Debts due by or to the United States," and such suits may be tried and determined by any District Court within whose jurisdictional limits the defendant may be found.

Seventh. Of all causes of action arising under the postal laws of the United States.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Courts. (And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.)

Ninth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and (seventy-six,) (eight,) title "Insurrection."

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

¹ The jurisdiction of the Circuit Court as given above, will, after January 1, 1912 be merged in that of the District Court as set out in section D, following. After January 1, 1912 the Circuit Court will be abolished as a separate court.

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty-five, title, "Civil-Rights."

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

Thirteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Fourteenth. Of all proceeding by the writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the Court is held.

Sixteenth. Of all suits brought by any alien for a tort "only" in violation of the law of nations, or of a treaty of the United States.

Seventeenth. Of all suits against consuls or vice-consuls, except for offenses above the description aforesaid.

Eighteenth. The District Courts are constituted courts of bankruptcy and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy¹).

D. Jurisdiction of District Courts under the Judiciary Act of 1911. — By an act of Congress approved March 30, 1911, and taking effect on January 1, 1912, the laws of the United States relative to the judiciary were codified, revised, and amended. When this act becomes effective, the Circuit Courts will be abolished and the jurisdiction formerly exercised by these Courts will be merged in that of the District Courts. Under this act the District Courts of the United States will have the following original jurisdiction:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and a) arises under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or b) is between citizens of different States, or c) is between citizens of a State and foreign states, citizens, or subjects. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment had been made: Provided, however, that the foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

¹) The jurisdiction of the District Court, will, after January 1, 1912 be, as set out in owing to the abolition of the Circuit Court, the following section D.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.,

Tenth. Of all suits by the assignee of any debenture for drawback of duties issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking associations established in the district for which the Court is held, under the provisions of title "National Banks" Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the constitution of the United States, or any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said Court; Provided, however, that nothing in this paragraph shall be construed as giving to either the District Courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims" or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the District Courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: And provided further, that no suit against the government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, that the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the Court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the Court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any laws to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

These courts also have appellate jurisdiction of the judgments and orders of the United States commissioners arising under the Chinese exclusion laws.

E. Federal Jurisdiction is based upon Character of Parties or Character of the Suit. — It should be borne always in mind that the Federal courts do not possess a general jurisdiction of controversies between persons, but their jurisdiction is founded wholly on the character of the parties or the nature of the controversy. Where jurisdiction is based upon the character of the parties, the nature of the case is immaterial, and likewise where the jurisdiction is founded on the nature of the controversy the character of the parties need not be considered.

The word suit is a comprehensive one and applies to any proceeding in a court of justice in which an individual seeks a remedy given by the law. While the modes of proceeding may vary, yet where it is sought to enforce a right in a court of justice, the proceeding is a suit. The words "at common law or in equity" embrace all suits

in which legal rights are to be ascertained and determined in contradistinction to those in which equitable rights alone are recognized and equitable remedies administered, and to admiralty proceedings. They do not mean merely suits which the common law recognized among its old and settled proceedings. Proceedings to condemn property for a public use under the power of eminent domain are civil suits at common law within the meaning of this term, but proceedings to establish a will are not included by it, nor do proceedings in mandamus come under the scope of a suit at common law or in equity.

Under the provision authorizing suits to be brought under the laws of the United States, suits under the patent laws, copyright and trademark laws may be commenced in the Federal courts. So, jurisdiction may be taken where a party to the action is a corporation created by the laws of the United States, or where the suit is to enjoin the erection of a bridge over navigable waters. Upon the question of diverse citizenship, it may be remarked that a corporation is considered to be a citizen, but a State is not; nor are citizens of the territories of the United States or of the District of Columbia considered to be citizens of a State. A person may be a citizen of the United States and still not be a citizen of any State. Within the terms of the Judiciary Act to constitute citizenship, there must be residence within a State and an intention that such residence shall be permanent. Therefore, in pleading, it is not sufficient to aver that a party is a resident of a State, as residence is not the equivalent of citizenship for the purpose of sustaining the jurisdiction of the courts of the United States.

F. Local Jurisdiction of the Federal Courts. — Where an offense is punishable with death, the trial should be had in the county in which the offense was committed, if that can be done without great inconvenience, but if the offense was committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender is found or into which he is first brought. If an offense against the United States is commenced in one judicial district and completed in another, either district has jurisdiction.

If there are several defendants in any suit and one or more of them are neither inhabitants of, nor found in the district in which the suit is brought and do not voluntarily appear, the Court may nevertheless entertain jurisdiction and proceed with a trial and adjudication of the suit between the parties who are properly before it, but the other parties who have not regularly been served with process, or have not voluntarily appeared, shall not be concluded or prejudiced by the judgment or decree.

If there is more than one district in the state, every suit not of a local nature against a single defendant, inhabitant of such State, must be brought in the district in which he resides, but if there are two or more defendants residing in different districts of the State, the suit may be brought in either district.

If the suit is of a local nature and the land or other subject matter of a fixed character lies partly in one district and partly in another in the same State, the suit may be brought in the District Court in either district, and the Court in which it is brought, shall have jurisdiction to hear and decide it.

If a receiver is appointed in a suit, and the land or other property of a fixed character which is the subject of the suit, lies within different States in the same judicial circuit, the receiver, upon qualifying, is immediately vested with full jurisdiction and control over all the property which is the subject of the suit, and which lies within such circuit, but the Circuit Court of Appeals for such circuit, or a judge thereof, may disapprove of such order within thirty days thereafter after reasonable notice to the adverse parties, and the particular party heard on the motion for such disapproval.

The receiver is required to file in the District Court for each district of the circuit in which any portion of the property lies, within ten days after his appointment, a certified copy of the bill and the order of his appointment; if he fails to do so, or if an order of disapproval is made, then he becomes divested of jurisdiction over all the property except that portion of it lying within the State in which the suit is brought.

In suits to enforce legal or equitable liens upon, or to remove encumbrances or liens from real or personal property, a Court may make an order for absent defendants to appear, which shall be served, if practicable, upon the defendant wherever found, and also upon the person or persons in charge of said property, if there be any. But if such personal service is not practicable upon such absent defendant, the order

shall be published in such manner as the Court may direct, but not less than once a week for six consecutive weeks.

The parties may stipulate that any civil cause at law or in equity, may be transferred to the Court of any other division of the same district, and if the judge shall sign a written order to such effect, such cause may be so transferred.

The statute permits any receiver or manager of any property appointed by any United States court, to be sued in respect to any of his acts or transactions, in carrying on the business connected with such property, without the previous permission of the court appointing such receiver or manager. Such suit, however, is subject to the general equity jurisdiction of the court appointing the manager or receiver, so far as may be necessary to the ends of justice.

G. Exclusive Jurisdiction of the Federal Courts. — The jurisdiction vested in the courts of the United States is exclusive of the jurisdiction of the courts of the several States in the following cases:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls, or vice-consuls.

H. Concurrent Jurisdiction with State Courts. — Where a State court and a Federal court have concurrent jurisdiction either court may proceed with the case, but if a State court has obtained the custody of property, the Federal courts, on the principle of judicial comity, will generally not interfere, and where a Federal court has acquired jurisdiction over property it will not allow a State court to interfere with its control. Where a receiver has been appointed by a State court, for instance, to take possession of certain property a Federal court will not undertake to deprive him of that possession. If two separate suits are brought, one in a State court and one in a Federal court on the same cause of action, the practice is generally to allow the case first commenced to proceed and to stay the proceedings in the second. The motion for a stay should be made in the court which last acquired jurisdiction. While a Federal court cannot enjoin a State court from proceeding, it can order that the parties in a case pending before it shall not proceed in a State court on the same cause of action. It cannot, in other words, stay a court but it can stay the parties in the case pending before it. The principle of judicial comity also prevails where one Federal court has taken custody of property and another suit is brought on the same cause of action in another Federal court.

I. Removal of Causes to the Federal Courts. — All suits of a civil nature, at law, or in equity, arising under the constitution or laws of the United States or treaties, of which the District Courts are given original jurisdiction, may be removed by the defendant to the court of the United States for the proper district. Under the statute of 1911, such removal, of course, will be to the District Court.

Where the defendant is a non-resident, he may remove any other suit of a civil nature, at law, or in equity, of which the District Courts are given jurisdiction.

If there is in any suits of this class, a controversy wholly between citizens of different States which can be fully determined as between them, either one or more of the defendants actually interested in such controversy may remove the suit into the District Court.

If in any suit pending in a State court in which there is a controversy between a citizen of the State in which suit is brought, and a citizen of another State, it is

made to appear to the District Court that from prejudice or local influence, any defendant who is a citizen of another State, will not be able to obtain justice in such State court or in any other State court to which the defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove the case, he may remove such suit to the District Court of the United States for the proper district, at any time before the trial; but if such suit can be fully determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and if it appears that no party to the suit will be prejudiced by a separation of the parties, the District Court may direct the suit to be remanded, so far as the same relates to such other defendants, to be proceeded with in the State court.

Where a suit has been removed to a District Court of the United States from a State court, on the affidavit of a party plaintiff that he had reason to believe and did believe that from prejudice or local influence, he was unable to obtain justice in the State court, a United States District Court shall, on application of the other party, examine into the truth of the affidavit and the grounds mentioned therein, and unless the District Court shall be satisfied that such party will not be able to obtain justice in the State court, it shall cause the suit to be remanded to the State court.

If, from any cause, the District Court should decide that a cause removed from a State court was improperly removed and should order the case to be remanded to the State court whence it came, such remand is immediately carried into execution, and no appeal or writ of error from the decision, of the District Court in so remanding such cause, is allowed, with the exception that no case arising under the statute relating to the liability of common carriers by railroads, to their employees in certain cases, brought in any State court of competent jurisdiction, shall be removed to any court of the United States.

Whenever a party who is entitled to removal, (except in suits removable on the ground of prejudice or local influence) may desire to remove such suit from a State court to a United States District Court, he may make and file a petition, duly verified, in such suit in said State court at the time or at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit to the United States District Court, and shall likewise give a bond with sufficient surety for his entering in the District Court within thirty days from the date of filing his petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the United States District Court, if such Court shall hold that the suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in such suit, if special bail was originally required therein. The Court is compelled to accept the petition and bond, and is not allowed to proceed further in the suit.

It is required that written notice of the petition and bond for removal shall be given to the adverse party before filing. After the copy is entered within the time specified in the District Court of the United States, the removing party must within thirty days thereafter, plead, answer, or demur to the declaration or complaint and the cause shall then proceed in the same manner as if it had originally been commenced in the District Court.

If an action is commenced in a State court affecting the title to land and the parties are citizens of the same State, and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, one or more of the plaintiffs or defendants may, before the trial, state to the court, and, if the court requires it, make affidavit, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant or an exemplification of it, unless the loss of public records shall prevent their doing so, and shall move that any one or more of the adverse parties inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information. If they refuse to give such information, they shall not be allowed to plead such a grant or give it in evidence upon the trial. If, however, they do inform the court that they claim under such a grant, any one or more of the parties moving for such information may, then on petition and bond, remove the cause for trial to the District Court of the United States.

If any civil suit or criminal prosecution is commenced in any State court against any person who is denied or cannot enforce in the judicial tribunals of the State,

or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or against any officer for any arrest or imprisonment or other trespass committed under color of any authority derived from any law providing for such equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon petition of the defendant filed in the State court at any time before the trial or final hearing of the case, be removed for trial to the next District Court of the United States, and if such petition is filed, all further proceedings in the State court shall cease.

J. Duties of Officers on Removal Proceedings. — It is the duty of the clerk of the District Court to furnish such defendant copies of all pleadings, depositions, and testimony, and if the defendant files such copies in the District Court on the first day of its session, the cause shall proceed in such Court in the same manner as if it had been brought there by original process. Should the clerk refuse or neglect to furnish such copies, the petitioner may docket the case in the District Court and such Court shall then have jurisdiction and may, upon proof of such refusal or neglect of the clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause, and in case he refuses or neglects to do so, may order a non-suit and dismiss the case. But if the clerk furnishes copies as required by statute, to the petitioner, and the petitioner fails to file copies in the District Court, a certificate under the seal of the District Court stating such failure shall be given, and upon its production in the State court, the cause shall proceed therein as if the petition for removal had not been filed.

When all the acts necessary for the removal of any suit of the character just mentioned, have been performed, and the defendant petitioning is in actual custody on process issued by a State court, it becomes the duty of the clerk of the United States District Court to issue a writ of habeas corpus cum causa, and the marshal is required to take the body of the defendant in his custody to be dealt with in the District Court according to law.

If a civil suit or criminal prosecution is commenced in any State court against officers acting under any revenue law of the United States, or is commenced against persons holding property by title derived from any such officer or against any person on account of anything done by him while an officer of either House of Congress in discharge of his official duty, the suit may, at any time before its trial, likewise be removed to the District Court upon the filing of an affidavit stating the facts, with certificate of counsel to the effect that he has examined the proceedings and has carefully examined the matters set forth in the petition, and believes them to be true.

If a personal action is brought in any State court by an alien against a citizen of a state who, at the time the alleged action, was a civil officer of the United States and a non-resident of that State in which jurisdiction is obtained by the State by personal service of process, the action may be removed to the District Court of the United States.

All injunctions, orders, attachments, and processes issued in the State court remain in force and effect after the removal, until dissolved or modified by the Court to which the suit may be removed.

If the District Court of the United States is satisfied after removal that the suit does not really and substantially involve a dispute and controversy properly within the jurisdiction of the District Court, or that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case cognizable or remediable under the statute, the District Court shall proceed no further, but shall either dismiss the suit or transmit it to the court from which it was removed.

If a clerk of the State court shall refuse to any one of the parties applying to remove the same, a copy of the record after a tender of the legal fees, such clerk shall, after conviction, be fined not more than one thousand dollars or imprisonment for not more than one year, or both.

K. Right to Remove Case from State to Federal Courts. — The object of removing a case from a State court to a Federal court is for trial, and it can be removed for no other purpose. But there is no constitutional right of removal, as the power to define and describe to what extent the judicial power is to be exercised by the federal courts is vested in Congress. Unless Congress has conferred upon the Federal courts such judicial power as it may rightfully confer, such power remains dormant.

But when Congress has provided for the removal of causes from the State to the Federal courts, the right of removal cannot be defeated, nor the effect of such removal limited by the legislature or courts of a State.

Formerly, either the plaintiff or defendant might remove a cause from the State to the Federal courts on the ground that the suit arose under the constitution or laws of the United States. But in 1888 this right of removal was limited to defendants and was restricted to that class of suits of which the Circuit Courts at that time possessed original jurisdiction.

When the petition for removal is filed in the State court it becomes a part of the record, and if the record thus shows that the suit is removable the State court can proceed no further, but must surrender jurisdiction to the Federal court to which it is sought to remove the cause. The State court must, for the purposes of removal, assume that the facts stated in the petition are true, and if the opposite party desires to controvert any of the facts stated in the petition for removal, he must make the issue in the Federal Court.

To authorize the removal of a cause, on the sole ground that it is one arising under the constitution, laws, or treaties of the United States, this ground must appear or the plaintiff's statement of his own claim.

Where it does not appear in such statement, it cannot be supplied by any statement of the petition for removal, or in the subsequent pleadings. The defendant cannot secure a removal by stating that he intends to make a defense based on the constitution, or a law or a treaty of the United States, or in a State of Federal statute which he claims is in conflict with the constitution of the United States, as such fact to justify removal must appear in the plaintiff's statement. In cases where the right of removal is founded upon the constitution or laws of the United States, the petition for removal is not required to state the citizenship of the parties, as their citizenship is immaterial.

L. Amount in Controversy. — For the purpose of limiting the number of suits that might otherwise be commenced in or removed to the Federal courts, the statute now provides that the value of the matter in dispute must exceed the sum of two thousand dollars, and interest and costs. The amount by the Judiciary Act of 1911 is increased to three thousand dollars. If the cause of action stated in the complaint is one where the damages in case of the plaintiff's recovery are not fixed, the amount for which he claims judgment is the amount that fixes the jurisdiction, but if the amount of damages that would be allowed on a default is liquidated by the law, that sum and not the sum which the plaintiff may seek to recover determines the jurisdiction. However, if in a case, where the damages are unliquidated, the plaintiff colorably claims an excessive amount, the Court is not bound to retain jurisdiction. When a suit is brought for the purpose of securing an injunction, the test of jurisdiction is not the amount of damages which the plaintiff has sustained but the value of the object to be secured by the bill of complaint, and so when it is sought to abate a nuisance, the value of the matter in dispute is the value of the property that may be destroyed and not the amount of damages which the plaintiff may suffer.

By the matter in dispute is understood the subject of litigation, and the pecuniary value of the matter in dispute may be determined not only by the money judgment prayed for, but, in some cases, by the increase or decrease in value of the property directly affected by the relief prayed, or by the pecuniary result from the judgment, to one of the parties to the suit. If, from the nature of the case, as stated in the pleadings, a judgment for an amount necessary to confer jurisdiction upon the court cannot be given, the jurisdiction of the Court will not attach, notwithstanding the fact that in the declaration, the damages are laid for a larger sum. Therefore, if a suit is brought for an amount in excess of that necessary to confer jurisdiction, the jurisdiction will be defeated, if it appears from the evidence of the plaintiff that the amount in controversy is in fact less than the required minimum. When an appeal is taken by the plaintiff, the amount in controversy is the amount of his claim; but if the appeal is taken by the defendant, the amount of the judgment rendered against him is considered to be the amount in controversy.

M. General Provisions of the Judiciary Act of 1911. — Terms of court are provided by the Judiciary Act of 1911 but the Act declares that no action, suit, proceeding, or process in any district shall abate, or be rendered invalid by reason of any act changing the time of holding such Court, but the same shall be deemed to be returnable and triable in the term established next after the return day, nor shall

the trial of any case, civil or criminal, which has been commenced and is in progress before a jury or the Court be stayed or discontinued before the arrival of the time fixed by law for another session of the Court, but the Court may proceed to bring the case to a conclusion in the same manner and with the same effect as if another stated term of the Court had not intervened. The District Courts, as courts of admiralty and as courts of equity are deemed always open for the purpose of filing any pleading or issuing process.

In order to prevent undue expense and delays in criminal cases, the Federal District Courts are required to hold monthly adjournments of their regular terms, when the business requires it to be done, and a special term may be held at the same place where any regular term is held, or such other place in the district as the nature of the business may require, and upon such notice as the judge may direct.

For the purpose of securing impartiality, it is provided that if the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel, or was a material witness for either party, or was related to or connected with either party so as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause that fact to be entered on the records of the court, and when an authenticated copy of this order is certified by the senior circuit judge, he shall appoint another district judge to try the case. Whenever a party to any action, civil or criminal, shall make and file an affidavit charging the judge before whom the action or proceeding is to be tried or heard, has a personal bias or prejudice either against him, or in favor of any opposite party to the suit, such judge shall proceed no further with the matter, but another judge shall be called in. In such affidavit, the facts and the reasons for the belief of the existence of such bias or prejudice must be stated, and the affidavit must be filed not less than ten days before the beginning of the term of the court, unless good cause is presented for the failure to file it within such time. A party shall not be entitled in any case, to file more than one such affidavit, nor shall such affidavit be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

III. RIGHTS OF ALIENS. — A. Right of Aliens to Sue in Court. — In all matters that relate to their personal and property rights, resident aliens have practically the same rights and privileges as citizens, and as a consequence, they possess the right to resort to the legal remedies necessary for the protection and enforcement of their personal and property rights. Alien friends, irrespective of the question of their residence or non-residence, have, in the absence of disabling statutes, the right to hold and dispose of property and make contracts for the protection of these rights. But a suit between two non-resident aliens upon a cause of action arising in a foreign state can be maintained only on principles of comity and not as a matter of right. Actions of an auxiliary or equitable character in the nature of attachment and execution are governed by the same rule, although residents of the state may be parties to the auxiliary actions as stockholders or claimants of the property sought to be reached. As to the right of aliens to sue in the State courts, the general rule is, that all foreigners *sui juris* who are not specially disabled by the law of the place where the suit is brought may there maintain suits to vindicate their rights and redress their wrongs. Resident alien friends possess practically the same right and privileges, so far as the protection by law of their persons, liberty, reputation, and property rights is concerned, as citizens; and to protect these rights they must possess the legal remedies necessary for their due vindication. Alien friends, resident or non resident, also have in the absence of disabling statutes at least, the right to take, hold, enjoy, and dispose of property, real and personal, and to make contracts with residents, and so must have the right to invoke legal remedies to maintain these rights. In both cases the remedies are commensurate with the rights to be protected.

A State possesses jurisdiction over persons found within its boundaries, and judgment may be rendered against such persons in all cases in which personal service is had within the State. The fact that persons are found within the limits of the jurisdiction of the court, does not obligate it to assume jurisdiction of a transitory cause of action arising in a foreign country, but it may exercise in such suit jurisdiction on principles of comity.

Where a transitory cause of action is based upon the statute of another country, owing to the difficulties that would arise in the construction of the statute, and the inconvenience and danger of injustice attending such an investigation, the court

is not bound to take jurisdiction as there could in such case, by no reasonable certainty that the rights of the parties would be adjusted as they would be if the case were tried in the country enacting the statute.

B. Property Rights of Aliens under Treaties. — The judicial power of the United States extends among things to all cases arising under treaties and to all cases affecting ambassadors and consuls. The most common case in which the laws of a State have been altered or suspended by treaties is that relative to the right of aliens to inherit land. At common law an alien may acquire title by purchase and the title so acquired is valid against everybody but the State, and the State must perform some act for the purpose of divesting such title and securing possession of the property. But as all laws in conflict with the provisions of a treaty are void, the disability of an alien to inherit may be removed by treaty. The treaty power of the United States extends to all subjects that may be the proper subject of negotiation between this government and others, and hence a treaty may declare what protection shall be given to aliens owning property in the United States, and may provide the manner in which property may be transferred, devised, or inherited. There is no limitation on the treaty power, as it is expressed in the constitution, unless it be found in those restraints against the action of the government or its various departments, or in those provisions which fix the nature of the government itself and that of the States.

A treaty, admittedly, cannot alter the character of the government, or do that which is forbidden by the constitution, but it may properly fix the status of aliens and declare what rights of property they shall enjoy. There is no law passed by the Federal government preventing aliens from holding land in United States. While several of the States have at various times passed laws limiting the right of aliens to hold land and particularly to inherit property, such laws must yield to the provisions of a treaty when they come into conflict with it.

IV. PROCEDURE IN FEDERAL COURTS. — **A. Distinction between Procedure at Common Law and in Equity.** — The constitution of the United States makes a distinction between actions at law and suits in equity, and the equity contemplated by the framers of the constitution was that prevailing at the adoption of the constitution. The Revised Statutes declare that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In common law cases the practice followed is that which prevails in the State courts, the statute declaring that the laws of the several States, except where otherwise required or provided by the constitution, treaties, or statutes of the United States, shall be regarded as rules of decision in trials at common law in the courts of the United States in which they are applicable.

But with reference to equity procedure the statutes of the United States prescribe that the forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction shall be according to the principles, rules, and usages which belong to courts of equity and admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance of such statute. These rules are subject to alteration and addition by these courts, respectively, and to regulation by the Supreme Court, by rules prescribed from time to time, to any Circuit or District Court, not inconsistent with the laws of the United States.

Under a statute of the United States, the Supreme Court has power to prescribe from time to time and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the Circuit and District Courts.

B. Procedure at Common Law. — **1. COMMON LAW RIGHTS.** — We shall first consider some of the principal points to be observed on the common law side of the court. Where there is no conflict with the constitution or Federal statutes, the statutes of a State, both as they may create or regulate the substantive rights of the citizen and as they prescribe remedies are recognized by the Federal courts and enforced. While there are some exceptions to the rule, the Federal courts in common law actions recognize the unwritten law of the State, as well as its statutes, and gener-

ally adopt the decisions of the State courts as binding upon them. If a State court has construed a statute, the Federal courts adopt such a construction as a part of the statute itself. This principle is carried so far that the Federal court must follow the decisions of the highest court of a State to the effect that the provisions of the State constitution respecting the passage of a statute are mandatory, irrespective of the rule adopted by the Federal courts relative to Federal statutes.

While the Federal courts follow the decisions of the State courts in relation to the title to real property and matters involving the construction and enforcement of contracts, as well as in controversies founded on personal relations, they do not necessarily pursue this course when the question is one of a general character or concerns the general law of merchants. The law merchant is not confined to any one nation and to enable the Federal courts properly to protect the interests of aliens and non-residents, they must be left free to act on their own conceptions of the law. This principle is also observed when the controversy before the court is one to enforce a liability against common carriers or to determine the validity of clauses in bills of lading or the proper construction to be placed upon contracts of insurance or the liability of a master to his employee for negligence, as these are all questions of a general interest.

2. COMMON LAW PROCEDURE. — As the distinction between law and equity is recognized, the common law side of the court cannot entertain suits of an equitable character. The statutes of the United States provide that the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Court are held.

Power is also conferred upon these courts to make rules and orders not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court. Thus, while the courts of the United States follow in common law actions the State practice very closely, they have a discretion and may adopt rules of their own which in some measure may prescribe a practice different from that followed by the State Courts.

The statutes of the United States give to the plaintiff in common law causes, similar remedies by attachment, or other process against the property of the defendant, which the State laws provide, and such statutes permit the Federal courts to adopt from time to time by general rules such State laws as may be in force, in the States where they are held, in relation to attachments and other process. But the party seeking such attachment or other remedy must furnish similar preliminary affidavits or proofs and similar security as required by the laws of the State.

The Federal courts follow the same rules in pleading in common law actions as are recognized by the State courts in the same locality, but are extremely liberal in allowing amendments so as to promote justice.

Jury trials are required in all common law actions, unless expressly waived by the parties. The statute provides that issues of fact in any Circuit Court may be tried, and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing, waiving a jury. In such case, the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.

Generally speaking, the rules of evidence prevailing in the State courts in common law causes, also prevail in the same class of cases in the Federal courts, but there are some exceptions as, for instance, in the manner of taking depositions. In the majority of the States the judge cannot charge the jury upon questions of fact, or even express to them his opinion upon any fact involved in the issues to be tried. But in the Federal courts the judges are not so restricted, and they have full power to charge the jury and may express their opinions upon the weight and effect of the evidence. If the judge believes that the preponderance of the evidence in favor of one of the parties is so strong that there should be no dispute among reasonable men as to the conclusions to be drawn, he may direct a verdict in favor of such party.

C. Pleadings in Equity. — The first pleading in an equity suit is the bill, which among other requirements should show that the court has jurisdiction as a Federal court to entertain the bill and also that the court has jurisdiction of the cause as

an equity cause. The bill must be signed by counsel as a pledge of good faith. The bill may contain interrogatories and if it does, the defendant must answer them. When the bill is filed, process issues, but it is usual to ask the clerk by a *praecipe* to issue process. If there is no appearance on the part of the defendant within the time required by the equity rules the plaintiff is entitled to a decree by default. If the bill alleges that the defendant has an interest in the subject matter in controversy without stating such interest with particularity a general disclaimer may be filed by the defendant when he desires to renounce all interest in the subject matter. But if the bill contains special allegations, showing an apparent liability on the defendant's part, an answer must accompany the disclaimer as the plaintiff is entitled to be advised whether the defendant has an actual interest or not. If the bill on its face shows any matter of abatement the question may be raised by demurrer. By a plea some distinct defense is interposed, which if sustained, will save the necessity of trying the suit on the general issues. Under one of the equity rules every demurrer or plea must be accompanied by a certificate of counsel that in his opinion it is well founded in point of law and also by the affidavit of the defendant that it is not interposed for delay, and a plea must be accompanied by an affidavit that it is true in point of fact. If the defendant desires to raise the question that there is an adequate remedy at law, the proper mode of doing so is by demurrer. The defendant as a matter of right can interpose only one plea but this rule is not an absolute one as the Court may in its discretion allow more than one to be filed.

The defendant by answer sets up his defense to the general issues. If the complainant does not waive an answer under oath, the answer, if made under oath, has the force of proof and is conclusive unless contradicted by two witnesses or one witness and corroborating evidence. The answer should deny or admit every material allegation in the bill of complaint and any statement in the bill to which the answer does not respond is not admitted by the failure to deny it, but must be proved. While an answer may set up inconsistent defenses, they must be consistent as an answer is supposed to be under oath.

After the answer is filed the complainant may except to the answer for insufficiency on the ground that the allegations of the bill have not been sufficiently answered. If he is satisfied with the sufficiency of the answer, he should file a general replication. Special replications are no longer used. What is equivalent to demurring to the answer is the setting of the case for hearing on bill and answer. By this proceeding, however, the complainant admits the sufficiency of all facts well pleaded in the answer.

The general rule is that in equity cases the evidence is taken by deposition, but the Court upon notice given, may, in its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court. The court may also order that the testimony be taken by an examiner of the Court or one specially appointed. The examiner is not authorized to pass upon questions of evidence, but his duty consists in taking down the evidence and reporting it to the Court. The case may be referred to a master in chancery either to report his conclusions on the facts or on the law, or on both.

D. Practice in Admiralty. — Congress passed an act in the year 1842 directing that the Supreme Court should prepare and promulgate rules to control the procedure and practice in equity and under this statute the court adopted rules known as the "admiralty rules."

Admiralty proceedings are divided into proceedings in rem and proceedings in personam. A proceeding in rem binds the whole world and as jurisdiction is obtained by a seizure of the property it is not necessary to serve notice upon the owner. The theory of the proceeding in rem is that the thing itself is proceeded against and the owner appears as a claimant. If there is no appearance on the part of the defendant, the judgment can bind only the property taken into custody.

A proceeding in personam is like an ordinary action to recover judgment against an individual for a sum of money.

The first pleading is called the libel which states the cause of action in writing and may propound interrogatories to the adversary. There is no particular form of phraseology to be used. All that is required is that the libel should state the cause of action in clear and simple language. Amendments are very liberally allowed. The application to amend is addressed to the sound discretion of the Court and is granted or denied with a proper regard to the rights and interests of both parties. When the libel is filed an order for process is made which, though supposed to be signed by the

judge, is as a matter of course issued by the clerk on orders signed in blank by the judge and left with him for that purpose. The process is directed to the marshal instructing him to seize the article libeled and to give notice that on a certain day the case will come on for hearing. All persons interested are notified to appear on that day and interpose their claims. If a vessel is in the custody of an officer of a State court the officer of the admiralty court cannot serve process upon it, but he may proceed when such custody has terminated. The statute provides that an owner of a vessel desiring its possession may give a bond in double the amount of the value of the vessel. A decree may be entered by default if no person appears and interposes a defense, but the Court may for good cause open the default and permit a defense to be made if an application is made for that purpose within ten days.

A demurrer may be interposed to the libel on any legal ground appearing upon the face of the libel, and any defense resting upon fact may be set up by answer. If the answer is not complete the libellant may except to it. The defendant in his answer may, if he desires, propound interrogatories to be answered by the libellant. It is not necessary to file a replication but the answer is not to be considered as admitting allegations not denied but such allegations must be proved.

The rules of evidence prevailing in the State courts are substantially the same as those observed in admiralty. The Revised Statutes of the United States provide that no witness shall be excluded on account of color or interest, with the exception that in actions by or against executors, administrators, or guardians, neither party can testify as to transactions with the testator, intestate, or ward unless he is called by the opposite party or is required to testify by the Court; but in all other respects the rules of decision are the laws of the State.

A counter claim which arises out of the same transaction may be set up as a defense to reduce the damages, but a set off — that is a debt arising out of another transaction — cannot be pleaded because such plea is permitted by statutes applying only to the common law and chancery courts. For the same reason, statutes of limitations do not bind courts of admiralty, but an admiralty court may hold that a claim is, stale by analogy when it would be barred in another form by the statute of limitations, and in some cases, where the rights of third parties have attached, in a much shorter time.

The evidence may be taken by deposition, or in the presence of the Court, or in both modes, or a commissioner may be appointed to take the evidence down in writing and report it to the Court. Costs are not allowed as a matter of course, but the court may refuse to allow them to a plaintiff when the Court considers it inequitable to do so. If the libellant is successful, the decree may be enforced by selling the vessel, or, if a bond has been given for its release, the decree may be enforced against the signers of the bond.

An appeal may be taken by filing a petition, addressed to the judges of the Circuit Court of Appeals praying an appeal and assigning the errors claimed to have been committed. The district judge or any judge of the appellate court may allow the appeal and if he allows it may sign the citation citing the opposite party to appear in the court of appeals on a designated day.

E. Bankruptcy Proceedings. — The Federal Courts have jurisdiction over bankruptcy proceedings. Power to confer this jurisdiction is not exclusively vested in the Federal government, but where it has not acted, the States have power to enact bankruptcy and insolvency laws. When, however, the national government acts on the subject the state laws are suspended. As the subject of bankruptcy is considered in another part of this work, it is referred to here only incidentally as being one of the branches of Federal jurisdiction.

F. Writs of Injunction. — When notice is given for a motion for injunction out of the District Court, the Court or the judge may, if there appears to be danger of irreparable injury from delay, grant an order restraining the acts sought to be enjoined until the decision upon the motion. Such order may be granted with or without security in the discretion of the Court or judge.

Writs of injunction may also be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and also by any judge of the District Court in cases where they might be granted by the Court.

No justice of the Supreme Court may hear or allow any application for an injunction or restraining order in any case pending in the circuit to which he is allotted elsewhere than in such circuit or such place outside of the circuit as may be

stipulated by the parties in writing, except in cases when it cannot be heard by the district judge of the district.

If the district judge is absent from the district or if from any cause is unable to act, any circuit judge of the circuit in which the district is situated, may grant an injunction or restraining order in a case pending in the District Court where the same might be granted by the district judge.

No court of the United States has power to grant a writ of injunction to stay proceedings in any court of a State, except in cases where such injunction may be authorized by some law relating to proceedings in bankruptcy.

No interlocutory injunction which suspends or restrains the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of the statute, can be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or any of its judges or by any circuit judge acting as district judge upon the ground that such statute is unconstitutional, unless the application for such injunction is presented to a justice of the Supreme Court of the United States or to a circuit or district judge and heard and determined by three judges of whom at least one must be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, or else unless a majority of the three judges shall concur in granting the application.

In all cases where such an application is presented to a justice of the Supreme Court or to a judge he shall immediately call the other judges to his assistance to hear and determine the application. One of the three judges must either be a justice of the Supreme Court or a circuit judge.

Such application cannot be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and also to such other persons as may be defendants in the suit.

If, however, any justice of the Supreme Court or any circuit or district judge is of the opinion that irreparable loss or damage will result to the complainant unless a temporary restraining order is granted, he may grant such temporary restraining order at any time before such hearing and determination of the application for interlocutory injunction. Such temporary restraining order, nevertheless, if granted, shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice.

The hearing upon an application for an interlocutory injunction is entitled to precedence and must in every way be expedited and be assigned for a hearing at the earliest practicable date after the expiration of the notice provided for by statute.

An appeal may be taken directly to the Supreme Court of the United States from any order made granting or denying, after notice and hearing, an interlocutory injunction in such a case.

G. Writs of Habeas Corpus. — The writ of habeas corpus directs that a prisoner or a person deprived of his liberty be brought before a court or a magistrate to determine the cause of his detention and to liberate him, if he is unlawfully held. It may be issued by the Supreme Court, the Circuit Courts and District Courts of the United States, but the writ is issued by the Supreme Court only in cases affecting ambassadors, public ministers, and consuls or for the purpose of reviewing the decision of some inferior tribunal. Any judge of any of the Courts named has power to issue the writ, but it cannot be used for the purpose of correcting errors and irregularities in a trial, and it can be issued only in cases where a person is actually restrained or where such restraint is threatened with power to enforce it. A writ of habeas corpus cannot be issued by a State court for the release of a person who is held under color of Federal authority and no person can be discharged by the writ by a Federal court, unless the person seeking release is in custody under or by color of the authority of the United States, or is in custody for some act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a Federal court or judge, or has been committed to trial before some Federal court, or is in custody in violation of the constitution or a law or treaty of the United States. It may also issue where a revenue officer of the United States is in custody for any act done or omitted under color of his office or under color of any law relating to the revenue, or where the subject or citizen of a foreign state domiciled therein is in custody under an alleged right, authority, protection, or exemption claimed under the sanction of any foreign state, the validity of which is dependent upon the law of nations.

It may also issue where it is necessary to bring the prisoner into court to give testimony.

If a prisoner is held in custody under process based upon a city ordinance, or an act of the legislature of a State or of Congress which is repugnant to the constitution of the United States, such prisoner may be discharged on habeas corpus. If a crime is exclusively within the jurisdiction of the Federal courts, a prisoner may be discharged by such courts when held by a State court under a charge of the commission of such crime.

It is provided by the constitution of the United States that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it. The constitution does not declare who may suspend the writ, and it is not settled whether such power rests in the President or in Congress.

An appeal may be allowed from an order denying a discharge on the writ.

H. Contempts. — The Federal courts have power to impose and administer all necessary oaths and to punish by fine and imprisonment at the discretion of the court, contempts of their authority; but the statute provides that the power to punish contempts shall not be construed to extend to any cases except where the misbehavior of any person in their presence or so near thereto obstructs the administration of justice, or where the misbehavior is by an officer of such courts in his official transactions or where there is a disobedience or resistance by any such officer or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of such courts.

New trials may be granted by the Federal courts in all cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.

I. Qualifications of Jurors. — Jurors in the courts of the United States, must have the same qualifications, generally speaking and they are entitled to the same exemptions, as jurors of the highest court of law in the State in which the trial is had.

All jurors must be publicly drawn from a box containing at the time of each drawing, the names of not less than three hundred persons possessing the necessary qualifications, to serve as jurors. These names are deposited in the box by the clerk of the court and the commissioner appointed by the judge of the Court.

The commissioner must be a citizen of good standing, residing in the district in which such court is held, and must also be a well known member of the principal political party in the district in which the Court is held, opposing that to which the clerk may belong. The clerk and the commissioner each place one name in the box alternately, without reference to party affiliations, until the whole number required is placed in the box.

No citizen who possesses all other qualifications required by law, shall be disqualified to serve as a grand or petit juror on account of race, color, or previous condition of servitude.

If, from challenges introduced and allowed or otherwise, there is not a petit jury to determine any civil or criminal case, the marshal or his deputy, shall by order of the Court, in which such defect of jurors may happen, return a sufficient number of jurymen from the by-standers to complete the panel. If for any reason the marshal or his deputies are disqualified, the Court may appoint a disinterested person who may return the jurors.

A grand jury consists of not less than sixteen nor more than twenty-three persons.

A grand jury is not summoned to attend in a District Court unless the judge in his discretion, or upon notification by the district attorney that such a jury will be needed, orders a venire to issue therefor.

In cities containing at least three hundred thousand inhabitants, a venire may issue for a second grand jury if the United States attorney shall certify in writing to the district judge that the exigencies of the public service require it.

No person shall serve as a petit jury in any District Court for more than one term in a year, and it is a sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of the court held within one year prior to the time of such challenge.

The defendant is entitled to twenty and the United States to six peremptory challenges when the offence charged is treason or any capital offense. The defendant is entitled to ten, and the United States to six peremptory challenges on the trial

of any other felony. In all other cases, civil and criminal, each side is entitled to three peremptory challenges.

In all cases where there are several defendants or several plaintiffs, the parties on each side are considered a single party for the purpose of exercising the challenges. All challenges made to the panel or individual jurors for cause or favor, shall be tried by the Court without the aid of triers.

V. APPELLATE JURISDICTION. — The appellate jurisdiction of the Federal courts is placed partly in the Supreme Court and in the Circuit Courts of Appeals of the different circuits. In 1891 the Circuit Courts of Appeal were established for the purpose of relieving the Supreme Court from the excessive burden of cases arising from the rapid growth of the country and the constant increase of litigation. Under this Act there is a Court of Appeals in every circuit consisting of three judges. Two constitute a quorum. The Court may be constituted of the Supreme judge for that circuit, the circuit judges and in the absence or disqualification of a circuit judge, of a district judge. No judge who presided or participated in the trial in the court below is qualified to sit as an appellate judge.

Appeals or writs of error may be taken directly to the Supreme Court in any case in which the jurisdiction of the court is in issue; from the final sentences and decrees in prize causes; in cases of conviction of a capital crime; in any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the constitution of the United States.

The Circuit Courts of Appeal have appellate jurisdiction to review by appeal or writ of error a final decision in the lower court in all cases other than those just mentioned in which an appeal or a writ of error may be taken directly to the Supreme Court. The judgments or decrees of the Circuit Court of Appeals are final in all cases in which the jurisdiction is dependent entirely upon the fact that the opposite parties to the suit or controversy are aliens and citizens of the United States or citizens of different States, and also in all cases arising under the patent laws, the revenue laws, and under the criminal laws and in admiralty cases. The Circuit Court of Appeals may at any time certify to the Supreme Court any question of law and the Supreme Court upon such certification may either instruct the Circuit Court of Appeals as requested, or may order the whole record to be sent up to it for its consideration and thereupon may decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

It may be observed that an appeal is the proper mode of bringing an equity case before the appellate court for review while a writ of error brings up a criminal case or common law action upon the assignment of errors claimed, and the only questions that may be reviewed are those of law.

The Supreme Court has appellate jurisdiction over the Circuit Court of Appeals by a certificate of the judges of the Circuit Court of Appeals when they certify a question to the Supreme Court for decision, by a writ of certiorari addressed to the Circuit Court of Appeals when it is desired by the judges of the Supreme Court to review the decision of the Circuit Court of Appeals by an appeal, or writ of error in any of the cases in which the decision of the Circuit Court of Appeals is not a finality, and also in certain cases arising under the act governing bankruptcy proceedings.

When the circuit judges certify a proposition of law concerning which it desires the instruction of the Supreme Court for a proper decision, the certificate should present separate propositions of law, and a statement of facts on which the question of law arises.

A party who desires to have reviewed the decision of the Circuit Court of Appeals, when an appeal does not lie directly to the Supreme Court, may petition the latter court for a writ of certiorari.

VI. WRITS OF ERROR TO STATE COURTS. — The Supreme Court of the United States may re-examine, reverse, or affirm upon a writ of error a final judgment or decree in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a statute, of, or an authority exercised under, the United States, and the decision is against its validity, or where is drawn in question the validity of a statute of, or authority exercised under any State, on the ground of their being repugnant to the constitution treaties, or laws of the United States,

and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under, the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission, or authority. The writ of error when issued has the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The proceeding upon the reversal is also the same as if the judgment or decree had been rendered in a court of the United States, except that the Supreme Court may at its discretion proceed to a final decision of the case, and may re-affirm, reverse, or modify the judgment or decree of the court below, and award execution or remand the same to the court from which it was removed.

If the State court decides in favor of the title, right, privilege, or immunity claimed under the federal authority, the Supreme Court cannot review the decision. This writ is issued as a matter of discretion and not as a matter of right. An application for the writ may also be made to the presiding judge of the highest court of the State in which the judgment was rendered. Cases of a criminal character in which the writ is issued have precedence on the docket of the Supreme Court over all cases to which the government of the United States is not a party, excepting only such cases as the Court, in its discretion, may decide to be of public importance.

It must appear to justify the issuance of the writ, that a Federal question was involved in the case in the State court, and if the decision was against the plaintiff upon two different grounds, one of which does not involve a Federal question, the writ of error will be dismissed; but if such independent ground is clearly untenable the Supreme Court may entertain jurisdiction. The object of the statute conferring this right of review is to protect the rights guaranteed by the Federal constitution. The statute does not fix any pecuniary limit to the amount involved as the question involved is what confers jurisdiction. If a court lower than the highest court in the State has final jurisdiction, the writ may issue to such court. Third parties who may have an indirect interest in the decision cannot claim the right of review, but such right is limited to the party actually affected to his injury by the adverse decision. Where it is sought to review the action of the State court on a Federal question it must appear by the record that such question was raised in the State court. The claim cannot be recognized when made for the first time in a petition for rehearing after judgment.

VII. COURTS OF SPECIAL JURISDICTION. — A. Commerce Court. —

The Commerce Court is composed of five judges assigned thereto from time to time by the Chief Justice of the United States from among the circuit judges of the United States, for a period of five years.

In all cases within its jurisdiction, the Commerce Court and each of the judges assigned thereto, may exercise any and all powers of the District Court of the United States so far as the same may be appropriate to the effective exercise of the jurisdiction of such Court.

It also has power to establish from time to time such rules and regulations concerning pleading, practice or procedure in cases or matters within its jurisdiction, as to the Court shall seem wise and proper.

This Court possesses the jurisdiction formerly possessed by the Circuit Courts of the United States over the following classes of cases:

1. All cases for the enforcement otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment of any order of the Interstate Commerce Commission other than for the payment of money.
2. Cases brought to enjoin, set aside, annul or suspend in whole or in part, any order of the Interstate Commerce Commission.
3. Certain cases under acts of Congress relative to the regulation of commerce with foreign nations and among states.
4. All such mandamus proceedings as under the acts to regulate commerce are authorized to be maintained in a Circuit Court of the United States.

The jurisdiction of the Commerce Court over cases of the classes mentioned, is exclusive, but the jurisdiction possessed by any Circuit Court or District Court over cases or proceedings not within the classes mentioned is not affected.

All suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission must be brought in the Commerce Court against the United States.

The pendency of such a suit does not of itself stay or suspend the operation of the Interstate Commerce Commission but the Commerce Court in its discretion may restrain or suspend in whole or in part, the operation of the order of the Commission pending the final determination of the suit.

The Commerce Court can issue no order or injunction restraining or suspending an order of the Interstate Commerce Commission otherwise than upon notice and after hearing, with the exception that in cases where irreparable damage would otherwise ensue to the petitioner, the Court or a judge thereof may, on hearing, after not less than thirty days' notice to the Interstate Commerce Commission and the Attorney General allow a temporary stay or suspension in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of such order.

At the time of hearing such application, the Court, if it finds that irreparable damage may result, may continue the temporary stay or suspension in whole or in part, until its decision upon the application.

The jurisdiction of this Court attaches by filing in the office of the clerk of the Court, a written petition setting forth briefly and succinctly the facts constituting petitioners' causes of action, and specifying the relief sought.

It is required that a copy of such petition shall be immediately served upon every defendant named, and when the United States is a party defendant, the service is made by filing a copy of the petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice.

An answer may be filed within thirty days.

The Court may prescribe the method of taking evidence in cases pending in the Court, but generally the practice and procedure of the Commerce Court must conform as nearly as may be, to that in like cases in the District Court. Any appeal from the final order or decree of this Court may be reviewed by the Supreme Court of the United States, if such appeal is taken within sixty days after the entry of the final judgment or decree.

The Supreme Court has power to affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require, but an appeal to the Supreme Court does not supersede the stay, judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a Justice thereof, shall so direct.

An appeal may likewise be taken to the Supreme Court from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order to the Interstate Commerce Commission and such appeal must be taken within thirty days from the entry of such order.

All appeals from this Court to the Supreme Court are entitled to priority in hearing and determination over all other causes, except criminal causes.

The Attorney General has charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court upon appeal from the Commerce Court, but the Interstate Commerce Commission and any party or parties in interest to the proceedings before the Commerce Court in which order or requirement is made, may appear as parties of their own motion and as of right and be represented by their counsel in any suit in which the validity of such order or requirement or any part thereof, is involved.

Likewise, communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, may intervene in the suit or proceedings at any time after its institution.

The Attorney General is not allowed to dispose of or to discontinue such suit or proceeding over the objection of such party or intervenor but such intervenor may prosecute, defend, or continue the suit of proceed with in unaffected by the action or non-action of the Attorney General.

B. Court of Claims. — The Court of Claims consists of a chief justice and four judges, and has jurisdiction to hear and determine all claims, except those for pensions, founded upon the constitution of the United States or any law of Congress, or upon any regulation of any executive department or upon any contract, express or implied, by the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the parties would be entitled to redress against the United States either in a court of law, equity, or admiralty if suit could be brought against the United States directly. But this Court has no power to hear or determine any claim arising out of the late Civil War. It has

power to hear and determine all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands on the part of the government of the United States against any claimant against the government in the Court of Claims.

If any claim or matter is pending in any of the executive departments involving controverted questions of fact or law, the head of such department may transmit the same with vouchers, papers, documents, and proofs relating to it, to the Court of Claims, which shall proceed to hear and determine such matter under such rules as the court may adopt.

The Court shall report the facts and conclusions of law which it finds to the department by which it was transmitted.

Aliens who are citizens or subjects of any government according to citizens of the United States the right to prosecute claims against such government in its courts, possess the privilege of prosecuting claims against the United States in the Court of Claims, if the subject matter and character of their claims are such that the Court may properly take jurisdiction of them.

Any claim against the United States cognizable by this Court, is barred, unless the petition setting forth a statement of it is filed in the court or transmitted to it by the secretary of the Senate or clerk of the House of Representatives within six years after the first accrual of the claim.

This Court has power to establish rules for its government and for the regulation of its practice, and may punish for a contempt in the manner prescribed by the common law and exercise such powers as are essential to carry into effect the powers granted to it by law.

A person making a claim is required to set forth in his petition, the action taken on the claim by Congress, or any department of the government if such action has been had, what persons are owners or interested in it, and when and upon what consideration such persons became so interested; that there has been no assignment or transfer of the claim or any part of it, except as stated in the petition, and that the claimant is justly entitled to the amount claimed from the United States after the allowance of all just credits and offsets; that the claimant, and in case of assignment, the original and every prior owner of it, if a citizen, has at all times borne true allegiance to the government of the United States and whether the claimant is a citizen or not. The petition should also state that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the government and that he believes the facts stated in the petition to be true. This petition must be verified by the affidavit of the claimant or his agent or attorney.

The government has the right to traverse the allegations as to true allegiance and voluntarily abetting, aiding or giving encouragement to rebellion against the government, and if, upon the trial, such issue is decided against the claimant, his petition shall be dismissed.

C. The Court of Customs Appeals. — The Court of Customs Appeals consists of a presiding judge and four associate justices appointed by the president with the advice and consent of the Senate. This Court is one of record and has power to establish rules and regulations for the conduct of its business, and may review any decision of a matter within its jurisdiction and may affirm, modify, or reverse the same. The Court possesses appellate jurisdiction to review by appeal final decisions by a board of general appraisers, all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed upon it under such classification and the fees and charge connected therewith, and has jurisdiction over all appealable questions as to the jurisdiction of the board of general appraisers and all appealable questions as to the law and regulations governing the collection of the customs revenues. In all such cases the judgment and decree of this Court of Customs Appeals are final.

If an importer, owner, or consignee of any imported merchandise or if the collector or Secretary of the Treasury is dissatisfied with the decision of the board of general appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of the board, they or either of them may, within sixty days after the entry of such judgment, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. This application is made by filing with the clerk of the Court a concise statement of

the errors of law and fact complained of. A copy is required to be served on the collector, importer, owner, consignee, or agent as the case may be.

The decision of the Court of Customs Appeals is final.

D. Interstate Commerce Commission. The Interstate Commerce Commission consists of seven members. The term of office of each commissioner is seven years. Not more than four commissioners can be appointed from the same political party. The Act creating the Commission applies to any person or corporation engaged in the transportation of oil or other commodity (except water and except natural or artificial gas) by means of pipe lines and partly by railroad, or partly by pipe lines and partly by water. The Act also applies to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or district of the United States to any other State, Territory, or district of the United States or to any foreign country. These agencies are considered as common carriers within the meaning and purpose of the Act. The Act also applies to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation, in like manner, of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. The Act, however, does not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory, nor does it apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory.

The term "common carrier," as used in the Act, includes express companies and sleeping car companies. The term "railroad" as used in the Act includes all bridges and ferries used or operated in connection with any railroad, and, also, all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease. The term "railroad" also includes all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated in the Act, and, also, all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of such property.

The term "transportation" includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

It is the duty of every carrier subject to the provisions of the Act creating the Interstate Commerce Commission to provide and furnish such transportation upon a reasonable request therefor and to establish through routes and to make reasonable rates and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes and for making reasonable compensation to those entitled to it.

All charges must be just and reasonable and every unjust and unreasonable charge is prohibited and declared to be unlawful. Common carriers must establish, observe, and enforce just and reasonable classification of property for transportation, with reference to which classifications, rates, tariffs, regulations, or practices may be prescribed. No common carrier is permitted directly or indirectly to issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law, and except to ministers of religions and persons employed in charitable work and to inmates of certain public institutions, and certain other persons.

No common carrier can directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person a greater

or less compensation for any service rendered or to be rendered in the transportation of passengers, or property than it obtains for a like service from another. Nor can any undue or unreasonable preference or advantage be given to any particular person.

A common carrier cannot charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction. But upon application to the Interstate Commerce Commission, such common carrier may, in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances. If a railroad carrier, in competition with a water route, reduces the rate on any kind of freight to or from competition points, it cannot increase such rate unless, after a hearing by the Interstate Commerce Commission, it be found that such proposed increase rests upon changed conditions other than the elimination of the water competition.

All pooling of freights and division of earnings by one common carrier with another are forbidden. Every common carrier is required to file with the Commission, and print and keep open to inspection, schedules showing its rates and fares. No change can be made in these rates, except after thirty days' notice to the Commission and to the public. But the Commission may, in its discretion, allow changes upon less notice. No carrier can charge more than its published rates. Severe penalties are prescribed by the Act for a failure to comply with its provisions.

Persons who claim to be damaged may elect whether they will complain to the Interstate Commerce Commission or will bring suit in the United States courts, but they cannot pursue both remedies.

The commission has the authority to inquire into the management of the business of all common carriers subject to the Act, and it must keep itself informed as to the manner in which such business is conducted. The Commission may determine and prescribe reasonable regulations and may order carriers to cease and desist from any unjust practice. It has power to determine and prescribe just and reasonable rates and classifications which shall be observed as maximum charges.

VII. AWARD OR ARBITRATION OF CONSUL OR COMMERCIAL AGENT OF A FOREIGN NATION. — The District Courts and the United States Commissioners have the power to carry into effect, according to its true intent and meaning, any award or arbitration or decree of any consul, vice-consul, or commercial agent of any foreign nation made or rendered by virtue of authority conferred on him as such consul, vice-consul, or commercial agent to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; but such consul, vice-consul or commercial agent should first apply by petition, for the exercise of such power.

Such Courts and Commissioners have power to issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree and to enforce obedience to the same by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until compliance is made with such award arbitration, or decree, or until the parties are otherwise discharged by the consent in writing of such consul, vice-consul, or commercial agent or his successor in office, or by the authority of the foreign government which has appointed such consul, vice-consul, or commercial agent.

The foreign government, or its consul, vice-consul, or commercial agent, requiring such imprisonment, must bear the expenses of such imprisonment and maintenance of the prisoners and the cost of the proceedings.

IV.

CONTRACTS

Contracts.

(By Henry Winthrop Ballantine, A. B., LL. B., Member of the San Francisco Bar.)

Analysis.

I. INTRODUCTORY

- A. Scope of the Law of Contracts, 74*
- B. Arrangement, 74*
- C. American Common Law of Contracts, 74*
- D. What Law Governs the Validity of a Contract, 75*

II. FORMATION AND EXECUTION

- A. Agreement or Mutual Assent, 75*
 - 1. Definition of a Contract, 75*
 - 2. Express and Tacit Agreements, 76*
 - 3. Tacit and Quasi-Contracts, 76*
 - 4. Preliminary Negotiations Leading to Final Offer and Acceptance, 76*
 - 5. Where Oral Agreement is to be Reduced to Writing, 77*
 - 6. Certainty and Definiteness of Terms, 77*
 - 7. Completeness, 77*
 - 8. Lapse and Revocation of Offers, 77*
 - 9. Acceptance and Meeting of the Minds, 78*
 - 10. Acceptance by Promise or by Performance, 78*
 - 11. Contracts by Correspondence, 78*
 - 12. Time of Consummation, 78*
 - 13. Actual Receipt of Communication not Necessary unless Stipulated for, 79*
 - 14. Acceptance by Taking Document, 79*
 - 15. Written Contracts, 79*
 - a) Necessity of Writing, 79*
 - b) Execution, 79*
 - c) Conditional Execution, 79*
 - d) Signatures, 79*
 - e) Parol Evidence to Vary Terms, 80*
 - f) Expression of Consideration in Writing, 80*

III. GROUNDS OF ENFORCEMENT

- A. Covenants and Specialty Contracts, 80*
 - Modern Disuse of Seals, 80*
- B. Consideration, 81*
 - 1. Origin of Requirement, 81*
 - 2. Consideration as a Double Test. 81*
 - 3. Basis in Bargain, 81*
 - a) Subscriptions to Charitable Objects as an Exception, 81*
 - b) Element of Consideration in Bilateral Contracts, 82*
 - 4. Sufficiency of Consideration, 82*
 - a) Recital of Payment of Nominal Sum, 82*
 - b) Forbearance and Compromise, 82*
 - c) Completing a Contract, as Consideration for Promise of Additional Compensation, 82*
 - d) Completion of Contract with Stranger as Consideration for a Promise, 83*
 - e) Mutuality of Obligation, 83*
- C. Promises Binding Without Consideration, 84*
 - Moral Obligation as a Ground for the Enforcement of a Promise, 84*
 - a) Moral Obligation where Former Debt is Barred by Technical Defence, 85*
 - b) Moral Obligation in Cases of Unjust Enrichment Without any Original Contractual or Quasi-Contractual Liability, 85*

IV. DUTIES OF CONTRACTING PARTIES

- A. Law Governing Duties, 85*
- B. Rules of Construction of Contract, 86*

- C. *Impossibility of Performance*, 87
 - 1. *Duty of Performance Absolute*, 87
 - 2. *Exceptions in Certain Cases of Impossibility*, 88
 - 3. *Inability Resulting from Circumstances Relative to the Promisor*, 89
 - a) *Physical Incapacity for Personal Service*, 90
 - b) *Personal Danger*, 90
 - c) *Public Restraint of Person*, 90
 - d) *Private Restraint*, 90
 - e) *Failure of Means of Performance*, 90
 - 4. *Measure of Duty Defective*, 90
 - 5. *Contrast with the Civil Law*, 90
- D. *Dependency of Duties on Reciprocal Performance*, 91
 - 1. *Breach of Contract by One Whose Consideration is Due as an Excuse from Reciprocal Duty to Perform*, 91
 - a) *Slight Breach "In Limine" Fatal*, 91
 - b) *Material Breach after Part Performance*, 91
 - 2. *Divisible Contracts*, 92
 - 3. *Entire Contracts*, 92
 - 4. *Repudiation as a Defense*, 92
 - a) *Must the Aggrieved Party Elect*, 92
 - b) *Retraction*, 92
 - c) *Rescission Distinguished from Excuse*, 93
 - 5. *Prospective Inability to Perform as an Excuse*, 93
 - 6. *Failure of Consideration*, 93
 - a) *Exchange Illusory*, 93
 - b) *Destruction of Continuing Consideration*, 93
 - c) *Risk of Loss in Executory Contract of Sale*, 94
 - 7. *Independent Duties*, 94
- E. *Prevention of Performance as Excuse*, 94
- F. *Refusal to Accept Performance*, 94

V. DISCHARGE OF CONTRACTUAL DUTIES

- A. *Law Governing Discharge*, 95
- B. *Performance*, 95
 - 1. *Substantial Performance*, 95
 - 2. *Performance to Satisfaction of Another*, 95
 - 3. *Time of Performance*, 96
- C. *Accord and Satisfaction*, 96
 - 1. *Accord Executed*, 96
 - 2. *Accord Executory*, 96
- D. *Release*, 96
- E. *Novation*, 96
- F. *Rescission*, 97
- G. *Operation of Law*, 97
 - 1. *Merger*, 97
 - 2. *Bankruptcy*, 97
 - 3. *Statutes of Limitation*, 97

VI. REMEDIES: ENFORCEMENT OF CONTRACTUAL DUTIES

- A. *Law Governing Remedies*, 97
- B. *Action of Debt*, 97
- C. *Action for Damages*, 97
 - 1. *Measure of Damages*, 97
 - 2. *Liquidated Damages*, 98
 - 3. *Anticipatory Breach*, 98
- D. *Specific Performance*, 98
 - 1. *Classes of Contracts Specifically Enforceable*, 99
 - 2. *Equities of the Defendant*, 99
 - a) *Mutuality*, 99
 - b) *Adequacy*, 99
 - c) *Unfairness*, 99

- E. Rescission and Restitution, 99*
 - 1. When Promisor May Rescind, 99*
 - 2. Purpose of Rescission, 100*
 - 3. Status Quo Restored, 100*
 - 4. Earnest, 100*

VII. INVALID CONTRACTS

- A. Void, Voidable, and Unenforceable, 100*
 - 1. Void Contracts, 100*
 - 2. Voidable Contracts, 100*
 - 3. Unenforceable Contracts, 100*
- B. Conflict of Laws as to Invalidity, 100*
- C. Contracts Void for Illegality, 101*
 - 1. Knowledge of Unlawful Purpose, 101*
 - 2. Public Policy, 101*
 - 3. Gaming and Wagering Contracts, 101*
 - 4. Stock Exchange Contracts, 101*
 - a) Buying and Selling on Margin, 101*
 - b) Option Contracts, 102*
 - c) Clearing House Settlements, 102*
 - d) Bucket Shop Contracts, 102*
 - e) Burden of Proof to Show Contract a Mere Bet or Wager, 102*
 - 5. Restraint of Trade, 102*
 - a) Sale of Good Will, 102*
 - b) Restraint of Competition, 103*
 - 6. Sunday Contracts, 103*
 - 7. Usury, 103*
 - 8. Illegality Invoked by the Court, 103*
 - 9. Illegality as Disability in the Plaintiff, 103*
 - 10. Relief from Illegal Contracts, 104*
- D. Manifest Impossibility, 104*
- E. Contracts Invalidated by Unfairness, 104*
 - 1. Scope of Bargain, 104*
 - 2. Limits of Bargain, 104*
 - 3. Mistake and Its Varieties, 104*
 - a) Discordant Error, 104*
 - b) Equivocation, 104*
 - c) Wrongly Transmitted Message, 104*
 - d) Error in Persona, 105*
 - e) Subjective or Unilateral Error, 105*
 - f) Mistake as to Tenor of Words, 105*
 - g) Fundamental Error or Mutual Mistake, 105*
 - 1. Error as to Subject Matter, 106*
 - 2. Mistake in Expression of True Agreement, 106*
 - 4. Misrepresentation and Fraud, 106*
 - a) Innocent Misrepresentation, 106*
 - b) Rescission for Fraud, 106*
 - c) Fraudulent Concealment, 107*
 - d) Effect of Fraud, 107*
 - 5. Duress and Undue Influence, 107*
 - a) Duress at Common Law, 107*
 - b) Undue Influence, 107*
- F. Invalidity by Reason of Incapacity, 108*
 - 1. Infants, 108*
 - a) Avoidance, 108*
 - b) Restoration of the Consideration, 108*
 - c) Necessaries, 108*
 - 2. Non Compos Mentis, 108*
 - 3. Drunken Persons, 109*
 - 4. Married Women, 109*
 - a) Common Law and Equity Rules, 109*
 - b) Statutory Removal of Disabilities, 109*

- c) *Conflict of Laws as to Capacity of Married Women to Contract*, 109
- d) *Statutes of Various States*, 109

5. *Aliens*, 110

G. *Statute of Frauds*, 110

VIII. JOINT AND SEVERAL CONTRACTS

A. *Joint Liability*, 110

- 1. *Construction of Obligation*, 110
- 2. *Respective Liability of Joint Obligors*, 111
- 3. *Survival of Joint Liability*, 111
- 4. *Contribution*, 111
- 5. *Partnership Contracts*, 111

B. *Joint and Several Liability*, 111

C. *Joint Rights*, 111

- 1. *Construction of Obligation*, 111
- 2. *Respective Rights of Obligees*, 112
- 3. *Contribution*, 112
- 4. *Survival of Rights*, 112.

IX. CONTRACTS FOR THE BENEFIT OF THIRD PERSONS

A. *Strangers to the Contract*, 112

- 1. *English Law*, 112
- 2. *American Law*, 112

B. *True Basis in Implied or Constructive Obligation to Perform Undertaking*, 112

- 1. *Receipt of Property and Assumption of Liability*, 112
- 2. *Donation of Claim*, 112
- 3. *Provision for Discharge of an Obligation*, 113
- 4. *Incidental Benefits Raise No Claim*, 113
- 5. *When Does Claim of Beneficiary Vest*, 113

X. ASSIGNMENT OF CONTRACTS

A. *Assignment of Claims (Choses in Action)*, 113

- 1. *What Classes of Rights Can Be Assigned*, 113
- 2. *Choses in Action Not Assignable by Older Law*, 113
- 3. *Effect of Assignment*, 114

B. *Suit by Assignee*, 114

- 1. *Successive Assignees*, 114
- 2. *Defences of Debtor against Assignor*, 114
- 3. *Latent Equities of Third Persons*, 114
- 4. *Contract with Negotiable Instruments*, 114

C. *Suit against Assignee*, 114

- 1. *Novation*, 114
- 2. *Contrast with German Civil Law*, 115

XI. PRINCIPAL AND AGENT

A. *Scope of Authority*, 115

- 1. *Agents for Particular Purposes*, 115
- 2. *Ratification*, 115

B. *Action upon Contract by Principal*, 115

C. *Action upon Contract by Agent*, 115

D. *Actions against the Principal*, 116

E. *Action against the Agent*, 116

XII. SURETYSHIP AND GUARANTY

A. *Definitions*, 116

B. *What Law Governs*, 116

C. *Creation of Guaranty*, 116

- 1. *Requirement of Writing*, 116
- 2. *Necessity of Consideration*, 117
- 3. *Necessity of Notice of Acceptance to Bind Guarantor*, 117

D. *Rule of Strict Construction in Favor of Surety*, 117

E. *Special Defences of Sureties and Guarantors*, 117

- 1. *Invalidity of Principal Contract*, 117
- 2. *Dealings with Debtor to Possible Prejudice of Surety*, 117

F. Steps Necessary to Fix Liability of Guarantor, 118

Notice of Default to Guarantor, 118

G. Subrogation of Surety to Rights and Remedies of Creditor, 118

XIII. CHARTER PARTIES

A. As Contract for Affreightment, 118

B. As Demise of Ship, 118

C. Liens, 118

D. Relation of Bills of Lading to Charter Parties, 118

1. Where the Charterer is Shipper, 118

2. Between the Shipowner and Shippers Other than the Charterer, 119

XIV. BOTTOMRY AND RESPONDENTIA

A. Definitions, 119

B. Authority of Master, 119

C. Nature and Priority of Liens, 119

D. Respondentia, 119

E. Liens for Supplies, Repairs, and Other Necessaries, 119

F. Priority of Liens, 120

I. INTRODUCTORY. — A. Scope of the Law of Contracts. — The general Law of Contracts has to do with the theory and fundamental principles underlying all agreements by which one person obligates himself to another, and deals with the requisites, operation, performance, and discharge of contracts generally¹).

This general Law of Contracts subdivides into many individual branches, such as Insurance, Negotiable Instruments, Carriers, Banks and Banking, etc. These are more or less specialized topics which have differentiated themselves as the courts have construed particular kinds of contracts and have worked out the obligations incident to particular transactions and relations. It is not within the scope of the present article to expound the more specific topics which are dealt with at length in separate text books and form complete and independent titles in Commercial Law. Some special reference will, however, be made to contracts of Suretyship and Guaranty, Bottomry and Respondentia, Charter Parties and to the law of Principal and Agent in its relation to contracts. The topics of Insurance, Negotiable Instruments, Carriers, Sales, and Factors are dealt with in special articles.

B. Arrangement. — The essentials to a valid contract, to wit, agreement and consideration, will first be treated, and then the operation, performance, and discharge of valid contracts. Defects which invalidate contracts and which render them void, voidable, or unenforceable, will then be considered. Among these negative elements or defenses are:

1. Illegality, or some taint in the character of the bargain or the object of the contract, as usury, gambling transaction, restraint of trade, etc.;

2. Unfairness of the bargain, resulting from fraud, mistake, duress, or undue influence;

3. Incapacity of the parties from infancy, coverture or insanity;

4. Statutory defenses, particularly the Statute of Frauds which makes the absence of a written memorandum a defense.

C. American Common Law of Contracts. — The law of contracts as it exists to-day in the United States is principally unwritten law finding its authoritative exposition in the printed reports of the decisions of the various State and Federal courts. There is a common law of each State which differs to a greater or less extent from the common law of every other State. In contract, as in tort and property cases, where the Federal courts acquire jurisdiction, they administer the statutes and common law of the State in which the court sits, but there is a general commercial law recognized by the Federal courts which may differ somewhat from the commercial law as interpreted by the courts of the State where a particular case arises²). The law of

¹ Writers on the common law have as yet failed to recognize any such great division as "the Law of Obligations" of European codes and systems. "Obligation" in European and in Roman law is a word of large extent, embracing all claims or relations between parties which entitle one of them to claim from the

other the fulfilment of some demand. The term was first adopted into the common law merely to signify a bond, i. e., a formal acknowledgment of debt under seal. The Law of Contracts is the most general department recognized in the Law of Obligations. — ²) *Swift v. Tyson*, (1842) 16 Pet. 1.

Massachusetts, of New York, of Pennsylvania, of California, of the Federal courts and the various States, as to contracts, torts, and property, are not, however, different systems or bodies of legal doctrine. The basis of all is found in the doctrines originally evolved by the English courts and adopted as the foundation of the legal system in every State except Louisiana¹). The continual study and citation of English decisions and decisions from the other States, and the influential authority of the United States Supreme Court, have maintained a substantial uniformity and similarity in general, although there may be great divergence and conflict of authority among the States on particular questions, such as "moral consideration," the right of a beneficiary to sue on contracts to which he is not a party, the validity of contracts for additional compensation for the performance of an existing contract, anticipatory breach, etc.

D. What Law Governs the Validity of a Contract. — When a contract is sought to be enforced in a State other than that in which it was made or in which it was to be performed, the law of the forum often adopts some foreign law as its standard to determine the requisites, validity, obligation, and effect of the contract. This foreign law must be brought to the attention of the court by proper evidence, and in the absence of any showing as to the foreign law, which is the true measure of the rights of the parties, the court will assume that the *lex loci* is the same as the *lex fori*, and determine all questions by its ordinary rules. A foreign contract, valid where made, may be enforced in any State where the court can acquire jurisdiction of the person of the defendant, unless the contract contravenes good morals or the settled policy of the State in whose tribunals its enforcement is sought.

There is a great conflict of authority among the States as to what law governs the validity of a contract. On sound theory, it is maintained by Professor Joseph H. Beale, a leading American authority on the Conflict of Laws, that the law of the place of making (*lex loci contractus*) should govern the effect of the contract and determine its validity or invalidity. The Supreme Court of the United States seems in different cases to have inconsistently recognized three different standards: 1. The law of the place of making; 2. The law of the place of performance, and 3. The law by which the parties intended, or may fairly be presumed to have intended, the contract to be governed²).

The present state of the authorities is summarized as follows by Professor Beale in an exhaustive and elaborate article³):

1. States adopting the law of the place of making: Colorado, Indiana, Maryland (?) Massachusetts, Tennessee, West Virginia.
2. States adopting the law of the place of performance: Alabama, Arkansas (?), California (?), Georgia, Iowa, Kansas, Kentucky, Louisiana (?), Maine (?), Mississippi, Michigan, New Hampshire, New Jersey, Ohio, Pennsylvania, South Dakota.
3. States adopting the law intended by the parties: England and the English Colonies, Connecticut⁴), District Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Carolina⁴), Texas⁴), Virginia⁴), Washington, Wisconsin; and in usury cases, also the Federal courts, Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio, and Tennessee.

The present tendency of the authorities, stimulated by the late English and Federal cases, is toward the adoption of the law actually or presumably intended by the parties. Professor Beale criticises this doctrine as giving legislative force to the intent of the parties and postulates that rights are necessarily created by the law of the place where the transaction occurs; yet it should be remembered that the forum merely adopts the foreign rules as its own *pro hac vice*, to work out justice, and the law of the country or state with a view to which the parties contracted would seem to be the just standard by which to determine the validity of their bargain and to measure their rights and duties under the contract.

II. FORMATION AND EXECUTION OF CONTRACTS. — A. Agreement or Mutual Assent. — 1. DEFINITION OF CONTRACT. — The definition of a contract

¹) The Civil Code of Louisiana, adapted from the Code Napoleon, makes some elaborate dispositions as to the Law of Obligations, after the manner of the Civil Law, differing from the nomenclature and conceptions of the common law of Contracts. The commercial law of Louisiana, however, with reference to negotiable

instruments, insurance, corporations, and partnership, is in its general features and principles, the same as the commercial law of the other States and of England. — ²) Joseph H. Beale, in 13 Harv. Law Rev. pp. 1, 79, 194, 260. — ³) Ibid. p. 207. — ⁴) Presumably, in these States, the law of the place of performance.

most commonly adopted is that given by Blackstone: "An agreement upon a sufficient consideration to do or not to do a particular thing¹⁾". The term contracts, however, is used to include all obligations arising from a promise, agreement, or voluntary undertaking. It is true that the most universal ground recognized by the law for giving force to an agreement is consideration. But promises are enforced as contracts in some jurisdictions without consideration, if they are expressed in solemn form under seal, or if they are based on strong moral obligation, or have induced the promisee to act in reliance upon them to his prejudice.

2. EXPRESS AND TACIT AGREEMENTS. — Express contracts are those in which the terms of the agreement are declared by express words. Tacit contracts, (contracts implied in fact), are those where the terms of the agreement are expressed by conduct, e. g., the voluntary acceptance of benefits. Whenever one person, A, confers a benefit on B, with the expectation of being paid and with the knowledge of the other, the doing of the work with B's knowledge is the proposal, and B's acceptance of the benefit amounts to a promise to pay the reasonable value of the goods or services. Where, however, the defendant has no opportunity to reject the benefit, then the obligation to pay, if any, is quasi-contractual, for no tacit promise may be inferred²⁾. Thus, where services are rendered to another, without his request or knowledge, however meritorious or beneficial, as the saving of his property from destruction by fire, there is no contract, either express or implied, for he cannot be deemed to have agreed to pay for what he had no opportunity to reject³⁾.

"When relatives live together as members of one family, or as one household, the right to compensation for board and personal services does not exist in the absence of an express contract; but when such relation does not exist an implied contract to pay remuneration may arise⁴⁾." The reason is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which are gratuitously performed. Between strangers such benefits are presumably conferred on the basis of bargain, and with a reasonable and proper expectation of compensation⁵⁾.

3. TACIT AND QUASI-CONTRACTS. — The term "implied contracts" is, unfortunately, applied both to real agreements, tacitly understood from conduct, such as the silent employment of another, and also to quasi-contracts, where the promise to pay is purely constructive and implied by law from the circumstance of unjustified benefits or burdens received or suffered at the hands of another. As the theory of the forms of action of our early common law, assumpsit, covenant, and debt, did not embrace obligations quasi ex contractu, these cases had to be dealt with by an implied assumpsit or fictitious promise to bring them within the theory of the only available remedy⁶⁾.

4. PRELIMINARY NEGOTIATIONS LEADING TO FINAL OFFER AND ACCEPTANCE. — An important distinction to be observed at the outset is that between a definite proposal or acceptance, and the preliminary steps in the negotiation of the contract.

A bargain is concluded only when one party has communicated to another a definite proposal containing all the terms of the bargain and the other party has accepted it. Mere advertisements, price marks, quotations of prices, and business circulars are not offers or proposals to which the maker can be held by an acceptance, for they leave various important matters to be arranged. They are intended merely as tentative or introductory negotiations. If an order of a specified quantity or amount is made according to the terms quoted, the acceptance of the order by the seller is necessary to complete the bargain and create a binding contract⁷⁾. So a telegram to a bidder for public work, "You are low bidder—come on morning train", does not conclude a contract with him, and he may refuse to comply with his bid. It is simply an acknowledgment that he was the lowest bidder; other negotiations are necessary to complete the contract⁸⁾. An agreement subject to the preparation and approval of a formal contract is not a contract, and the mere fact that the parties

¹⁾ 2 Bl. Comm. 442. Taney, C. J., in *Charles River Bridge v. Warren Bridge*, (1840) 11 Pet. 420. 572. *Justice v. Lang*, (1870) 42 N. Y. 493, 496. Cal. Civ. Code, sec. 1549. La. Civ. Code (1909) sec. 1761. Ga. Civ. Code (1911) sec. 4216. — ²⁾ *Harriman on Contracts*, p. 7. — ³⁾ *Bartholomew v. Jackson*, (1822)

20 Johns. 28. — ⁴⁾ *Disbrow v. Durand*, (1892) 54 N. J. L. 343. — ⁵⁾ See note 1 L. R. A. (N. S.) 819; also note, 11 L. R. A. (N. S.) 254. — ⁶⁾ *Wald's Pollock on Contracts* (3d ed.) p. 12. — ⁷⁾ *Moulton v. Kershaw*, (1884) 59 Wis. 316. — ⁸⁾ *Cedar Rapids Lumber Co. v. Fisher*, (Iowa, 1906), 105 N. W. 395.

contemplated a formal written agreement is strong evidence that the previous negotiations were not final¹).

5. WHERE ORAL AGREEMENT IS TO BE REDUCED TO WRITING. — "It is a general rule that when it is a part of the understanding between the parties, that the terms of their compact are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a final and completed contract²)."

On the other hand, oral negotiations or correspondence may settle all the terms of and complete the contract, although it is understood that a future written memorandum shall be signed up³). The intention to put the contract in writing at a subsequent time is not necessarily sufficient to show the bargain not final and complete. It is a question of intention whether the parties concluded a contract by their correspondence, of which a formal memorandum was to be made, or were only settling the terms of a written agreement into which they proposed to enter after all the particulars had been adjusted, and by which alone the contract was to be expressed. "A valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all the particulars were adjusted?⁴)" The terms of payment, as well as other elements of the contract, must be agreed upon, and nothing be left open for future arrangement.

In *Brown v. N. Y. Central Railroad*⁵), Earl, J., quotes from *Ridgway v. Wharton*⁶); as follows: "An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain."

6. CERTAINTY AND DEFINITENESS OF TERMS. — The parties must define with certainty the terms of the contractual undertaking and the things to be performed. Courts cannot assume to make bargains for the parties or to speculate as to what mutual undertakings they might properly have entered into. A letter to the owner of a building proposing to lease it for a certain term and rental, upon condition of alterations being made according to plans "to be mutually agreed upon," and a letter from the owner accepting the offer, do not constitute a contract for a lease. The letters do not form a completed agreement, but are conditioned upon a future agreement between the parties as to plans of alterations. The lessee cannot waive any claim to alterations and demand a lease without them⁷). "Where a contract is a unit and is left uncertain in one particular, the whole will be regarded as inchoate, because the parties have not been ad idem, and therefore neither is bound."⁸) A contract by which the defendant oil company agreed to sell plaintiff its oil on such reasonable terms as to enable him to compete successfully with other parties selling within the same territory was held too indefinite and too general to be enforceable as a contract⁹).

7. COMPLETENESS. — A blank left in a printed or written contract may be supplied only where the instrument contains the means of supplying it with certainty. Where there is so great uncertainty that it cannot be known what is contracted for the contract is necessarily void on that account¹⁰).

8. LAPSE AND REVOCATION OF OFFERS. — A mere proposal, without a binding contract to keep it open, may be withdrawn at any time before acceptance. Thus, an application for life insurance is not a contract, and does not bind the applicant to take the policy or pay the premium until the proposal has been accepted by the company and a policy issued. Even if the application is accompanied by a note or by actual cash for payment of the premium, while the company is free to reject the applicant, he is free to withdraw or modify his application¹¹). An auctioneer

¹) 4 L. R. A. (N. S.) 177, note. — ²) *Spinney v. Downing*, (1895) 108 Cal. 666; *Edgemoor Bridge Works v. County of Bristol*, (1898) 170 Mass. 528. — ³) *Sanders v. Pottlitzer Bros. Fruit Co.*, (1894) 144 N. Y. 209; 29 L. R. A. 431, note. — ⁴) *Lyman v. Robinson*, (1867) 14 Allen, 254. — ⁵) (1871) 44 N. Y. 79. — ⁶) *Per Lord Wensleydale*, 6 H. L. Cas.

304. — ⁷) *Mayer v. McCreery*, (1890) 119 N. Y. 434; 23 N. E. 1045. — ⁸) *National Bank v. Hall*, (1879) 101 U. S. 43, 49. — ⁹) *Marble v. Standard Oil Co.*, (1897) 169 Mass. 553. — ¹⁰) *Church v. Noble*, (1860) 24 Ill. 291, Dec. Dig. Contracts, sec. 39. — ¹¹) *Travis v. Nederland Life Insurance Co.*, (1900) 104 Fed. 486.

may withdraw the property put up for sale if dissatisfied with the bids, as he merely calls for offers, which are not binding until the highest bid is accepted, and the goods are finally knocked down to the bidder. Until then, either goods or bid may be withdrawn¹). An agreement to keep an offer open for a certain time does not prevent revocation, unless part of a valid "option" contract to that effect²). An offer remains open until notice of revocation actually reaches the offeree or the offer expires by its own terms, and mailing an acceptance will complete the contract even if a letter of revocation is already in the mails³).

A proposal which calls for a reply "by return mail" must be accepted, if at all, by answer sent by the earliest mail⁴). Even without such express limit an offer continues open only a reasonable time, and one cannot hold under advisement for two days an offer of goods which fluctuate rapidly in price, as this would not be a reasonable time in commercial matters⁵). So conditions may be prescribed by the offer as to the place and mode of acceptance, and any departure therefrom is no acceptance⁶).

9. ACCEPTANCE AND MEETING OF THE MINDS. — Acceptance, to result in a contract must be an absolute and unqualified assent to the terms of the offer. If one party offers to sell another 5000 tons of iron rails, and the prospective buyer directs the seller to enter an order for 1200 tons on the same terms, this amounts to a rejection of the original proposal. A subsequent attempt to accept the prior offer amounts only to a new offer and creates no contract⁷). So, the answer to an offer which proposes modifications or introduces a new term, whether as to quantity, price, time, or place of performance constitutes a counter proposal⁸).

10. ACCEPTANCE BY PROMISE OR BY PERFORMANCE. — Some proposals such as an offer to guarantee payment of goods sold or money advanced to a third party, or an order of goods to be shipped, or the advertisement of a reward for the arrest and conviction of a criminal and the like, can be accepted only by complete performance of the acts and rendering the full consideration requested⁹). Such contracts are called "unilateral," as there is a promise only on one side, the consideration on the other being executed. In contracts of guaranty notice of the transaction with the principal debtor by which one accepts the offer, should be given to the guarantor¹⁰). Where, as is usually the case, the bargain proposed contemplates a bilateral contract with an immediate engagement on both sides, the commencing of the work or performance is not an acceptance¹¹).

11. CONTRACTS BY CORRESPONDENCE. — "It is to be taken as settled law, both in this country and England, in cases of contracts between parties distant from each other but communicating in modes recognized in commercial business, that where an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded when the offer is accepted in reasonable time, either by telegram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer be withdrawn, to the knowledge of the other party"¹²).

12. TIME OF CONSUMMATION. — The contract is completed as soon as a letter of acceptance in response to a previous offer by letter is deposited in the mail properly addressed and postage prepaid. The same rule applies to contracts by telegraph¹³). The contract is complete as soon as the telegram of acceptance, in response to an offer by telegraph is, deposited with the telegraph company for transmission to the offeree¹⁴). It has been held however, that an acceptance by telegraph of an offer by mail does not complete the contract until the telegram is delivered to the sender and if the company is negligent in promptly transmitting the message, no contract results¹⁵).

¹) Blossom v. Railroad Company, (1866) 3 Wall. (U. S.) 196. — ²) Hayes v. O'Brien, (1894) 149 Ill. 403, 411. — ³) Wheat v. Cross, (1869) 31 Md. 99. — ⁴) McClay v. Harvey, (1878) 90 Ill. 525. — ⁵) Averill v. Hedge, (1838) 12 Conn. 424. — ⁶) Eliason v. Henshaw, (1819) 4 Wheat. 225. — ⁷) Minneapolis Railway v. Columbus Rolling Mill Co., (1886) 119 U. S. 149. — ⁸) Jenness v. Mt. Hope Iron Co., (1864) 53 Me. 20. — ⁹) Williams v. West Chicago, etc., Railroad Co., (1901) 191 Ill. 610. —

¹⁰) Bishop v. Eaton, (1894) 161 Mass. 496; cp. Davis v. Wells, (1881) 104 U. S. 167. —

¹¹) White v. Corlies, (1871) 26 N. Y. 467. —

¹²) Taylor v. Merchants Fire Insurance Co., (1850) 9 How. 390; Burton v. U. S., (1906) 202 U. S. 344. — ¹³) Brewer v. Horst-Lachmund Co., (1900) 127 Cal. 643; 50 L. R. A. 240, note. — ¹⁴) Andrews v. Schreiber, (1899) 93 Fed. 367. — ¹⁵) Lucas v. Western Union Telegraph Co., (Iowa, 1906) 6 L. R. A. (N. S.) 1016, note.

13. ACTUAL RECEIPT OF COMMUNICATION NOT NECESSARY UNLESS STIPULATED. — The mailing of a letter of acceptance is not in and of itself communication, but it normally results in that, and is directed to that end. The posting of a letter is therefore, like speaking to one present, the requisite expression of agreement which clinches the matter. The "minds of the parties meet," though not to the simultaneous knowledge of each. The letter must be properly addressed, stamped, and deposited in the post office or in one of the street letter boxes; otherwise it will not be a sufficient expression of agreement until it arrives at the destination. A proposal may of course make the formation of the contract dependent on actual communication or receipt of the acceptance¹).

14. ACCEPTANCE BY TAKING DOCUMENT. — Many contracts are made by the delivery and acceptance of a document, such as a railroad ticket, telegraph blank, bill of lading, warehouse receipt, or other instrument containing various terms and conditions. If the writing containing these terms and stipulations be accepted by the person to whom it is tendered he will as a rule be bound by its contents, fine print and all, whether he takes the trouble to read the document or not; and he cannot set up that he neither read, understood, or consented to them²). A party will not, however, be bound by conditions of a paper which he accepts, where the paper is a mere receipt not purporting to be a contract, or where the terms are not reasonably discernible and brought to his notice³).

15. WRITTEN CONTRACTS. — a) Necessity of Writing. — All contracts may be oral, and made by mere word of mouth, except such as are especially required by statute to be evidenced by some note or memorandum in writing signed by the party to be charged. These statutes are known as the "Statutes of Frauds" and are dealt with later⁴).

b) Execution of Written Contracts. — The execution of an instrument is the signing and delivering it, with or without affixing a seal⁵). A written instrument does not bind the party signing it if he suppresses or destroys it before he delivers it as a contract⁶). An instrument, whether operating as an executory contract or as a conveyance, must be delivered in order to be effectual. The delivery, however, need not be a manual transmission, but may be any act of acknowledgment or assent showing an intent to put the document into effect⁷).

There is no method of authenticating contracts in the United States by registration or inscribing them in the official records of a notary public or court, as is done in civil law countries. Acknowledgment before a notary is frequently made by statute *prima facie* evidence of the execution of the writing⁸).

c) Conditional Execution. — A contract executed by two alone, although in the body of the contract a third person was named as a joint contractor with the defendant was held valid against the party executing it, unless at the time he signed and delivered it he had expressly declared that he would not be bound unless the contract were executed by the third party⁹). There is, however, a conflict of authority as to the effect of the conditional execution of a contract under parol agreement that it shall not take effect until others have signed it¹⁰). When a contract provides for the furnishing of a bond to secure the performance of the contract, it is not complete until the bond is furnished, and until that time the parties may withdraw¹¹).

d) Signatures to Written Contract. — An agreement need not invariably be signed by all parties named in the body of the contract in order to become operative¹²). An agreement though signed only by one will bind the other party who adopts and acts upon it as much as if he had signed it¹³).

Where signatures are called for and contemplated by the body of a document, however, the absence of some of the names may raise a serious question whether the contract has ever been finally executed, especially where the contract contains reciprocal stipulations and covenants on the part of one who fails to sign¹⁴).

¹) *Lewis v. Browning*, (1880) 130 Mass. 173. — ²) *Boylan v. Hot Springs R. Co.*, (1889) 132 U. S. 146. — ³) *Michigan Central v. Michigan Springs, etc., Co.*, (1873) 16 Wall. 318. — ⁴) See *infra*, VII. G. — ⁵) *Cal. Code Civ. Proc. sec. 1933*. — ⁶) *La Prade v. Fitchburg & L. St. Ry. Co.*, (1910) 205 Mass. 77. — ⁷) *Hockett v. Jones*, (1880) 70 Ind. 227; *Cal. Civ. Code*, 1626. — ⁸) *Cal. Code Civ. Proc. sec. 1948*. —

⁹) *Dillon v. Anderson*, (1870) 43 N. Y. 231. — ¹⁰) 45 L. R. A., note. — ¹¹) *Standard Manufacturing Co. v. Lembke*, (1903) 108 Ill. App. 530. — ¹²) *Dillon v. Anderson*, (1870) 43 N. Y. 231. — ¹³) *Bloom v. Hazzard*, (1894) 104 Cal. 310; *Sellers v. Greer*, (1898) 172 Ill. 549; 50 N. E. 246. — ¹⁴) *Arnold v. Scharbauer*, (1902) 116 Fed. 492; *Spinney v. Downing*, (1895) 108 Cal. 666.

e) Parol Evidence to Vary Terms. — When the legal act of the parties is expressed in writing, whether the law requires such a contract to be evidenced by writing or not the written instrument is regarded as merging or “integrating” all prior and contemporaneous negotiations. No evidence, oral or written, is admissible to vary, contradict, or add to the terms of the written instrument. Every jurisdiction in the country has indorsed this rule, which, however, does not apply to a contract which is only partly reduced to writing¹). Written contracts may be varied by subsequent oral agreements and may be interpreted in the light of the circumstances under which the agreement was made²). So parol evidence may be given to connect different writings, unless the contract is within the Statute of Frauds³).

f) Expression of Consideration in Writing. — While the common law makes it essential to the validity of every contract not under seal that it be supported by a sufficient consideration, it is not necessary that a contract in writing, if not within the Statute of Frauds, should express a consideration, as it may be proved by parol evidence, or may be inferred from the terms and obvious import of the contract⁴). There is a conflict among the decisions of the courts of the different States where the statute requires that the agreement shall be in writing, some holding that only the promise need be in writing, others that the consideration, as well as the promise must be expressed⁵).

The acknowledgment of receipt of consideration in a contract may always be explained or contradicted like any other receipt. Where, however, a receipt also embodies a contract obligation parol evidence is inadmissible to vary or contradict the contractual portion⁶).

III. GROUNDS OF ENFORCEMENT. — A. Covenants and Specialty Contracts. —

A bare agreement, without any formality or reciprocity, is not sacred or enforceable in the common law. The ancient actions of covenant and debt, remedies whose theories were recognized long before assumpsit on simple contracts was developed, enforced a promise or acknowledgment of debt, when embodied in a specialty or deed executed with the formality of a seal. The obligatory force given to an instrument signed, sealed, and delivered did not rest on bargain, consideration, or agreement. It was binding on the promisor from the moment of its execution by him, even before any acceptance by the promisee. The man who set his hand to a deed was bound by the force of the deliberate and solemn form in which his intention was expressed, and no assent or consideration were needed to give it legal efficacy⁷).

DISUSE OF SEALS. — Although in ancient times great importance was attached to private seals as attesting in the most formal manner the execution of an instrument, in many jurisdictions seals have been entirely abolished by statute as to contracts. In many others a seal upon an executory contract is only presumptive evidence of a sufficient consideration, which may be inquired into⁸). In other States the distinction between sealed and unsealed writings is abolished and all are open to the defence of want of consideration, although all contracts in writing *prima facie* import a consideration⁹). While in a few of the more conservative jurisdictions, such as Massachusetts, Pennsylvania, Delaware, and Maryland, the seal is still respected, the tendency of the modern law is to abolish entirely the ancient distinction between sealed and unsealed writings, and to assimilate the theory of specialty contracts to that of simple contracts, requiring acceptance and consideration to charge the maker¹⁰). It is only with simple contracts that we are concerned in commercial affairs.

The common law courts might rationally have decided that any undertaking, assumed by voluntary act, provided it rested upon any reasonable and worthy basis (*causa*) should be valid and enforceable as a covenant. Lord Mansfield indeed sug-

¹) Chapin v. Dobson, (1879) 78 N. Y. 74. — ²) Cal. Code Civ. Proc., sec. 1856; Cal. Civ. Code, sec. 1625. — ³) Bradley v. Washington & Packet Co., (1839) 13 Pet. 89, 10 L. Ed. 72, note; Bailey v. Railroad Co., (1873) 17 Wall. 96, 105; see 10 L. R. A. 689, note. — ⁴) 60 Am. St. Rep. 432, note. — ⁵) Browne's Statute of Frauds, sec. 391; Patmor v. Haggard, (1875) 78 Ill. 607, 610. — ⁶) Fire Insurance Association v. Wickham, (1891) 141 U. S. 564, 35 L. Ed. 860, note. — ⁷) Sharp v. Bates, (1905) 102 Md.

344. — ⁸) Baird v. Baird, (1895) 145 N. Y. 659; N. Y. Code Civ. Proc., sec. 840, Stimson, Am. Stat. Law, 4121. — ⁹) Cal. Code Civ. Proc., sec. 1932; Cal. Civ. Code, sec. 1629. — ¹⁰) A voluntary deed or conveyance of land under seal is generally good without actual consideration, although it is customary to recite one to rebut any possibility of a “resulting use.” A scroll or scrawl with a pen or the letters “L. S.” or the word “Seal” are sufficient.

gested that there is no reason why all agreements in writing, at least in commercial affairs, should not be binding, as furnishing as good evidence of an intent to bound as a covenant under seal¹). If this suggestion had been adopted the principles of the English law of contract might have been more nearly assimilated to those of the modern civil law, as adopted by the law of Scotland²).

B. Consideration. — **1. ORIGIN.** — The English and American theory of contractual obligation rests primarily on the doctrine of consideration. This is a not very successful attempt to reduce to a rule of thumb that reciprocity which must exist in an agreement to raise a right to performance in favor of one party and to make non-performance a legal wrong on the part of the other. The doctrine grew up by a more or less accidental and obscure historical evolution in the judicial process of furnishing a remedy to those cases which could be brought within the theory of the action of *assumpsit*. The judges were doubtless somewhat influenced by the maxim, *ex nudo pacto non oritur actio*, by the analogy of *quid pro quo* in the action of debt, and by the delictual analogy of trespass on the case, which called for a remedy where there was a wrong or injury inflicted.

2. CONSIDERATION A DOUBLE TEST. — If we rationalize the doctrine of consideration, we shall find that the apparently arbitrary and technical rules of consideration furnish a touchstone or test of two substantive qualities in the transaction, viz: 1) Is the engagement of the parties put on the basis of bargain, or is the real basis gratuitous? 2. If a bargain is found, does the subject matter given in exchange have sufficient possibility of value to be the foundation of a legitimate claim, or is it obviously insufficient?

3. BASIS ON BARGAIN. — The typical contract in the common law may be defined as an obligation arising from bargain. All business dealings consist in the last analysis of bargains, or arrangements for present and future exchange. Without some positive sanction for the expectation that bargains will be honestly fulfilled men would be unable to do business or make reliable arrangements for the future.

Consideration is primarily the test of bargain, and may be defined as the thing which the promisee gives or promises to give in exchange for the thing promised; not for the promise, as it is usually expressed. Nothing is a consideration which is not regarded or treated as an item of the exchange by the parties. To give it that effect it must have been offered by one party and accepted by the other as the inducement or moving cause or reciprocal concession for what is promised. "The mere presence of some incident to a contract, which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract"³). Thus, an agreement in writing to pay the debt, note, or obligation of another, if it remains unpaid at a future date, finds no consideration by reason of the mere forbearance of the creditor to sue, although in reliance on the promise of the guarantor, where the latter makes no request for forbearance of suit and the creditor does not agree to forbear suit in consideration of the guaranty⁴).

a) Subscriptions to Charitable Objects. — Subscriptions of money to charitable objects, such as the building of churches, though originally invalid for want of consideration, are generally held to become binding contracts where money is expended and liabilities are incurred on the faith of the subscription⁵). The courts in their endeavor to apply the ordinary tests of consideration to such a contract have indulged in a variety of speculations more curious than useful, e. g., finding the consideration in the mutuality of promises among the subscribers or a supposed request to proceed on the strength of the subscription. The truth is that the dealing does not proceed on the basis of consideration, exchange, or the reciprocity of bargain, but of benevolence or generosity. The doctrine of consideration is not wide enough to cover all cases of just obligation and has to be strained to cover cases of change of position in reliance on a promise to make a gift⁶). In general, however, promises to make a gift, as by the delivery of one's promissory note, even where one feels in honor bound to reimburse a loss, or a promise to pay an annuity to a friend or relative out of motives

¹) *Pillans v. Van Mierop*, (1765) 3 Burr. 1664. — ²) *Wald's Pollock on Contracts*, (3d ed.) p. 198. — ³) *Fire Insurance Association v. Wickham*, (1891) 141 U. S. 564, 579. — ⁴) *Oneal Co. v. Peterson*, (Iowa, 1908), 116 N. W. 593;

19 L. R. A. (N. S.) 842, note. — ⁵) *Presbyterian Church v. Cooper*, (1889), 112 N. Y. 517, 8. Am. St. Rep. 767 — ⁶) See *Wald's Pollock on Contracts* (3d ed) p. 215, note 24.

of love and gratitude for past services¹), are held to be without sufficient basis in consideration.

b) **Element of Consideration in Bilateral Contracts.**—It is pointed out by Professor Williston, the leading American authority on the law of contracts and sales, that there has been much difference of opinion among legal scholars on the elementary question of what is the essential element consideration in bilateral contracts²). When the action of assumpsit was first introduced the only consideration recognized was an executed consideration, a detriment already incurred. But in the 17th century the formula was adopted that “mutual promises are a consideration for each other.” This formula is misleading. When we say that “mutual promises are consideration for each other,” we speak elliptically and use “promise” for “promised performance.” Professor Williston points out that the parties to a bilateral contract always contemplate that the performance on one side shall be the exchange or price of performance on the other³). Courts and writers, however, have got tangled up in the formula, and have attempted to find the “legal detriment” of consideration in the promises at the moment when they are given. But it is a complete circle to say that promises are binding because they are consideration for each other, and that they are consideration because they are binding, and so a legal detriment⁴). If there will be a real exchange by performance the test of bargain is satisfied⁵); we do not have to figure out a detriment already incurred at the making of the contract. To insist on that is, in effect, to deny the possibility of executory consideration altogether.

4. **SUFFICIENCY OF CONSIDERATION.**—A consideration need not be adequate, in the sense of being a fair equivalent of what is promised. The parties must make their bargains for themselves. Nevertheless the consideration must have some possible value in the eye of the law. This is expressed by the formula that the consideration must be a “legal detriment” to the promisee, involving some real concession or change of legal position. The giving of a less sum of money for a greater, the abstaining from a crime, tort, or breach of legal duty, the forbearance to insist on a claim clearly untenable, are not regarded by the law as sufficient inducement to create a contractual claim⁶).

a) **Recital of Payment of Nominal Sum.**—“A consideration of one dollar is just as effectual as a larger sum stipulated for or paid. A valuable consideration, however small or nominal, is sufficient to support a contract of guaranty or any other contract. If the promisor has not received it in fact, he will be entitled to receive it”⁷). It has been held, however, that a recited consideration of one dollar for an option to purchase real estate extending over a year is so flagrantly disproportionate to the value of the privilege in such a case that it is obviously nominal. The parties could not have regarded it as an equivalent or the agreed value of the thing contracted for, and it is as a matter of law not a consideration at all⁸).

b) **Forbearance and Compromise.**—The waiver, release, or surrender of any legal right, as the forbearance to sue even for a day or the compromise of a debatable claim, are sufficient consideration. There is some difference of judicial opinion whether it is sufficient that a claim be honestly asserted, or whether it must also be reasonably doubtful in fact or law to be the basis of a valid compromise⁹). The release of an entire debt admittedly due on payment of part is not a satisfaction of the whole, but if there be a bona fide dispute over the amount due, the adjustment of the dispute may be the basis of a settlement in full by the payment of part¹⁰).

c) **Completing a Contract, as Consideration for Promise of Additional Compensation.**—If a contractor threatens to break his contract on account of unforeseen difficulties and expense, unless he is promised an increased price for his services over and above the contract price, can he recover the additional compensation? There

¹) *Richardson v. Richardson*, (1893) 148 Ill. 563; *Parsons v. Jeller*, (1907) 188 N. Y. 318. — ²) *Wald's Pollock on Contracts*, 3d ed. p. 201, note 141, p. 324, note. — ³) 8 Harv. Law Rev. 27. — ⁴) *Wald's Pollock on Contracts*, (3d ed.) p. 209; *James Barr Ames*, 13 Harv. Law Rev. 29. — ⁵) Take the case of an infant's promise, or that of a party who does not sign a contract within the Statute of Frauds. — ⁶) *Feeter v. Weber*, (1879) 78 N. Y. 334; *Luken's Appeal*, (1891) 143 Pa. St. 386,

22 Atl. 892. — ⁷) *Davis v. Wells*, (1881) 104 U. S. 167; 26 L. ed. 690; *Lawrence v. McCalmont*, (1844) 2 How. 426, per Story J.; *Southern v. Harris*, (1903) 44 S. E. 885. — ⁸) *Murphy v. Reid*, (Ky. 1907) 10 L. R. A. (N. S.), 195, note; see *Pollock v. Brookover*, (1906) 6 L. R. A. (N. S.), 403; *Great Western Oil Co. v. Carp*, (Tex. 1906) 95 S. W. 57. — ⁹) *Wahl v. Barnum*, (1889) 116 N. Y. 87; 22 N. E. 280. — ¹⁰) *Fire Insurance Association v. Wickham*, (1891) 141 U. S. 564.

is a sharp conflict of authority whether the promise made to induce the contractor to complete what he was already bound to do is supported by sufficient consideration. It is difficult to find a "legal detriment" in such a case, although there may be a very great detriment in fact on the contractor's part and a very valuable benefit to the promisor. Subtle refinements of speculation are indulged in by some courts to satisfy the requirement of a "legal detriment," for example, an imaginary rescission of the old contract and the making of a new one in its place, for a larger compensation, but without reciprocal advantage to the promisor¹), or the waiver of a supposed right to break the contract and pay damages²). Looking at the question of sufficiency of consideration broadly the real issue in such cases would seem to be, not the metaphysical possibility of finding a "legal detriment," but whether good faith and business policy are promoted in the long run by permitting a contractor to exact additional compensation to prevent a breach of his contract. In some cases conditions unforeseen when the contract was made justify a demand for more pay, and when the contractor goes ahead in reliance on the promise, there seems little justice in excusing the promisor who was sane, *sui juris*, was not imposed upon, knew what he was about, acted for his own advantage and got what he bargained for³). On the other hand, the court properly refuses its aid to a contractor who takes unjustifiable advantage of the necessities of the other party to coerce a promise to pay increased compensation⁴).

The contractor may easily protect himself, however, for the slightest modification of the contract in favor of the party agreeing to pay additional compensation for completion, such as additional work or the compromise of any honestly disputed point concerning the contract will, according to all authorities, furnish sufficient consideration⁵).

d) Completion of Contract with Third Party as Consideration for Promise. — A promise of additional compensation for the performance of what one is already under obligation to a third party to do, is held by the weight of authority in the United States to be invalid as lacking consideration⁶). The contrary is the law in England, at least as to bilateral contracts. It is assumed in the American cases that by the doing or by the undertaking to do what one is already bound to do for another, one incurs no "legal detriment." It may well be that on grounds of justice and good faith a contractor should not be assisted to exact more pay from the other party to a contract. But if a stranger to the contract wishes to offer additional inducements to complete performance, it seems rather far-fetched to deny the contractor a recovery. To hold that what the promisor receives is not adequate or sufficient in value to form the basis of a contract, merely because another may be entitled to insist on the performance of the same thing, seems to be carrying the test of consideration to a ridiculous extreme and to be losing sight of the purpose for which it is applied. That there may be a contract for the same thing with another is none of the promisor's business. That is a matter purely between the parties to that contract. To inquire into the condition of obligations of one of the parties to a stranger to the contract serves no purpose of justice or utility, but results from the blind and mechanical application of the test of consideration as a mere rule of thumb⁷).

e) Mutuality of Obligation. — As a general rule a purely executory bargain does not bind either party unless both parties are bound to something definite and certain. Mutuality of obligation is an essential feature of every bilateral contract resting on mutual promises or undertakings⁸). If one party cannot hold the other to anything definite and certain by the terms of the agreement the transaction is "unilateral" and no contracts exists against either. Thus, where a proposal was accepted to furnish another "what pails he might want," the price and terms of purchase being fixed, the agreement was held void for want of mutuality, as the defendant neither

¹) *Monroe v. Perkins*, (1830) 9 Pick. 298; *Abbott v. Doane*, (1895) 163 Mass. 433; 34 L. R. A. 38, note. *Linz v. Schunck*, (Md. 1907) 11 L. R. A. (N. S.) 789. — ²) *Bishop v. Busse*, (1873) 69 Ill. 403, 407. — ³) *Abbot v. Doane*, *supra.*; *Evans v. Oregon & Washington Railroad*, (Wash. 1910) 28 L. R. A. (N. S.) 455. — ⁴) *Alaska Packers Ass'n. v. Domenico*, (1902) 117 Fed. 99; *Shriner v. Craft*, (Ala. 1909) 28 L. R. A. (N. S.) 450, note. — ⁵) *King*

v. Louisville & N. R. Co., (1908) 131 Ky. 46; 114 S. W. 308; *Osborne v. O'Reilly*, (1887) 42 N. J. Eq. 468, 473; 9 Atl. 209. — ⁶) *Wald's Pollock on Contracts* (3d ed.) p. 210, *Williston's note* 19; *Vanderbilt v. Schreyer*, (1883) 91 N. Y. 392; *L'Amoreux v. Gould*, (1852) 7 N. Y. 349; 57 Am. Dec. 524. — ⁷) See *Harriman on Contracts*. — ⁸) *Parsons on Contracts*, (9th ed.) p. 486; *Page on Contracts*, p. 452; *Harriman on Contracts*, p. 682.

agreed to take or want such pails as he might sell in his trade, nor to take or want any pails whatever¹).

An accepted offer to furnish such goods and merchandise at certain prices and in such quantities as the tentative buyer shall require or want in his business is without consideration, unless there is an express or implied agreement by the buyer to purchase all the articles he may require of the seller. If the quantity to be delivered be conditioned by the will or wish of the buyer alone and be capable of infinite variation, the bargain is void for want of mutuality and consideration. But an obligation to take the entire supply of an established business is broken by buying elsewhere, and it is not entirely optional with the buyer whether to order or not²).

The later decisions are liberal in upholding such contracts, by implying an agreement on the part of the buyer that he will purchase all of the commodity covered by the contract which he may need in his business, thereby making the obligation mutual³). But where a contract of agency or employment does not bind one of the parties for either a definite or an indefinite time, although by its terms it does bind the other, there is no mutuality of obligation and the agreement is void⁴). A contract by an employer to give another person permanent employment at stipulated wages in consideration of giving up a claim for damages for personal injuries received by the servant is not lacking in mutuality, because the employee does not bind himself to continue in the employment, but has the option of quitting whenever he sees fit⁵).

A contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other party.

C. Promises Binding Without Consideration. — The common law courts have refused to go so far as the civil law in recognizing an agreement or declaration of intention to be bound, as a sufficient legal reason for enforcing a promise. The doctrine of consideration takes bargain as the exclusive and universal ground of contractual obligation. To this there are certain exceptions:

1. Bonds and covenants under seal, which came down from antiquity, and which are almost obsolete;

2. Promises founded on the existence of some moral obligation, or moral "consideration" as it is loosely called, where a person has received value from or occasioned by loss to another, and there is no question of unconsidered motive or ill-judged benevolence.

1. MORAL OBLIGATION AS A GROUND FOR ENFORCEMENT OF A PROMISE. — The broad doctrine that had some support in the early English cases⁶), particularly under the influence of Lord Mansfield, that a moral obligation is a sufficient legal reason to make a promise obligatory, was practically overthrown by the reporter's note to the case of *Wennall v. Adney*⁷). The idea, however, of existing legal liability as sufficient foundation to make an express promise binding was the origin of the action of indebitatus assumpsit on a debt, and is still sometimes recognized⁸). The moral obligation to compensate for past benefits received or past prejudice inflicted is (in certain cases of clear injustice) sufficient basis for the law to imply a promise and extend a quasi-contractual remedy. The acknowledgment of an equitable obligation in the nature of debt by a trustee makes him legally liable. In the case of certain obviously just claims, such as debts barred by the statute of limitations, by bankruptcy, or by want of notice to an indorser, when such claim is recognized by a promise, or even by an acknowledgment or admission, it will be enforced without any fresh consideration, on the ground that it is still due in conscience, notwithstanding the discharge by positive rule of law.

The explanation is sometimes attempted that such promises merely amount to the waiver of a personal defense or privilege against an existing contract, and a renewal of the preexisting legal liability on which the remedy merely is suspended. But the obligation in such cases arises not from the original liability, but on the

¹) *Higbie v. Rust*, (1904) 211 Ill. 333; 103 Am. St. Rep. 204. — ²) *Coldblast Transp. Co. v. Kansas City Bolt & Nut Co.*, (1902) 114 Fed. 77; 57 L. R. A. 646. *Wells v. Alexandre*, 130 N. Y. 642. — ³) *Lima Locomotive & M. Co. v. Nat'l. S. C. Co.*, (1907) 155 Fed. 77; see 11 L. R. A. (N. S.) 713, note; 1 L. R. A. (N. S.) 445; 19 L. R. A. (N. S.) 598, note. — ⁴) 20 L. R. A. (N. S.) 899, note; *Vogel v. Pekoc*, (1895)

157 Ill. 339; 8 L. R. A. (N. S.) 1004. — ⁵) *Carney v. Carr*, (Mass. 1897) 35 L. R. A. 512, note. — ⁶) *Lee v. Muggeridge*, (1813) 5 Taunt. 37. — ⁷) (1802) 3 Bos. & P. 249; see *Eastwood v. Kenyon*, (1840) 11 Ad. & El. 438. — ⁸) *Beadle v. Whitlock*, (1869) 64 Barb. 287; *Cent. Dig. Contracts* secs. 240, 255; *Dec. Dig. Contracts*, sec. 67.

circumstances creating a strong moral obligation recognized by the subsequent promise, which is the measure of the amount and conditions of the claim, and the basis of the remedy.

a) Moral Obligation where Former Debt Barred by Technical Defence. — The moral obligations most commonly recognized are those where the subsequent promise is founded on a formerly enforceable contract obligation, barred by some technical or statutory defense. The fact that a debt may be barred by the Statute of Limitations can affect the remedy only, but in no degree can it release the debtor from the moral duty of paying it, and the moral obligation will support a promise to pay it in whole or in part, conditionally or unconditionally¹). An acknowledgment or promise made while the contract is a subsisting liability extends the term of limitation prescribed, and when made after the bar of the statute establishes a new contract²). In most states statutes provide that no promise or acknowledgment is sufficient basis of a new or continuing contract by which to take the case out of the operation of the statute of limitations, unless made in writing, signed by the party to be charged³).

A new promise to pay after a discharge in bankruptcy or insolvency is obligatory by force of the subsisting moral obligation to pay⁴). But a new promise to pay a debt discharged by an accord and satisfaction, or by a voluntary release by the creditor, cannot thus be supported⁵). A promise by one after attaining majority to pay debts incurred during infancy needs no consideration. It is commonly spoken of as a "ratification" or "affirmance" of the former voidable contract.

b) Moral Obligation where there was no Original Legal or Quasi-Contractual Liability. — It is generally conceded that a mere conscientious duty, arising from relationship or moral sentiment, but not based on material value, is insufficient as a ground of enforcement⁶). There is, however, a square conflict of authority as to the sufficiency of moral obligation arising from the receipt of material or financial benefit, without any original contractual or quasi-contractual liability, to support a promise to pay. Such are cases where one promises to repay another who has paid his indebtedness, without request or authority⁷). There is some authority in favor of enforcing a promise by a woman after discovery to pay a void indebtedness incurred during coverture⁸). The cases are also in conflict as to whether there is any liability on a promise to pay for improvements placed on property without request on the supposed credit of the lessor, or by mistake⁹).

All of the authorities admit that, where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay is supported by the moral obligation to pay, although the legal obligation is gone forever; and there seems no just distinction between such cases and those in which there never was any legal, but only a moral obligation to pay¹⁰). The weight of American authority seems to be in favor of enforcing a promise to compensate for past benefits or services, (an "antecedent valuable consideration," as it is called), although unsolicited and rendered under circumstances not sufficient to create a contractual or quasi-contractual liability originally¹¹). But a moral obligation to support a promise must be an obligation of justice and common honesty, based on value received, almost sufficient to raise a quasi-contract; not a mere obligation of benevolence, relationship, or piety. It seems, furthermore, that the moral obligation must be coextensive with the promise, which may fall short of, but cannot go beyond it.

IV. DUTIES OF CONTRACTING PARTIES. — A. Law Governing Duties. — While it is frequently stated that the rights and duties of the contracting parties are to be

¹) McCormick v. Brown, (1868) 36 Cal. 180; see 102 Am. St. Rep. 751, note. — ²) Southern Pacific v. Prosser, (1898) 122 Cal. 417. — ³) Cal. Code Civ. Proc. sec. 360. — ⁴) Mutual Reserve Fund v. Beatty, (1899) 93 Fed. 747; Lambert v. Schmalz, (1897) 118 Cal. 33; see 38 Am. St. Rep. 737, note. — ⁵) Warren v. Whitney, (1845) 24 Me. 561; 41 Am. Dec. 406. — ⁶) Mills v. Wyman, (1825) 3 Pick (Mass.) 207. — ⁷) Ingraham v. Gilbert, (1855) 20 Barb. (N. Y.) 152; Mass. Mutual Life Insurance Co. v. Green, (1904) 70 N. E. 202; 185 Mass. 306; Thompson v. Thompson, (1902)

76 App. Div. (N. Y.) 178; 78 N. Y. Supp. 389. — ⁸) Goulding v. Davidson, (1863) 26 N. Y. 604; see 7 L. R. A. (N. S.) 1053, note. — ⁹) Notably Bailey v. Rutjes, (1882) 86 N. C. 517; contra Cornell v. Vanartsdalen, (1846) 4 Pa. 369. — ¹⁰) Ferguson v. Harris, (1893) 39 S. C. 323; 17 S. E. 782. — ¹¹) See exhaustive notes to Muir v. Kane, (1910) 26 L. R. A. (N. S.), 532; 53 L. R. A. 353, note; Drake v. Bell, (1899) 55 N. Y. Supp. 945; Ferguson v. Harris, (1893) 39 S. C. 323; 17 S. E. 782; Landis v. Royer, (1868) 59 Pa. St. 95; In re Kern's Estate, (1895) 171 Pa. 55; 33 Atl. 129.

determined with reference to the law of the place where the contract is made (*lex loci contractus*), the statement is subject to a qualification of first importance. If the contract is made in one jurisdiction, but is performable in another, the law of the place of performance (*lex loci solutionis*) will control the contractual duties¹).

The American authorities are not entirely harmonious in this connection, but the general trend of the decisions is unmistakable. The law thus follows the presumed intent of the parties, for in the words of Lord Esher, "the business sense of all business men has come to a conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country"²). On the other hand, if it should appear, from an examination of the terms of the contract, that the parties intended their contractual responsibilities to be governed by the law of the place where the contract was made or even that of some other jurisdiction, that intent will be effectuated unless in derogation of the established public policy or a statutory enactment of the forum (place of trial). Accordingly, if two persons enter into an undertaking within the United States to be carried into execution in England, the law of England will, in default of agreement to the contrary, measure their respective obligations. But if it is in terms provided that the law of New York or the law of France shall afford the measure of the rights and duties arising under the contract, the expressed intent will prevail⁴). In short, the criterion generally recognized is the true intent of the parties⁵).

B. Rules of Construction. — 1. The intent of the parties is to be ascertained primarily from the terms of their undertakings in the light of the attendant circumstances. It is immaterial that one party did not intend the meaning which his words conveyed to the other, — he is held to their natural and necessary import. The necessity of this doctrine is self-evident, for if one could be heard to say that the language in which his promise was couched did not represent his actual purpose, contractual obligations would promptly be deprived of the last vestige of certainty. Consequently, it is universally held that a promise must be construed as the maker knew, or ought to have known, that it would be understood by the other contracting party⁶). Secret intent and undisclosed motive are immaterial.

2. The intent of the parties is to be determined through an examination of the contract as an entirety⁷). It is often possible that certain provisions, considered individually, will bear a construction entirely at variance with the meaning which will properly attach to them when read in conjunction with the rest of the contract.

3. The preliminary negotiations and agreements of the parties may often be taken into consideration as shedding light on the terms eventually formulated⁸). It should be observed, however, that such preliminary negotiations are not ordinarily entitled to weight except when the import of the formal undertaking is doubtful⁹). Furthermore, they are usually rendered unavailable, except in the case of verbal contracts¹⁰), by the operation of the parol evidence rule, *infra*.

¹) *Pritchard v. Norton*, (1882) 106 U. S. 124; *Hall v. Cordell*, (1891) 142 U. S. 116; *Mason v. Dousay*, (1864) 35 Ill. 424; *Lee v. Selleck*, (1860) 32 Barb. 522; *Carnegie v. Morrison*, (1841) 43 Mass. 381; *Succession of Wilder*, (1879) 22 La. Ann. 219; 2 Wharton, *Conflict of Laws*, sec. 439a. — ²) *Chatenay v. Brazilian Submarine Tel. Co.*, (1891) 1 Q. B. 79, 82, 60 L. J. Q. B. 295, 63 L. T. Rep. (N. S.) 739. — ³) *McAlister v. Smith*, (1856) 17 Ill. 328; *Hyatt v. Bank of Kentucky*, (1871) 71 Ky. 193; *First Nat. Bk. v. Shaw*, (1874) 61 N. Y. 283. — ⁴) *Greer v. Poole*, (1880) 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. Rep. N. S. 687; *Le Breton v. Miles*, (1846) 8 Paige (N. Y.) 261; — ⁵) 9 Cyc. 665. — ⁶) *Mansfield v. Hodgdon*, (1888) 147 Mass. 66; *Talcot v. Arnold*, (1874) 61 N. Y. 616; *Nichols v. Mercer*, (1867) 44

Ill. 250; *Metropolis Nat. Bank v. Kennedy*, (1872) 84 U. S. 19; *McConnell v. City of New Orleans*, (1883) 35 La. Ann. 273; 9 Cyc. 577; *Wald's Pollock on Contracts*, revised by Williston, p. 317. — ⁷) *Mauran v. Bullus*, (1842) 41 U. S. 528; *Ches. & Ohio Canal Co. v. Hill*, (1872) 82 U. S. 94; *Wilson v. Marlow*, (1872) 66 Ill. 385; *Potter v. Berthelet*, (1884) 20 Fed. 240; *Hull v. Burr*, (1909) 58 Fla. 432; 9 Cyc. 579. — ⁸) *Gill Manuf. Co. v. Hurd*, (1883) 18 Fed. 673; *Jennings v. Whitehead, etc., Co.*, (1885) 138 Mass. 594; *Kennedy v. Porter*, 109 N. Y. (1882) 526; 9 Cyc. 579. — ⁹) *Glynn v. Moran*, (1899) 174 Mass. 233; *Jennings v. Whitehead, etc., Co.*, (1885) 138 Mass. 594. — ¹⁰) *Pierson v. Hoag*, (1866) 47 Barb. (N. Y.) 243.

4. Parol evidence is not admissible to vary the terms of a written contract¹). When the parties have undertaken to embody the terms of their transaction in a written instrument, the document becomes the exclusive memorial of their legal act. If extrinsic evidence could be used to show that the transaction was different from that recorded in the writing, written contracts would lose much of their security, and fraud could readily be practiced²).

The parol evidence rule is, however, subject to certain well recognized exceptions, or, perhaps more accurately, qualifications: a) Proof of the invalidity of a written instrument, as by reason of non-delivery or conditional execution³), or of extrinsic circumstances such as mistake⁴) or fraud⁵), is not precluded; b) If the document does not purport on its face to comprehend all the incidents of the transaction between the parties, collateral agreements, whether prior to or contemporaneous with the execution of the written instrument, may be shown⁶); c) Alterations and erasures in the text of the written instrument are properly subject to explanation by oral evidence⁷); d) Ambiguous words and expressions are necessarily open to parol explanation in order that the court may determine with certainty the actual import of the instrument⁸); e) Technical and commercial terms⁹), local usages¹⁰), abbreviations¹¹), signs¹²), foreign language¹³), and matters of a similar nature going to the real meaning of the contractual undertaking are invariably subject to outside evidence in aid of construction; f) Discharge of obligation by performance of contract¹⁴), mutual rescission¹⁵), accord and satisfaction¹⁶), novation, subsequent agreement¹⁷), or any other effective means may always be established by oral testimony.

5. When a contractual provision is susceptible of conflicting interpretations, it will be accorded the construction most consonant with the general purposes of the contract¹⁸). It would be folly to so interpret a contract as to render it nugatory or partially ineffective, if that result can be avoided.

6. When one construction will make a contract legal and another will render it illegal, the former result will be achieved if possible¹⁹).

7. When the language of a provision is of uncertain meaning, it will be construed most strongly against the party who framed it²⁰). The object of this rule is to prevent one person from misleading another by an equivocal promise, and then seeking to derive an advantage by construing it most strongly in his own favor.

8. When it appears that the parties have proceeded in accordance with a particular construction of the contract's terms, the court will adopt that interpretation, unless prevented by other principles of controlling weight²¹).

C. Impossibility of Performance. — 1. DUTY OF PERFORMANCE ABSOLUTE. — The parties to a contract are under an absolute duty to perform their respective undertakings under the contract unless circumstances intervene which

¹) *Godkin v. Monahan*, (1897) 83 Fed. 116; *Poole v. Mass. Plush Co.*, (1898) 171 Mass. 49; *Frink v. Roe*, (1886) 70 Cal. 296; *St. Landry State Bank v. Meyers*, (1898) 52 La. Ann. 1769; *Pike v. McIntosh*, (1897) 167 Mass. 309; *Johnson v. St. Louis, etc., R. Co.*, (1891) 141 U. S. 602; 17 Cyc. 567, 596. — ²) *Wald's Pollock on Contracts*, (3d ed.) p. 310; 17 Cyc., sec. 568, 9. — ³) *Verzan v. McGregor*, (1863) 23 Cal. 339; *Burke v. Dulaney*, (1894) 153 U. S. 228; *Higgins v. Ridgway*, (1897) 153 N. Y. 130. — ⁴) *Lloyd v. Sandusky*, (1903) 203 Ill. 621; *Camden, etc., Works v. Fox*, (1887) 34 Fed. 200. — ⁵) *Race v. Weston*, (1877) 86 Ill. 91; *Miller v. Barber*, (1876) 66 N. Y. 558. — ⁶) *Raynor v. Drew*, (1887) 72 Cal. 307; *Taylor v. Wilcox*, (1897) 167 Mass. 572; 17 Cyc. 713, and cases cited. — ⁷) *Robinson v. Nevada Bank*, (1889) 81 Cal. 106; *Curtice v. West*, (1888) 50 Hun (N. Y.) 47; *Thomas v. Thomas*, (1899) 76 Minn. 237. — ⁸) *Stevens v. Wait*, (1885) 112 Ill. 544; *McLeroy v. Duckworth*, (1858) 13 La. Ann. 410; *Southampton v. Jessup*, (1903) 173 N. Y. 84. — ⁹) *Collender v. Dinsmore*, (1873) 55 N. Y. 200. — ¹⁰) *Myers v. Walker*, (1860) 24 Ill. 133. — ¹¹) *Converse*

v. Wead, (1892) 142 Ill. 132. — ¹²) *De Blois v. Reis*, (1880) 32 La. Ann. 586; *Arthur v. Roberts*, (1871) 60 Barb. (N. Y.) 580. — ¹³) *Erusha v. Tomash*, (1896) 98 Iowa, 510. — ¹⁴) *Howard v. Stratton*, (Cal. 1884) 2 Pac. 263; *Juilliard v. Chaffee*, (1883) 92 N. Y. 529. — ¹⁵) *Alschuler v. Schiff*, (1896) 164 Ill. 298. — ¹⁶) *Savage v. Blanchard*, (1889) 148 Mass. 348; *Tucker v. Tucker*, (1887) 113 Ind. 272. — ¹⁷) *Mackenzie v. Hodgkin*, (1899) 126 Cal. 591; 126 Cal. 591; *Janney v. Brown*, (1884) 36 La. Ann. 118; *Bradford v. Union Bank*, (1851) 13 How. 57. — ¹⁸) *Watts v. Camors*, (1881) 10 Fed. 145; *Tiernan v. Jackson*, (1831) 5 Pet. 580; *Saunders v. Clark*, (1865) 29 Cal. 299; *Field v. Leiter*, (1886) 118 Ill. 17; *Steinsping v. Bennett*, (1861) 16 La. Ann. 201; 9 Cyc. 586. — ¹⁹) *U. S. v. Cent. Pac. R. Co.*, (1886) 118 U. S. 235; *Crittenden v. French*, (1859) 21 Ill. 598. — ²⁰) *Dodge v. Walley*, (1863) 22 Cal. 224; *Duryea v. N. Y.*, (1875) 62 N. Y. 592; *Phoenix Ins. Co. v. Slaughter*, (1870) 12 Wall 404. — ²¹) *People v. Murphy*, (1886) 118 Ill. 159; *Millikin v. Minnis*, (1838) 12 La. 539; *Katz v. Bedford*, (1888) 77 Cal. 319.

suspend or excuse their responsibility. A promisor is, as a general rule, liable for the non-performance of his promise, even if he is not guilty of wilful default, negligence, or remissness. He must perform his promise according to its literal terms, as interpreted by the ordinary canons of construction, even though an accidental calamity may render the performance of his promise unexpectedly burdensome or even impossible¹). The utmost good faith and diligence will afford no excuse for failure unless the fatal obstacle has been expressly made an excepted risk, or comes within certain exceptions where the law implies an intention that in such an event the contract shall cease to be binding.

In ascertaining the duties under contract the law has, for the most part, followed the literal wording of the promise, and has refused to look beyond the construction of the terms into the nature or justice of the transaction. Partly from failure to appreciate the nature of contractual relations, partly from unwillingness to declare new law, the tendency may be observed, even to this day, to reduce all rules as to duties under contract to rules of construction or interpretation.

The general doctrine as to the absolute character of contractual duties was pronounced in the early case of *Paradine v. Jane*²): "Where the law creates a duty or charge and the party is disabled to perform it without any default in him, there the law will excuse him But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."

ASTOUNDING as the fact may seem, it is still the general American rule that impossibility of performance by act of God will not discharge the promisor from his contractual liability. The cases exemplifying the doctrine are numerous and variegated. One who contracted to build a canal on certain lands was unable to perform his agreement because of the refusal of the owners of the lands to sell them. It was held that this circumstance afforded no release from responsibility³). One who contracted to pasture on another's land "all the cattle it shall be capable of grazing, in no case less than 3000 head," was held liable for the pasturage of 3000 head, although the land could not possibly sustain that number⁴). A manufacturer is not relieved of liability for failure to perform his contract for the sale of goods by reason of the breakdown of his machinery⁵). One who contracts to deliver goods within a designated period of time is not excused from performance by the freezing of a river on which the goods are to be transported⁶).

If a building contractor agrees to construct a house on the land of another, and performance is rendered impossible by reason of a latent defect in the soil or by destruction of the building by fire or earthquake shortly before the day named for completion, liability for the breach cannot be avoided⁷). In fact, such accidental calamity would, in all probability, afford no excuse for the delay in construction. The contractor must perform his promise or respond in damages for the breach, notwithstanding the fact that unforeseen accidents have rendered the performance of the contract unexpectedly burdensome or even impossible.

2. EXCEPTIONS IN CERTAIN CASES OF IMPOSSIBILITY. — Certain rules excusing a party from the performance of an undertaking which becomes impossible have found a place in our law as rules of construction or interpretation of the intent of the parties. These "unexpressed conditions of the agreement" covering contingencies not contemplated by the parties, are in fact created by law from the nature of the transaction and principles of justice as between the parties. The object of the law of contracts is to establish a positive sanction for the expectation of good faith in business dealings. The fact that a promise is binding does not necessarily involve the consequence that the promisor is to be held bound by general words, which were not used with reference to the possibility of the particular contingency which afterwards happens. If something has happened which it is obvious

¹) *Summers v. Hibbard*, (1894) 153 Ill. 102; *Adams v. Nichols*, (1837) 19 Pick. 275; *The Harriman*, (1869) 76 U. S. 161; *Booth v. Spuyten Duyvil Co.*, (1875) 60 N. Y. 487; *Wald's Pollock on Contracts*, revised by Williston, p. 528, note. — ²) (1660) *Aleyn*, 26. — ³) *Stone v. Dennis*, (Ala. 1836) 3 Port. 231. — ⁴) *Williams v. Miller*, (Cal. 1885) 6 Pac. 14. — ⁵) *Summers v. Hibbard*, (1894) 153 Ill. 102. — ⁶) *Eugster v. West*, (1883) 35 La. Ann. 119. — ⁷) *Tompkins v. Dudley*, (1862) 25 N. Y. 272; *Simpson v. U. S.*, (1898) 172 U. S. 372.

that no person of intelligence could have contemplated, this should be regarded as outside of the risks fairly undertaken by the promisor and beyond the measure of his duty.

Early law knew only express conditions. Once having recognized a promise as binding, it seemed incapable of finding any other measure of duty than the literal terms. It might reasonably have been supposed that the law would excuse the promisor from the non-performance of an obligation when due to some risk which he had not undertaken and for which he was not responsible, and when his failure could not have been avoided by the exercise of all diligence and skill. But it is only in certain specific classes of cases, where, it is said, an intention may be presumed, that the law relieves from an apparently unqualified undertaking. These particular instances of impossibility exist by virtue of: a) the nature of the undertaking itself, and b) inability resulting from the circumstances of the promisor.

a) *Public interference with the subject-matter.* — A promisor is excused from performance where the thing to be done is rendered impossible by some legislative, executive, or judicial interference on the part of the public authorities¹). Where land is taken by the exercise of the power of eminent domain²), or where a corporation is enjoined from carrying on business at the instance of the State³), or in case of declaration of war⁴), the performance of certain contracts is rendered impossible. Such impossibility affords an excuse which the law cannot ignore without inconsistency⁵).

b) *Destruction or impairment of specified subject-matter.* — When, from the words of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless some particular specified thing continued to exist, the promisor is excused if performance becomes impossible through the destruction of the specified thing without default on the promisor's part⁶). This is explained upon the theory of a condition implied from what the parties must have contemplated when entering into the contract. Thus, where the contract contemplates work on a specified chattel or building, the destruction of the subject-matter excuses each party from further performance, being a misfortune equally affecting them both⁷). When one contracts to lease and work certain specified mines for a stipulated period and the mines become exhausted, the lessee is excused⁸). If the contract is to deliver a future crop from certain specified land, destruction of the crop by blight, frost, or other unexpected cause will relieve the promisor from liability⁹). If a contract is made for the sale of the product of a particular mill and the mill is destroyed, this circumstance will afford a complete defense for non-performance¹⁰). In each of the foregoing illustrations it is clear that the parties contracted with reference to the continued existence of a particular subject-matter, and the destruction of that subject-matter without fault on the part of the promisor operated to discharge the obligation.

When the continued existence of a definite object is not plainly the basis of the contract, impossibility of performance caused by the destruction of the means or materials on which the promisor depended will not excuse him from liability for non-performance. Such is the law even though it be apparent, from the nature of the contract, that a certain state of facts was contemplated as the foundation of what was to be done and although the untoward contingency was outside of the risks fairly undertaken by the promisor and beyond his control. This is true where performance becomes impossible entirely; a fortiori there is no excuse when performance is only inconvenient or impracticable.

3. *INABILITY RESULTING FROM CIRCUMSTANCES RELATIVE TO THE PROMISOR.* — It is seldom that the promisor is released from the duty of performance by difficulty or impossibility of a subjective kind, arising out of circumstances relative merely to himself¹¹). A debtor, who owes a certain amount but has neither money nor credit, is not thereby absolved¹²). The promisor is held to an

¹) Wald's *Pollock on Contracts*, revised by Williston, p. 525; 9 Cyc. 629, 630. — ²) *Baily v. De Crespigny*, (1869) L. R. 4 Q. B. 180. — ³) *People v. Globe Mutual Life Ins. Co.*, (1883) 91 N. Y. 174. — ⁴) *Esposito v. Bowden*, (1857) 7 E. & B. 763. — ⁵) *Cordes v. Miller*, (1878) 39 Mich. 581. — ⁶) *The Tornado*, (1882) 108 U. S. 342; *Walker v. Tucker*, (1873) 70 Ill. 527; *Thomas v. Knowles*, (1879) 128 Mass. 22;

9 Cyc. 631. — ⁷) *Gilbert Manu. Co. v. Butler*, (1888) 146 Mass. 82. — ⁸) *Walker v. Tucker*, (1873) 70 Ill. 527. — ⁹) *Ont. Fruit Assn. v. Cutting Packing Co.*, (1901) 134 Cal. 21; *Lo-secco v. Gregory*, (1901) 108 La. 648. — ¹⁰) *Stewart v. Stone*, (1891) 127 N. Y. 500. — ¹¹) *Jones v. Anderson*, (1887) 82 Ala. 302. — ¹²) *Dean v. Lowey*, (1893) 50 Ill. App. 254.

external standard; he is answerable if the thing can be accomplished by anyone with the proper means and requisite skill, knowledge, and diligence even if he personally be wholly unable to perform¹). To this general rule, however, there are certain exceptions, which furnish further instances where impossibility is recognized as an excuse.

a) Physical incapacity for personal service. — Where performance relates to personal services which can be rendered only by the promisor, the death or serious illness of the promisor will constitute an excuse for non-performance²). But where the duty of performance is not of an individual, personal nature, it is no excuse that the promisor is disabled by illness, even though the execution of the undertaking by him may require his personal labor or supervision³).

b) Personal danger. — Reasonable fear of a contagious disease, such as small-pox, justifies a workman in refusing to perform under such circumstances of personal danger that no prudent man would incur the risk⁴).

c) Public interference. — When performance becomes impossible by the exercise of public authority over the person of the promisor, he should be excused from performance, just as in the case of public interference with the subject-matter. Thus, jury duty or a subpoena to testify in court should entitle one to postpone, if not to withdraw entirely from performance of his contract⁵).

d) Private interference. — Interference by private litigants with the promisor, as by injunction or writ of attachment, ordinarily does not excuse⁶). The promisor is held to the obligation of controlling the acts of third persons so far as may be necessary to enable him to perform his contract.

e) Failure of means of performance. — The destruction or impairment of the promisor's factory does not excuse from performance of a contract to deliver goods at a stated time if the contract did not require the goods to be manufactured in that factory⁷). Nor is the promisor excused from liability on a contract to sell goods manufactured at a particular mill by the fact that the machinery in the mill broke down thereby making the performance impossible⁸). There are, however, a few American decisions to the effect that the continued existence of the means of performance, if contemplated by the contract, is an implied condition of contractual liability⁹).

4. MEASURE OF DUTY DEFECTIVE. — The specific classes of exceptional cases in which an excuse is recognized for failure to perform the contractual undertaking do not comprehend all cases in which, upon principle, an excuse should be permitted. The only escape from the express terms of the promise is found in the fiction that the excuse was impliedly provided for and may be attained by construction. It should, however, be apparent that for the law to make a rule as to the measure of contractual duty is not subject to the objection that the court is enforcing a different contract from that which the parties have made for themselves. It is not altering or adding to a contract to refuse to visit on one party the results of a common misfortune equally affecting both in the accomplishment of the objects of the contract.

It may be presumed, from considerations of policy and caution, that a risk is assumed unless of such a nature that it obviously would not be assumed by a reasonable man. But it should not be assumed that either party intended to be bound to do something impossible in itself or clearly outside the realm of bargain. It is unjust to throw upon the promisor the entire responsibility of anticipating and guarding against every difficulty and providing against every contingency that may intervene and result in hardship, no matter how absurd the idea of execution thereafter may be.

5. CONTRAST WITH THE CIVIL LAW. — Under the Civil Law the promisor, as a general rule, is not liable for the non-performance or incomplete performance of his promise, if rendered impossible by any circumstance not brought about by his negligent or wilful default or omission of the diligence usual in ordinary intercourse. Even if a debtor is, by the terms of his promise, bound in a particular case without reference to any default on his part, failure of performance is excused if unavoidable

¹) *Kenwood Bridge Co. v. Dunderdale*, (1893) 50 Ill. App. 581. — ²) *Spalding v. Ross*, (1877) 71 N. Y. 40; *Stewart v. Loring*, (1862) 5 Allen, 306; *Blakely v. Sousa*, (1900) 197 Pa. St. 305. — ³) *Jennings v. Lyons*, (1876) 39 Wis. 553. — ⁴) *Lakeman v. Pollard*, (1857) 43 Me.

463. — ⁵) 9 Cyc. 630. — ⁶) *Klauber v. Street Ry. Co.*, (1892) 95 Cal. 353. — ⁷) *Jones v. U. S.*, (1877) 96 U. S. 24. — ⁸) *Summers v. Hibbard*, (1894) 153 Ill. 102. — ⁹) *Dexter v. Norton*, (1871) 42 N. Y. 62.

by the application of the highest degree of diligence¹). The Civil Law does not visit on one party the results of a common misfortune upon the fallacious assumption that otherwise it would be making a new contract for the parties. The object of the law of contracts is to require good faith in the fulfilment of contractual engagements, — not to make the promisor an insurer against risks unforeseen and outside the scope of the bargain.

Lex non cogit ad impossibilia. In order to escape the hardships of the law with respect to impossibility of performance, the cautious contractor will expressly stipulate that his undertaking is contingent upon strikes, fires, floods, earthquakes, acts of God, and all other causes beyond his control.

D. Dependency of Duties on Reciprocal Performance. — The early English decisions treated the reciprocal duties of the parties to a bilateral contract as independent, unless expressly or by construction made dependent upon performance on the other side. One party might hold the other liable for failure to perform irrespective of default on his own part. The pursuit of these principles, however, led to such anomalies and worked results so subversive of justice that the old doctrine has been broken through. The prevailing rule in both England and America is to regard mutual undertakings as dependent wherever possible.

1. BREACH OF CONTRACT BY ONE WHOSE CONSIDERATION IS DUE AS AN EXCUSE FROM RECIPROCAL DUTY. — Where a party to a bilateral contract totally or partially fails to perform what he has promised at the proper time, the other party frequently may in turn decline to perform his reciprocal duty. It would be unfair to compel A to live up to his side of an exchange when B has made default in the consideration for which he bargained. A is accordingly excused by the failure of the other party to perform his obligation when due, just as he is excused by premature refusal to perform, his expectation of consideration thus being thereby destroyed or disappointed²). Breach of contract always gives a right of action, but not always an excuse to the other party.

What total or partial default entitles A to say that the basis upon which he made his promise is broken, that the consideration for it has failed, that he will no longer go ahead with the bargain? This is frequently a difficult question, and depends upon circumstances.

a) Slight breach “in limine.” — Even a slight breach at the outset may be fatal and terminate the duty on the other side³). More serious breach is required after part performance than before, since if nothing has been done, there is less hardship in withholding performance even for a slight fault⁴). Even so the fault must be a substantial one, not merely a breach of some subsidiary promise.

An illustration of a breach in limine constituting a sufficient defense to an action upon a contract is afforded by the case of *Davison v. Von Lingen*⁵). The defendant chartered the steamship “Dove” “now sailed or about to sail from Benizaf with cargo for Philadelphia.” In fact, the vessel was then loading at Benizaf and did not sail until seven days later. The charterer declined to accept her on the ground that she had neither sailed nor was she about to sail at the time when the charter-party was entered into. It was held that the time and situation of the vessel were essential and substantive parts of the contract and that the charterer need not accept the ship.

b) Material breach after part performance. — After the contractor has gone ahead, what is a material breach becomes a very different question. Even a wrongdoer ought not to forfeit the benefit of part performance unless in serious default. After accepting substantial part performance it may be a breach of good faith for one to call the contract off by reason of technical, inadvertent, or unimportant omissions or defects in compliance with the terms of the contract. Accordingly, it is no longer competent for the recipient to insist upon literal and exact performance as a condition precedent to performance by himself; he must perform and bring an action for damages sustained in not having received the whole consideration, unless the shortcoming is so vital that his legitimate expectation has in substance been defeated⁶). It is often very difficult to determine whether a breach is of the essence of the consideration and justifies a party in refusing to proceed further.

¹) Schuster, *Principles of the German Civil Law*, p. 153. — ²) 9 Cyc. 641. — ³) Blossom v. Shotton, (1891) 59 Hun, 481. — ⁴) McCue v. Orbituell, (1892) 156 Mass. 205. — ⁵) (1885)

113 U. S. 40. — ⁶) McDonough v. Evans Marble Co., (1902) 112 Fed. 634; Feeney v. Bardsley, (1901) 66 N. Y. L. 239.

In the case of *Nolan v. Whitney*¹), the plaintiff had agreed to construct a building in accordance with certain specifications. He endeavored in good faith to perform his part of the contract, but there were trivial defects in the plastering which could be covered by a deduction of \$ 200. The defendant refused to pay for the building, but occupied it nevertheless. The court allowed the plaintiff to recover upon the contract, holding that where a substantial performance is established, slight deviations, not wilful, may be an offset, but will not defeat suit. It would have been otherwise if the contractor had used inferior materials or intentionally violated the specifications.

2. **DIVISIBLE CONTRACTS.** — In divisible contracts, the consideration is apportioned to different items. Thus in contracts for carriage of goods, the debt for freight arises on delivery of each pound or bushel. The plaintiff can recover freight in proportion to the amount delivered, leaving the defendant to his action for short delivery²). So where the contract relates to separate matters, breach as to one matter does not excuse the party from performance as to the other matter. Thus in a charter-party a provision that the vessel shall be "tight, staunch, and strong" is a condition to taking the vessel; "keeping tight and sea-worthy" is a condition to continued use; delivery is a condition to payment of freight; but unseaworthiness is no defense, after the freight is delivered, to the collection of the debt for carriage.

3. **ENTIRE CONTRACTS.** — When in a bargain the consideration for performance of the promise of one party is the performance of the whole of the promise of the other, so that failure in any part is failure in the whole, the contract is said to be entire and not divisible. In the leading American case of *Norrington v. Wright*³), Wright had contracted to purchase 5000 tons of iron to be shipped in instalments of 1000 tons per month and to be paid for upon delivery. *Norrington* shipped only 400 tons during the first month and 800 tons during the second, and Wright thereupon declined to accept any further deliveries, asserting the right to rescind the contract. It was claimed on the other hand that each shipment was a separate undertaking and that default in one instance could afford no justification for refusal to accept subsequent instalments. The Supreme Court held that the contract was entire and that the subsidiary provisions as to periodical delivery or payment would not render the undertaking divisible or severable, as in cases where the consideration is apportioned to different items, as independent exchanges⁴).

4. **REPUDIATION AS A DEFENSE EXCUSING INNOCENT PARTY FROM PERFORMING OR TENDERING.** — Where the co-contractor has made it plain, in the course of performance or even before his performance is due, that he will not give the performance agreed upon as consideration, either because he cannot or because he will not, this excuses the other party from any duty of proceeding to execute the bargain⁵). "A promisor can no more be expected to perform his promise when he is not going to receive counter-performance, than when he has actually failed to receive it." The duty in bilateral contracts is dependent on the just expectation of consideration.

a) Must the aggrieved party elect? — It is said in the English cases that after repudiation, the other party may at his option treat the contract as at an end, or elect to keep the contract alive and give the repudiator a period for repentance. But it is held in the American cases that the plaintiff must not enhance the damages. He cannot treat the notice of repudiation as inoperative and go on with the contract⁶).

b) Retraction. — The voluntary exercise of the right to refuse to continue performance and stand on the defensive, does not terminate the contract. Repudiation or inability to perform will excuse the innocent party from performing, but retraction of the repudiation before performance is due would seem to make tender of performance necessary by the other party. The repudiator is estopped, however, to withdraw his repudiation after the plaintiff has acted in the representation, e. g., by failure to prepare for performance.

¹) (1882) 88 N. Y. 649. — ²) *Hutchinson on Carriers*, (3d ed.) sec. 800. — ³) (1885) 115 U. S. 188. — ⁴) The English cases seem to require such a failure in instalment contracts as amounts to a renunciation of the contract, but the American cases hold that repudiation is only one circumstance among others to show the materiality of the breach

and whether it is a defense for refusal to proceed further. — ⁵) *Ballou v. Billings*, (1884) 136 Mass. 307; *Anvil Min. Co. v. Humble* (1894) 153 U. S. 540; *Feinberg v. Weiher*, (1892) 19 N. Y. Supp. 215; *Brusie v. Peck Bros & Co.*, (1893) 54 Fed. 820. — ⁶) *Clark v. Marsiglia*, (1845) 1 Den. 317; *Kingman v. Western Mfg. Co.*, (1899) 92 Fed. 486.

c) Rescission distinguished from excuse. — Where the party wishes to terminate his legal relations entirely, and rescind the contract, he must manifest his election to do so. This is different from merely standing on the defensive. It is the assertion of an affirmative right, a remedy alternative to the right to damages, which is usually exercised where the aggrieved party has performed fully or in part and wishes to recover what he has given. As rescission is an alternative remedy, a party must manifest his election without undue delay¹); but it is not necessary to manifest acceptance of renunciation by refusal to perform, in order to make it operate as an excuse for further performance²). One waives his excuse from performance only by positive acts and estoppel.

5. PROSPECTIVE INABILITY TO PERFORM BY REASON OF INSOLVENCY OR OTHER CAUSE. — Where one party to a contract disables himself from making the conveyance or doing the work which the contract calls for, or becomes insolvent, the other party is in certain cases excused from prior performance on his part, just as in case of repudiation of the contract³).

6. FAILURE OF CONSIDERATION. — Failure of consideration implies that the rewas a consideration sufficient to support a contract, but that it has subsequently failed, in whole or in part, without the fault of the promisor. It is not properly applied to contracts wanting in consideration at their formation, or even where consideration fails by the default of the other party, although frequently so employed. Failure of consideration is a defense even to unilateral contracts or to specialties, if in fact the contract was based on an exchange. Thus, the dependency of performances of the two sides of an exchange may appear after both have been executed, where the basis of the contemplated exchange breaks down, in the right to rescind and recover what has already been rendered on the false basis⁴).

a) Exchange illusory. — Where a man agrees to buy that which is already his own, the basis of his reciprocal duty proves entirely inadequate. So where the seller has no title to the subject matter and his deed is inoperative, or where he purports to transfer void patents, the bargain falls through; the consideration fails although the promisee has done everything in his power to execute the consideration⁵). Where one party is excused by impossibility of performance, the other is excused from his reciprocal duty by failure of consideration⁶).

b) Destruction of continuing consideration. — One who rents the use of offices or apartments in a building for a period of time, with no interest in the soil upon which the building stands, is released from his duty by the accidental destruction of the edifice, whereby he is deprived of the continued use and enjoyment which is the consideration for his promise to pay periodic rent⁷). It is so in the case of letting and hiring of chattels, if the rental value of the personalty is lost.

Where a house rented for a term is destroyed before the end, this does not relieve the lessee from duty to pay rent. While letting and hiring agreements relating to chattels or the use of apartments are of a purely contractual nature, leases of land with buildings thereon confer an estate for years in the soil. The destruction of the

¹) *Hennessy v. Bacon*, (1890) 137 U. S. 78. — ²) *Wald's Pollock on Contracts* (3d ed.) p. 351. — ³) Professor Williston on this point says: "There is some difficulty in determining when it is sufficiently certain that one side of a contract will not be performed, to justify a refusal to perform the other side. Certainly if a party announces that he cannot perform, the other party is justified in taking him at his word. Destruction of the subject-matter of the promise of one party is clearly a defense to the other. Transfer to a third person of property forming the subject-matter of the contract is not so clear, since it is possible that the grantor may recover the title in time to fulfill the contract, but ordinarily the chance seems so remote that the defense should be allowed. A bankrupt's trustee may find it for the advantage of the insolvent estate to complete the bargain, and if so he ought to have that right. But no one is obli-

ged to give credit to one who is insolvent or bankrupt, performance of his promise being thereby rendered insecure. Insolvency or bankruptcy affords a defense to any such contractual obligation, and payment may be required on delivery, though the contract expressly provides for a term of credit. And if a contract is of such a nature that an assignee cannot carry it out, insolvency will excuse further performance by the other party. These seem to be the only cases in which prospective inability of one party is sufficiently certain to be a defense to the other party." *Wald's Pollock on Contracts*, (3d ed.) p. 354. — ⁴) *Sterling v. Gregory* (1906) 149 Cal. 117; *Roberts v. Fisher*, (1873) 65 Barb. 303. — ⁵) *Harlow v. Putnam*, (1878) 124 Mass. 553; 3 *Page on Contracts*, sec. 1480. — ⁶) *German-Amer., etc., Co's Assignee v. McCulloch*, (1885) 28 Ky. Law, 133. — ⁷) *Shawmut Bank v. Boston*, (1875) 118 Mass. 125.

building is regarded as a common misfortune, depriving both parties to some extent of their interests in the property, and the tenant must continue to pay occupation rent for a burnt-out plot of ground¹).

Under the Civil Law and the older English law, the letting of land only confers a contractual right on the lessee of the same legal character as the letting of a horse or bicycle for an hour. The obligation to pay rent does not last if the fitness for the use agreed upon is destroyed or impaired²). But by the modern common law to rent land is one thing, to rent a room or a chattel is a different thing. Thus, where one leases land with a building upon it for five years, and the building is next day destroyed by fire, the tenant must during the whole five-year period regularly pay his rent, there being no implied covenant on the part of the landlord to repair or rebuild.

c) Risk of loss in an executory contract of sale. — In contracts of sale of a house or building there is no abatement of the purchase price in case of destruction of the building, even if such accident deprives the premises of all their value³). At common law, it would seem that the buyer would be protected by "implied conditions" against failure of consideration; the owner cannot furnish the consideration agreed upon, namely, a house and lot for the purchase price. In equity, however, where the buyer of land has the remedy of specific performance, he is regarded as the substantial owner of the land from the moment of making the contract. The buyer is in the position of a mortgagor and the seller in that of a mortgagee who holds legal title simply as security for the payment of the purchase price. The contract effects an immediate transfer of all the substantial interest in the property. The consideration bargained for having been received, it does not afterward fail if it become of no value, since it is at the risk of the true and substantial owner.

So in contracts for work and labor, where a debt arises at certain stages of the work, such debt is not discharged by the destruction of the product of the work after it has been received⁴).

7. INDEPENDENT DUTIES. — The duty of performance is not always dependent upon complete performance of the contract by the other side⁵). Where a performance is uncertain or contingent, as in contracts of insurance, where chance is intended to play an essential part, the consideration consists largely in assuming the risk; accordingly, nonpayment of the premium is no defense to liability for insurance in case of loss; one performance not being the equivalent or the exchange for the other. If both performances are subject to the same risk they may be an exchange for each other and the duties will then be interdependent.

On the other hand, where severable exchanges are contemplated, only those considerations which are definitely set off against each other are dependent. Thus, in a lease covenants to repair and to pay rent are independent, eviction alone excuses rent, the tenant must rescind altogether or perform his part and sue for damages; while non-repair only excuses the tenant from the duty of accepting or keeping the house. Thus, in a charter-party keeping the vessel tight, staunch and strong may be a condition to taking her or to continued use, but unseaworthiness is not defense to payment of freight after the goods are delivered.

E. Prevention of Performance. — The prevention of one's performance of his contract by natural causes, third persons, or inability is not recognized as a general excuse for failure, independently of the construction of the contract; yet any wilful hindrance, however slight, by an act of the other party excuses performance⁶). If the hindrance by the other party is not wilful and yet casts an added burden of a material character upon the promisor, the latter is excused, at least to the extent of the interference with performance.

F. Refusal to Accept Performance. — The refusal by the creditor, promisee, or obligee to accept a tender of performance, satisfies the duty of performance and excuses the promisor from further effort⁷). The countermand or repudiation of a contract dispenses with the necessity of tender, which, having been refused in advance, would be a nugatory act. The debtor is not required to force on the creditor an unwelcome performance when the latter directed otherwise.

¹) *Cowell v. Lumley*, (1870) 39 Cal. 151; *Stubbings v. Evanston*, (1891) 136 Ill. 37. — ²) *Viterboro v. Friedlander*, (1887) 120 U. S. 707. — ³) *Wainscott v. Silvers*, (1859) 13 Ind. 497; *Mesks v. Tichenor*, (1887) 85 Ky. 536; *Pomeroy's Equity Jurisprudence*, sec. 1406.

— ⁴) *Central Lithographing Co. v. Moore*, 75 Wis. (1882) 170. — ⁵) 7 Am. & Eng. Encyc. of Law, 124. — ⁶) *Anvil Mining Co. v. Humble*, (1894) 153 U. S. 540; *Nelson v. Plimpton*, etc., Co. (1874) 55 N. Y. 480. — ⁷) *Cassaday v. Clarke*, (1846) 7 Ark. 123.

IV. DISCHARGE OF CONTRACTUAL DUTIES. — A. Law Governing. — In general it may be said that the discharge of contracts is governed by the law of the place of performance, for such is presumed to have been the intent of the parties¹). If, however, it is expressly or impliedly agreed that the law of some other jurisdiction shall control, the agreement is ordinarily recognized²).

When a contractual obligation is terminated through reliance upon a defense which is processual in character (i. e., going to the remedy), the law of the forum, or place of trial, will control³). The most common illustration of such a defense is the statute of limitations. In some jurisdictions the statute operates to extinguish the obligation, and when this is true with respect to the law of the place of performance, the obligation must be held discharged in the place where suit is brought⁴). If, on the other hand, the statute merely confers an affirmative defense, the law of the place of trial will apply⁵).

The defense of bankruptcy offers more serious complications. The general rule is that if the obligor receives his discharge within the jurisdiction where the obligation was performable and where the obligee is domiciled, the discharge will be universally recognized⁶). A discharge in a jurisdiction other than that of the obligation will not be recognized elsewhere except as to creditors who were parties to the bankruptcy proceeding⁷).

A discharge in bankruptcy under the Federal law is recognized as binding throughout all the States⁸).

B. Performance. — 1. SUBSTANTIAL PERFORMANCE. Complete performance of the contractual undertaking is ordinarily essential to constitute discharge⁹). The common law was very strict in requiring absolute conformity with the terms of the contract, but this rule has been modified by the equitable doctrine that substantial performance will suffice, if the contract is of such a nature that exact fulfilment of its conditions cannot reasonably be expected¹⁰). In commercial contracts parties are still held to strict performance for manifestly anything less would not satisfy the contract¹¹). In the case of such contracts as building contracts, on the other hand, the courts recognize the need for elasticity; it is therefore established that when the builder has in entire good faith substantially fulfilled the obligations of the contract, slight or unintentional deficiencies will not defeat his rights¹²).

2. PERFORMANCE TO SATISFACTION OF ANOTHER. — It is often provided by the contracting parties that the performance of one party must be satisfactory to the other. Great injustice would be occasioned if one party could be allowed to defend arbitrarily upon the ground that the execution was not in accordance with his personal taste. The present tendency of the decisions therefore is to hold that if the performance of the contract should be satisfactory to a reasonable person the contract's terms will be deemed fulfilled¹³). As a corollary of this rule, if it is clear that the parties undertook to make personal taste the measure of performance, the contract will be enforced to the letter¹⁴). The rule established by the courts of New York is exemplified by the case of *Duplex Safety Boiler Company v. Garden*¹⁵). The contract provided for alterations to certain boilers and payment was to be made only when the defendants "were satisfied that the boilers as changed were a success." The defendants continued to use the boilers without complaint, but refused to pay the plaintiff upon the plea that the alterations were not satisfactory. The court held that since the object of the contract was not to gratify individual taste or preference, the defendants were obligated to accept what reasonably ought to satisfy them on grounds of fitness and utility.

Building contracts frequently contain a stipulation that the builder will not be entitled to recover his contract price until the production of the architect's certificate

¹) *Scudder v. Union National Bank*, (1875) 91 U. S. 406. — ²) *Le Breton v. Miles*, (1840) 8 Paige (N. Y.) 261. — ³) *Bank of United States v. Donnelly*, (1834) 8 Pet. 361; *Wharton, Conflict of Laws*, Vol. 2, sec. 535, and cases cited. — ⁴) *Lincoln v. Battelle*, (1831) 6 Wend 475. — ⁵) *Townsend v. Jemison*, (1850) 9 How. 407. — ⁶) 5 Cyc. 407, and cases cited. — ⁷) *Phelps v. Borland*, (1886) 103 N. Y. 406; 3 *Parsons on Contracts*, (9th ed.) 439, note — ⁸) *Wharton, Conflict of Laws*, Vol. 2, sec. 523. — ⁹) *Leopold v. Salkey*, (1878) 89 Ill. 412; *Glacius v. Black*, (1872) 50 N. Y. 145. — ¹⁰) *Heckmann v. Pinckney*, (1880) 81 N. Y. 211. — ¹¹) *Norrington v. Wright*, (1885) 115 U. S. 188. — ¹²) *Philip Hiss Co. v. Pitcairn*, (1901) 107 Fed. 425. — ¹³) *Doll v. Noble*, (1889) 116 N. Y. 230; *McNeil v. Armstrong*, (1897) 81 Fed. 943. — ¹⁴) *Crawford v. Mail Pub. Co.*, (1900) 163 N. Y. 404. — ¹⁵) (1886) 101 N. Y. 38.

to the effect that the work has been satisfactorily accomplished. In such instances the builder cannot be denied recovery because of his inability to secure favorable action from the designated arbiter. If the architect fraudulently refuses to exercise an honest judgment, the fulfilment of the condition is dispensed with and the builder may recover¹).

Even though the execution of the contract cannot be considered a substantial compliance with its terms, a party may nevertheless be entitled to recover quasi-contractually or on a quantum meruit for the value of the work done or services given²).

3. TIME OF PERFORMANCE. — If, according to the terms of the contract, it must be performed upon a designated date, any delay will be a fatal breach unless it appears that such was not the real intent of the parties³).

When the time of performance is not expressly fixed by the parties, it will be presumed that the contract is to be performed within a reasonable time⁴). The question of what is a reasonable time must be determined by the court or jury when suit is brought upon the contract⁵).

In commercial contracts, such as contracts for the manufacture or sale of goods, time is presumed to be the essence and stipulations relating to the time of execution are strictly adhered to⁶).

C. Accord and Satisfaction. — The discharge of a contractual obligation by accord and satisfaction may take place in either of two ways: 1. by accord executed and 2. by accord executory.

1. ACCORD EXECUTED. — When the parties mutually agree that the existing obligation shall be discharged by the acceptance of a designated satisfaction, the original contract is terminated forthwith⁷). It is, of course, essential that the agreement comply with all the requirements respecting mutual consent and consideration. If the satisfaction agreed upon is less than what the original obligation calls for the accord will fail for want of consideration; but if the satisfaction consists in giving something more than or something different from that required by the original contract, the accord is valid and the original undertaking discharged.

2. ACCORD EXECUTORY. — An accord executory is a bilateral agreement whereby the parties undertake to give and accept a substitute for what the contract calls for⁸). The promise of the obligor is to perform in accordance with the new agreement, while the obligee agrees on his part to accept the performance under the new agreement in lieu of the execution of the original contract. If the new undertaking is fulfilled in accordance with its terms the obligations subsisting between the parties are totally discharged. If, however, the obligor fails to execute the new agreement, he is liable to suit thereon or upon the old one, at the plaintiff's election⁹).

If the obligee should bring suit for the enforcement of the original obligation prior to the time fixed for the performance of the new agreement, a court of equity may, at the instance of the obligor, enjoin the proceeding¹⁰).

D. Release. — A contractual obligation may be abrogated at common law by a release under seal¹¹).

By statute in many States, seals have been abolished and this has frequently had the effect of abrogating this method of discharge¹²). However, in some States where seals have been abolished the courts have held that a written release is as efficacious as a release under seal, while in still other jurisdictions statutes have been enacted with the same end in view.

E. Novation. — Novation is the substitution of a new obligation for an existing one, either by a change of parties, as the substitution of one debtor for another¹³), or by a change in the substance of the contract between the same parties, or both¹⁴).

¹) *Crane Elevator Co. v. Clark*, (1897) 80 Fed. 705; *Foster v. McKeown*, (1901) 192 Ill. 339. — ²) *Kauffman v. Raeder*, (1901) 108 Fed. 171. — ³) *Henderson v. McFadden*, (1901) 112 Fed. 389; *Underwood v. Wolf*, (1890) 131 Ill. 425. — ⁴) *Brennan v. Ford* (1873) 46 Cal. 7; *Hamilton v. Scully*, (1886) 118 Ill. 192. — ⁵) *Cotton v. Cotton*, (1883) 75 Ala. 345. — ⁶) *Cleveland Rolling Mill v. Rhodes*, (1887) 121 U. S. 255. — ⁷) *Nassoiy*

v. Tomlinson, (1896) 148 N. Y. 326. — ⁸) *Teal v. Bilby*, (1887) 123 U. S. 572; *Greene v. Paul*, (1893) 155 Pa. St. 126. — ⁹) *Babcock v. Hawkins*, (1851) 23 Vt. 561. — ¹⁰) *Bomeisler v. Forster*, (1897) 154 N. Y. 229. — ¹¹) *Mills v. Lorraine*, (1900) 186 Ill. 635. — ¹²) *Wabash Ry. v. Brow*, (1895) 65 Fed. 941. — ¹³) *Studebaker Bros. Mfg. Co. v. Endom*, (1899) 51 La. Ann. 1263. — ¹⁴) *McCreery v. Day*, (1890) 119 N. Y. 1.

F. Rescission. — An executory contract may at any time be rescinded by agreement between the parties¹). Rescission by mutual agreement should be carefully differentiated from rescission by one party as exemplified by section B, para. 4, *supra*. In the latter case the right may be exercised by one party without the consent of the other, being a remedy for default or repudiation of the contract. Rescission under the present title, on the other hand, is by mutual consent.

G. Operation of Law. — In addition to discharge by act of the parties, contractual obligations may be determined by operation of law.

1. **MERGER.** — When a simple contract is embodied in a formal instrument, it becomes merged in the new obligation²). Judgment likewise has the effect of merging the obligation upon which it is based³).

2. **BANKRUPTCY.** — A valid discharge in bankruptcy does not extinguish the debtor's obligation, but affords a complete defense to action upon it⁴). Contractual relations are not dissolved by discharge except when they are mergeable in a provable debt at the time of the bankruptcy⁵).

In this connection it should be noted that a discharge in bankruptcy under the Federal bankruptcy statute does not impair valid liens acquired more than four months prior to the filing of the petition in bankruptcy. If, therefore, the creditor has secured a valid lien upon the property of the bankrupt more than four months prior to bankruptcy, his right to satisfy the debt out of the property to which the lien attaches cannot be disturbed⁶).

3. **STATUTES OF LIMITATION.** — Statutes of limitation operate either to a) extinguish the obligation⁷); or b) to provide an effective defense to action upon it⁸). In either event, the contract is rendered unenforceable.

VI. REMEDIES FOR ENFORCEMENT OF CONTRACTUAL DUTIES. — **A. Law Governing Remedies.** — Matters relating to the remedies for breach of contract, such as the form of the action, the admissibility of evidence, and matters of procedure generally, are governed by the law of the forum, or place where suit is instituted⁹).

B. Action of Debt. — By the action of debt, one of our oldest actions, the common law specifically enforced the duty to pay money in a sum certain, or capable of being reduced to a certainty, however it may have become due¹⁰). Judgment for the plaintiff was to the effect that he recover his debt, and in general, nominal damages for its detention. The remedy was based on the conception of proprietorship in a sum of money in the hands of the debtor, just as if he detained chattels of the creditor.

The debtor was not, at common law, in the absence of special promise, liable to pay interest on his debt¹¹). In the United States, however, interest is generally allowed on a liquidated claim in case of detention of money due¹²).

C. Action for Damages. — In all cases except debt, the common law method of enforcement of contractual duty in event of the non-performance of any sort of undertaking was by a substituted method of performance, namely, the payment of an equivalent sum of money by way of damages, which should put the injured party, so far as possible, in the same position as if the duty had been performed and the claim satisfied in specie¹³).

1. **MEASURE OF DAMAGES.** — The value of the performance of which the plaintiff may have been deprived is measured by general rules for assessing the loss sustained. Detriment which is the natural and direct consequence of the breach is the normal measure of compensation in lieu of performance; e. g. the difference between contract price and the market price at time of performance, and the consequent cost of replacement¹⁴).

¹) *Brigham v. Herrick*, (1899) 173 Mass. 460. — ²) *Att'y-Gen. v. Whitney*, (1884) 137 Mass. 450. — ³) *Gray v. Richmond Bicycle Co.*, (1901) 167 N. Y. 348. — ⁴) *Lowenberg v. Levine*, (1892) 93 Cal. 215. — ⁵) *Watson v. Merrill*, (1905) 136 Fed. 363; *In re Brew Co.*, (1906) 16 Am. Bankr. Rep. 110; *Remington on Bankruptcy*, secs. 451, 641, 1118, 2275. — ⁶) *In re Blumberg*, (1899) 94 Fed. 476. *Phelps v. Curtis*, (1875) 80 Ill. 109; 5 Cyc. 403, and cases cited. — ⁷) *New York Life Insurance Co. v. Aitkin*, (1891) 125 N. Y. 660. — ⁸) *Walsh*

v. Mayer, (1884) 111 U. S. 31. — ⁹) *Union National Bank v. Chapman*, (1902) 169 N. Y. 538. — ¹⁰) *Wald's Pollock on Contracts*, (3d ed.) 151, 152. — ¹¹) 16 Am. & Eng. Encycl. of Law, p. 992. — ¹²) *Nashua, etc., R. Co. v. Boston, etc., R. Corporation*, (1894) 61 Fed. 237; *Emerson v. Schoonmaker*, (1890) 135 Pa. St. 437. — ¹³) *Chicago, etc., R. Co. v. Cicero*, (1895) 157 Ill. 56; 8 Am. & Eng. Encyc. of Law, p. 545. — ¹⁴) *Marston v. Singapore Rattan Co.*, (1895) 163 Mass. 296.

Exceptional loss is not recoverable unless within the contemplation of the parties as the probable result of a breach at the time of making the contract¹). It would be unjust to hold a defendant liable for consequence far beyond the ordinary value of performance, unless he had notice of what was dependant upon performance, or of special circumstances from which an extra burden or risk was assumed in making the contract. The creditor moreover must take all reasonable means of mitigating his loss and avoid damages as far as possible²).

2. LIQUIDATED DAMAGES. — If a sum agreed to be paid upon a breach of contract is liquidated damages, that is, a contractual assessment by the parties of the true value of performance, the injured party may recover such sum in full³). It is often a difficult question to determine whether a stipulated payment is a penalty or liquidated damages; this must be determined by the facts of the bargain, not merely by what it is called⁴).

If the performance is the payment of money or a matter of certain value, and the stipulated sum of money is in excess of that value, it is obviously a penalty. If the value of performance be uncertain, a specified sum will be construed to be liquidated damages. If, however, a fixed sum be provided for breach of different promises indifferently, some certain and some uncertain in value, this is a penalty⁵).

3. ANTICIPATORY BREACH. — When a party to a contract has repudiated his obligation, or has by some act put it out of his power to perform, the other party is entitled to maintain immediate action without waiting until the time set for performance⁶). Upon fundamental principle, it is difficult to justify the doctrine of anticipatory breach for it cannot truly be said that a breach is possible until the time fixed for performance has arrived. The doctrine has, however, become firmly established in England⁷), and in the majority of American States⁸), although it is repudiated in Massachusetts⁹) and a number of other jurisdictions¹⁰).

From the practical point of view, there are important considerations supporting the right of the innocent party to bring immediate action when the obligation of the contract has been repudiated by the other. Many courts hold that a legal injury is occasioned by repudiation inasmuch as the promisee's right under the contract is a legitimate expectation upon which he is entitled to rely. This inchoate right to the performance of a bargain cannot become complete until the time for performance has arrived, but in the meantime it may be violated by disregarding the obligation. The measure of the promisor's duty is not merely the literal language of the promise; it is faithfulness, diligence and respect for the relation. A right of action may accrue by refusal to accept performance, and in general any prevention of a sufficiently serious character is regarded as an immediate breach giving rise to a cause of action for the loss of the entire contract. Such an effect may follow from countermanding work. So anticipatory breach is a present injury to the other party although the promisor only promised performance at a future day and not at the date of repudiation. "The promisee has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests¹¹)".

D. Specific Performance. — One might suppose a priori that the primary and normal remedial right would be the right to performance in kind, and that as a general rule every obligation would give rise to a right of specific performance, the promise to be enforced by order of the court directing the defendant to perform under threat of imprisonment or fine¹²).

¹) *Safety Insulated Wire, etc., Co. v. Baltimore*, (1895) 66 Fed. 140. — ²) *Scott v. Boston, etc., Steamship Co.*, (1871) 106 Mass. 468; *Clark v. Marsiglia*, (1845) 1 Den. 317; *Wald's Pollock on Contracts*, (3d ed.) 349. — ³) *Clark v. Barnard*, (1883) 108 U. S. 436; *Hennessy v. Metzger*, (1894) 152 Ill. 505. — ⁴) *Radloff v. Haase*, (1902) 196 Ill. 365; *Sun Pub. Co. v. Moore*, (1902) 183 U. S. 642. — ⁵) *Charleston Fruit Co. v. Bond*, (1885) 26 Fed. 18; *Trower v. Elder*, (1875) 77 Ill. 452; *Anson on Contracts*, p. 330. — ⁶) *Roehm v. Horst*, (1900) 178 U. S. 1, 18. — ⁷) *Frost v. Knight*, (1872) L. R. 7 Exch. 111, 41 L. J. Exch. 78, 26 L. T. Rep. (N. S.) 77; *Hochster v. De La Tour*, (1853) 2 E. & B. 678, 22 L. J. Q. B. 455. — ⁸) *Garberino v. Roberts*, (1895)

109 Cal. 125; *Union Ins. Co. v. Central Trust Co.*, (1899) 157 N. Y. 633. — ⁹) *Daniels v. Newton*, (1874) 114 Mass. 530 — ¹⁰) *Perkins v. Frazer*, (1901) 107 La. 390. — ¹¹) The doctrine of anticipatory breach has been incisively criticized by Professor Williston in the third edition of *Wald's Pollock on Contracts*, pp. 355—369. — ¹²) So in tort we should expect the primary remedial right to be specific reparation, the right to compel the tortfeasor to restore the state of things that would have existed, if the wrongful disturbance had not been committed. We find, however, that restoration of the status quo or restitution in kind, like specific performance, is an extraordinary remedy.

We find that at common law the only obligation specifically enforced is debt, the obligation to pay a definite sum of money, and that the remedy for the non-performance of any sort of undertaking is an action for damages merely. The remedy of specific performance had its origin in the courts of equity and is only granted where damages would not be adequate compensation or an equivalent for the promised performance¹).

1. CLASSES OF CONTRACTS SPECIFICALLY ENFORCEABLE. — It is to be presumed that contracts to create or transfer interests in land cannot be adequately relieved by pecuniary compensation. They are therefore as a class specifically enforceable²).

Contracts relating to moveables, to supply goods, merchandise, etc., are not specifically enforceable in the absence of special circumstances³). It is otherwise if the article is unique and has no adequate pecuniary equivalent⁴). Contracts for personal service or to employ another cannot be specifically enforced on grounds of convenience and public policy, even if damages be inadequate⁵).

2. EQUITIES OF DEFENDANT. — Since the purpose of this equitable remedy is to do more perfect and complete justice between the parties than is possible by legal relief, equity will not intervene if this will involve substantial hardship or be inequitable toward the defendant. The specific relief is said to be discretionary, that is, all the special conditions to warrant the extraordinary interposition must be present⁶).

a) Mutuality. — One cannot obtain a decree of specific performance unless he himself has performed or can be made to perform specifically⁷).

b) Adequacy of consideration. — The court will not specifically enforce gratuitous promises; nor will it lend its aid to contracts which are not just and reasonable, or contracts which are improvident on the part of the defendant⁸).

c) Unfairness. — If the contract be unfair to the defendant by reason of any fraud, mistake, or suspicion of sharp practice, equity will leave the plaintiff to such relief as he may obtain at law⁹).

E. Rescission and Restitution. — The aggrieved party may terminate the contract entirely and extinguish all legal relations with the other party without more, merely seeking the restoration of what he has rendered¹⁰). This is rescission, which is an alternative remedy to claiming performance of contractual duty, or of an equivalent by way of compensation. The remedy of rescission is to be distinguished from a contract of rescission, or mutual release by consent, the former being imposed in invitum by law at the option of the injured party, if the conduct of the other party is such as to justify a refusal on his part to proceed farther. Being an alternative remedy an election to adopt it must be manifested¹¹). In this it is unlike the mere refraining from further performance, which does not involve a total termination of the contract, and does not prevent an action for its enforcement.

1. WHEN PROMISOR MAY RESCIND. — The remedy by rescission is open in the following cases:

1. In cases of repudiation by the other party¹²).

2. In case of material breach by failure to perform¹³) (In England an inference of repudiation or abandonment is regarded as essential, on the fictitious theory that rescission is based upon mutual consent, an offer by the defaulter accepted by the other party¹⁴).

¹) *Canal Commissioners v. Sanitary District*, (1901) 191 Ill. 326; *Fleishman v. Woods*, (1901) 135 Cal. 256; *Hyer v. Richmond Traction Co.*, (1897) 168 U. S. 471. — ²) *Cumberledge v. Brooks*, (1908) 235 Ill. 249; *Wilhite v. Skelton*, (1906) 149 Fed. 67. — ³) *Meehan v. Owens*, (1900) 196 Pa. St. 69; *Sugar Beets Product Co. v. Lyon's Beet Sugar Refining Co.*, (1908) 161 Fed. 215; 36 Cyc. 555. — ⁴) *Dock v. Dock*, (1897) 180 Pa. St. 14. — ⁵) *General Electric Co. v. Westinghouse etc., Co.*, (1906) 144 Fed. 458. — ⁶) *Miss., etc., R. Co. v. Cromwell*, (1875) 91 U. S. 643. — ⁷) *Pacific Electric R. Co. v. Campbell-Johnston Co.*, (1908) 153 Cal. 106; *Oswald*

v. Nehls, (1908) 233 Ill. 438; *Shubert v. Woodward*, (1909) 167 Fed. 47. — ⁸) *Goodwin v. Springer*, (1908) 233 Ill. 229; *Newton v. Woolley*, (1900) 105 Fed. 541. — ⁹) *Miss., etc., R. Co. v. Cromwell*, (1875) 91 U. S. 643. — ¹⁰) *Wald's Pollock on Contracts* (3d ed.) 334, 347. *Tennessee v. Bacon*, (1890) 137 U. S. 78. — ¹¹) *Graves v. White*, (1882) 87 N. Y. 463. — ¹²) *Ballou v. Billings*, 136 Mass. (1884) 307. — ¹³) *San Francisco Bridge Co. v. Dumbarton Co.*, (1897) 119 Cal. 272; *Farmer's Loan & Trust Co. v. Galesburg*, (1890) 133 U. S. 156. — ¹⁴) *Wald's Pollock on Contracts* (3d ed.) p. 339.

3. Where the consideration fails or become void in a material respect, by default or from any cause such as impossibility¹).

4. Rescission is the remedy also used to disaffirm an invalid contract which is voidable by reason of fraud, duress, mistake, etc.²).

2. **PURPOSE OF RESCISSION.** — The remedy is usually exercised where the party has performed wholly or in part and wishes to recover what he has given or its value. Restitution is thus an alternative to compensation in damages. Rescission is not a usual remedy for breach where one has not performed, because by putting an end to all contractual relations it deprives a party of his right of action for damages by loss of the contract. He may, however, be content to rescind, especially if the contract creates a cloud on the title to realty.

3. **STATUS QUO RESTORED.** — If part performance has been received, the rescinder must restore the other party to his original position, or at least offer to restore anything he has received under the contract in specie³). The right to claim rescission and restoration in lieu of performance is forfeited if the rescinder cannot restore everything previously received⁴).

4. **EARNEST.** — If something is given in earnest at the making of a contract, this is not merely evidence of the conclusion of the bargain, but also serves as a security that the contract shall be performed. Such a deposit is commonly made by the purchaser on a contract of sale: 1. To be forfeited if the party giving it fails to perform; 2. To be returned if the party receiving it fails to perform, 3. To be treated as part payment upon performance⁵).

VII. INVALID CONTRACTS. — Having considered above the affirmative elements and operation of valid contracts, we may proceed to a consideration of the negative elements or vices annulling or restraining their normal effect and rendering them void, voidable or unenforceable.

A. Void, Voidable, and Unenforceable. — 1. **VOID CONTRACTS.** — A contract which is legally inoperative from the beginning is termed a "void contract."

2. **VOIDABLE CONTRACTS.** — A contract with a flaw which remains operative only until impugned by an act of avoidance at the option of one of the parties thereto is termed a "voidable contract." Confirmation of the contract, or an affirming of the bargain, puts an end to its voidability.

3. **UNENFORCEABLE CONTRACTS.** — A contract upon which an action cannot be maintained by one of the parties, but which has the ordinary elements of a valid contract, is, as to him, termed "unenforceable." These may sometimes be rendered enforceable *ex post facto* by written evidence or whatever is necessary to supply the defect.

B. Conflict of Laws as to Invalidity. — What law governs as to the validity of a contract in general is treated above. Ordinarily a contract invalid by the law of the State where made will not be enforced elsewhere though valid under the law of the forum⁶). But if the contract be valid where made, it may be enforced in another State, although it would have been void if made therein⁷). The courts of a State, however, are not bound to recognize or enforce a contract which is in contravention of the statutes or public policy of the State where suit is brought, though it may be valid in the State where the contract was made⁸).

Grounds of nullity. The causes which result in nullity, voidability, or imperfect obligatory force in attempted contracts, (although possessing all the affirmative valid elements of valid contracts) are in general:

1. Illegality, or some taint in the character of the bargain, or the object of the contract;

2. Manifest impossibility of performance;

3. Unfairness of the bargain, resulting from mistake, fraud, duress, or undue influence;

4. Incapacity in one of the parties to bind himself;

¹) *Chapman v. Brooklyn*, (1869) 40 N. Y. 372. — ²) *Cincinnati Cooperage Co. v. Gaul*, (1895) 170 Pa. St. 545. — ³) *More v. Calkins*, (1890) 85 Cal. 177; *Hadforth vs. Jackson*, (1889) 150 Mass. 149; *Brown v. Witter*, 10 Ohio (1840) 143, *Wald's Pollock on Contracts*, (3d ed.) pp. 333, 339, 341. — ⁴) *Handforth v. Jackson*, (1889) 150 Mass. 149. —

⁵) *Howe v. Hayward*, (1875) 108 Mass. 55; *Elzey Cotton Cases*, (1874) 22 Wall. 195. —

⁶) *Allegheny Co. v. Allen*, (1903) 69 N. J. L. 270; 55 Atl. 724. — ⁷) *Rumsey v. N. Y. & P. R. Co.*, (1902) 203 Pa. 579; 53 Atl. 495. —

⁸) *Feineman v. Sachs*, (1885) 33 Kan. 621; 52 Am. Rep. 547; *Parker v. Moore*, (1902) 115 Fed. 799.

5. A statutory bar to the remedy, imposed for the non-observance of some prescribed form, such as the written memorandum under the Statute of Frauds; (such a memorandum made subsequently confirms the contract by supplying the defect in a valid manner).

C. Contracts Void for Illegality. — Illegality occurs not merely where performance involves the commission of tortious or criminal acts, but also wherever the bargain is tainted by any connection with things offensive to morals and contrary to the general policy of the law as subversive of public welfare.

1. **KNOWLEDGE OF UNLAWFUL PURPOSE.** — Mere knowledge on the part of a vender that the buyer intends to use the property for the perpetration of a heinous crime, or as a means to unlawful end, would probably be in the United States no defence to an action for the price of goods sold, where the contract was innocent in itself. But where the direct purpose of the contract is to put the property to an unlawful use, or if the party collaborates in the illegal purpose, he can ask no relief or assistance from the law¹).

2. **PUBLIC POLICY.** — The power of courts to declare contracts void as in contravention of public policy opens a wide field for judicial discretion. In general, the utmost liberty to contract is favored, and justice requires that compacts be held sacred and enforced by the courts of justice²). But there are large and increasing groups of cases where it is recognized that the transaction in question cannot properly be made the basis of public enforcement and assistance. These different classes of illegal contracts involve considerations of policy peculiar to their own subject matter. It is possible to give only a few illustrations.

3. **GAMING AND WAGERING CONTRACTS.** — Bets and wagers were at common law valid and enforceable bargains, unless indecent or offensive. They are now generally regarded as contrary to public policy and good morals, as being frivolous and tending to beget wastefulness and the desire to get property without rendering any real equivalent³).

This policy does not apply to insurance contracts, which are in themselves nothing but wagers or promises to pay money on the determination of some uncertain event, for these wagers are directed to legitimate objects. The policy which condemns gambling and wagering does not extend to premiums or prizes to be awarded to the winners of games or contests of skill or strength, even where the competitors pay an entrance fee to make up the purse⁴).

The inconvenience of countenancing idle wagers in a court of justice, concerned with serious affairs, the feeling that such questions may be deferred until the court has nothing else to attend to, has led the courts to refuse their assistance to wagers, save to those having a commercial or commendable object, where their design is to protect some actual interest in life or property, or to hold out a reward for the exercise of individual strength, prowess, or superiority.

4. **STOCK EXCHANGE CONTRACTS.** — a) **Buying and selling on margin.** — A speculative contract for the purchase and sale of stocks on a margin is not invalid, as a mere wager. The law presumes the validity of a contract by which stocks are to be purchased and carried by the broker on a margin. Supposedly the broker is at once to buy the stock, and at all times to have, in his name and under his control, ready for delivery, the shares purchased or an equal amount of other shares of the same stock⁵).

The intention to deal in stock or to deal in quotations is the test. Where a commercial transaction with actual stock is contemplated, the contract is valid even though entered upon by one who sells without present ownership or who buys without expecting to purchase outright, intending a purchase or a resale before the time of delivery. All these facts and circumstances are to be taken into consideration, however, in determining whether the dealings were mere wagers or were valid purchases or sales on margin, as also the magnitude of the purchases made with reference to the standing and financial ability of the speculator, and whether the deal-

1) *Chamberlain v. Fisher*, (1898) 117 Mich. 248; 75 N. W. 931; so in case of loans for gambling purposes: *Jones v. Akin & Akin*, (1904) 35 Tex. Civ. App. 436; 80 S. W. 385. — 2) *Cole v. Brown, etc., Co.*, (Iowa) 18 L. R. A. (N. S.) 1164. — 3) *Love v. Harvey*, (1873) 114 Mass. 80. — 4) *Wilkinson v. Stett*, (1900) 175 Mass. 581; 56 N. E. 830; *Hankins v. Ottinger*, (1896) 115 Cal. 454; 40 L. R. A. 76. — 5) *Richter v. Poe*, (1909) 109 Md. 20; 22 L. R. A. (N. S.) 174, notes.

ings were purely in relation to margins and not to any possible completion of the sale or purchase¹).

"The true test of the validity of the contract is whether it could be settled only in money, and in no other way; or whether the party selling could tender, and compel the acceptance of the particular commodity sold; or whether the party buying could compel the delivery of the commodity purchased²). Under the rules of the New York Cotton Exchange all sales or purchases for future delivery of cotton contain a provision that there must be an actual delivery of cotton if this be required. For this reason the validity of these contracts has been sustained by the courts of New York"³). In California the Constitution, art. IV, 326, as amended, provides that all contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover any damages for failure to perform the same, or any money paid thereon, in any court of this State." This is declaratory of the general law.

b) Option contracts. — Under Hurd's Rev. Statutes of Illinois, 1903⁴), "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, shall be fined, . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." It is held, however, that only contracts for options which are in the nature of gambling contracts fall within this prohibition⁵), viz., those options which are commonly termed "puts and calls."

c) Clearing-house settlements. — The closing up of transactions on a board of trade for the purchase and sale of grain, by setting off one trade against another is not necessarily illegal⁶).

d) Bucket-shop contracts. — The device known as a "bucket shop," which purports to engage in actual dealing, but where the only intention is to bet on the fluctuations of the market by the pretended purchase of grain or stock on margins is merely a species of gambling, and illegal⁷). There is no employment of a broker to make a bona fide purchase or sale for actual delivery, but the so-called broker is in reality the other party to the contract. In a real transaction the buyer is entitled to receive all interest, dividends, rights, and privileges which may pertain to the securities deliverable under the contract.

e) Burden of proof to show that contract is a mere bet on rise and fall of prices. — If under the guise of a contract for the sale of goods to be delivered at a future day, the real intent be merely to bet or speculate on the rise and fall of prices, then the whole transaction constitutes nothing more than a wager and is null and void. But "as a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference in the price was to be paid by the parties to the contract⁸)".

5. RESTRAINT OF TRADE OR COMPETITION. — As a matter of underlying principle a man ought not to be assisted in restraining himself from the exercise of any lawful craft or business, and all interference with liberty of action in trading is contrary to public welfare and policy⁹).

a) Sale of good will. — In cases of sale of good will of a business the law sanctions such contracts not to compete as are reasonably necessary for the protection of the vendee who succeeds to the business. This has given rise to the distinctions between general and partial restraint of trade¹⁰).

¹) *Fletcher v. Jacob Dold P. Co.*, (1899) 58 N. Y. Supp. 612; 169 N. Y. 571; *Harvey v. Merrill*, (1889) 150 Mass. 1; see note 5 L. R. A. 200 — contracts for future delivery; see cases collected in note, 22 L. R. A. (N. S.) 174, on inferences as to character of transaction from fact that it was on margin. — ²) *Bibb v. Allen*, (1892) 149 U. S. 481. — ³) *Sampson v. Camperdown Mills*, (1897) 82 Fed. 833. — ⁴) p. 640, § 130. — ⁵) *Kantzler v. Benzinger*, (Ill. 1905) 214 Ill. 589; 73 N. E. 874; cf. *Schneider v. Turner*, (1889) 130 Ill.

28, 6 L. R. A. 164; 22 N. E. 497. — ⁶) *Chicago Board of Trade v. Christie G. & S. Co.*, (1905) 198 U. S. 236. — ⁷) *Central Stock & Grain Exchange v. Board of Trade of Chicago*, (1902) 196 Ill. 396; 63 N. E. 740. — ⁸) *Clews v. Jamieson*, (1900) 182 U. S. 461; *Richter v. Poe*, (1908) 109 Md. 20. — ⁹) *Taylor Iron & Steel Co. v. Nichols*, (1908) 24 L. R. A. (N. S.) 933, 69 Atl. 186. — ¹⁰) *Buckhout v. Witwer*, (1909) 23 L. R. A. (N. S.) 506; *Fleckenstein Bros. Co. v. Fleckenstein*, (1908) 24 L. R. A. (N. S.) 913, note. 71 Atl. 265.

b) Restraint of competition. — Agreements between competitors to limit competition by restriction of production maintaining prices, etc., with the object of keeping rivals out of the business and avoiding competition between themselves to the public's detriment, are illegal contracts¹). These are to be distinguished from contracts in connection with the sale of good will of a business, which aim to protect the vendee. Here the object is not to restrict the freedom of the contractor in carrying on his business, but to suppress competition and to monopolize some portion of trade or commerce of the realm by a union of former competitors, with an injurious effect upon the market and the public at large²).

6. SUNDAY CONTRACTS. — Contracts which are neither tainted by wrong nor contrary to public policy, as interpreted by the common law, may be void as falling under the ban of some statute. Such are the Sunday statutes enacted in certain States, which prohibit work, labor, and business on Sunday. It is a question of construction of the particular statute whether a contract made on Sunday but to be performed on a business day, is illegal. If fully consummated on that day, it may be held to be void, even though not expressly declared to be so by the statute³). Thus, it is held that no action may be maintained on an express promise to repay money borrowed on Sunday, and that its retention raises no implied promise to repay it⁴). There is in general no requirement that the consideration must be returned as a condition of defending against a contract because made on Sunday⁵). But a contract partially made on Sunday and perfected on a secular day is valid⁶). The weight of authority sustains the rule that contracts which are void because made on Sunday cannot be validated by a subsequent ratification on a secular day⁷). In other jurisdictions, however, if affirmed on a subsequent day, they then become valid particularly where the person ratifying has received some benefit which he has retained⁸). Payment of debts on Sunday discharges them⁹).

Contracts to perform labor or do business on Sunday, other than a work of necessity or mercy, such as Sunday advertising¹⁰), if prohibited by statute, are void, but some statutes provide that the performance shall be had upon the next business day¹¹).

7. USURY. In Massachusetts, California, and certain other States there are no usury statutes and lenders may charge any rate of interest they can get. In most American States, however, a maximum rate is fixed by statute, ranging from 6% to 12%, to protect borrowers against oppression, and any agreement for interest in excess of this is made illegal and void; but some of these States allow banks to make call loans to dealers on stock exchanges and others at any rate agreed upon. Special rates, above the ordinary, are also usually allowed to be charged by pawnbrokers. In New York and some other States it is provided that no corporation shall interpose the defense of usury in any action¹²).

8. ILLEGALITY INVOKED BY COURT. — It has been held that the objection of illegality is one which the court itself is bound to raise in the interest of the due administration of justice. Whenever the illegality appears, whether the evidence come from one side or the other, the disclosure is fatal. The court should not hesitate a moment in dismissing the case and sending the corrupt plaintiff from its presence, whatever might be the character of the defense or the defects of pleading¹³).

9. ILLEGALITY AS A DISABILITY IN THE PLAINTIFF. — "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to real justice, as between him and the

¹) *Stewart v. Stearns & Culver L. Co.*, (1908) 24 L. R. A. (N. S.) 649, note. 48 So. 19. — ²) *Clemmons v. Meadows*, (1906) 6 L. R. A. (N. S.) 847, note; *U. S. v. Addyston Pipe & Steel Co.*, (1898) 85 Fed. 271; 175 U. S. 211. The topic of Monopolies and Trusts is treated *infra*. — ³) *Cranson v. Goss*, (1871) 107 Mass. 439. — ⁴) *Troewert v. Decker*, (1881) 51 Wis. 46. — ⁵) See note 5 L. R. A. (N. S.) 295. — ⁶) See note 4 L. R. A. (N. S.) 1151. — ⁷) *Jacobson v. Bentzler*, (1906) 127 Wis. 566; 7 Am. &

Eng. Ann. Cas. 633. — ⁸) See note 7 Am. & Eng. Ann. Cas. p. 635. — ⁹) *Cranson v. Goss*, (1871) 107 Mass. 441. — ¹⁰) *Handy v. St. Paul Globe*, (1889) 41 Minn. 188. *Sentmel Co. v. Meiselbuch, etc., Co.*, (1911) 128 N. W. 861. — ¹¹) Cal. Civil Code, sec. 11. — ¹²) Cons. Law, 1909, c. 20, sec. 374. A table of laws relating to usury is appended to the article on *Commercial Paper*, *infra*. — ¹³) *Oscanyan v. Arms Co.*, (1880) 103 U. S. 261.

plaintiff. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted"¹).

10. RELIEF FROM ILLEGAL CONTRACTS. — In general the law leaves the parties to an illegal contract where it finds them. There are certain exceptional cases where the party to an illegal contract will be relieved and may recover back the money or consideration he has given; such are cases where the plaintiff is not in *pari delicto* (equal fault), or where he repudiates the transaction before the illegal purpose is consummated, or where the contract was prohibited merely for his protection, or where a new duty arises from the actual receipt of money or goods as the profits of the transaction, after the execution of the void contract and is separable from it²). The doctrine of illegality of contracts is not intended as a shield for injustice or dishonesty, or a privilege to fraud in subsequent dealings.

D. Manifest Impossibility. — A contract is void *ab initio* if the performance of the promise is contrary to law or nature. Such impossibility, at the time of making the contract, is to be distinguished from practical or supervening impossibility³).

E. Contracts Invalidated by Unfairness. — **1. SCOPE OF BARGAIN.** — In matters of bargain parties deal with one another at arms length and each must beware and judge for himself. His welfare is his own lookout. The maxim "*caveat emptor*", (let the purchaser beware), is the maxim of self defense. Contracting parties are to a great extent contending and hostile adversaries matching wit against wit, strategy against strategy, feigned indifference against evident anxiety, eloquence against deprecation. The seller has a large immunity for his commendation; the buyer is not bound to disclose what he knows; neither party is bound to correct the other party's unexpressed misconceptions.

2. LIMITS OF BARGAIN. — Within the realm of bargain each party takes his own risks; yet the scope of bargain, though wide, is not unlimited. A man must have his fair chance. In the law of tort a man is protected against loss by fraud and deceit. In the law of contracts he will not be held bound unless he had a fair opportunity in the commercial conflict. The fairness and freedom of choice may be affected by falsehood, violence, or oppression and the law will not permit the wrong-doer to take advantage of his own wrong. Unfairness of bargain, while it does not, ordinarily avoid or vitiate a contract entirely, gives to the party wrongfully influenced the option of avoiding his contract. We shall first consider how far a contracting party may be relieved from a bargain into which he entered through mistake or inadvertence outside the realm of bargain.

3. MISTAKE AND ITS VARIETIES. — a) **Discordant error.** — The parties to an agreement may so talk at cross purposes, as to prevent any real agreement from being reached, in which case their mistake and misunderstanding relates rather to the existence of any bargain than to any "*improperly created motive*" rendering an actual compact unfair and avoidable⁴). Such are the following cases.

b) **Equivocation.** — Where an ambiguous expression is used, to which each party reasonably gives a different sense, no agreement is concluded between the parties. Thus, in the case of an agreement to purchase the cargo of the ship "*Peerless*" from Bombay, where it transpired that there were two ships of that name and the defendant intended one, and the plaintiff the other, there was held to be no contract⁵). This results from the fact that the same words may bear more than one meaning, and reference may be had by them to different objects of the same name or description, equally well⁶).

c) **Wrongly transmitted message.** — An offer sent by telegraph, which is incorrectly transmitted, is hardly to be regarded as an offer of the original sender, and an acceptance of such supposed offer cannot produce an agreement between the sender and the addressee. The question is, however, disputed whether a party is not bound by

¹) Per Mansfield, C. J., in *Holman v. Johnson*, (1775) 1 Cowp. 343. — ²) *Packard v. Byrd*, (S. Car. 1905) 6 L. R. A. (N. S.) 547; *Denneny & Co. v. John McNulta*, (1898) 41 L. R. A. 609; *Hobbs v. Boatright*, (1906) 5 L. R. A. (N. S.) 906, note; *Becker v. Wilcox*, (1908) 16 L. R. A. (N. S.) 571, note. — ³) *Reid v. Alaska Packing Asso.*, (1903) 43 Oreg. 429.

— ⁴) *Vickery v. Ritchie*, (1909) 202 Mass. 247; 26 L. R. A. (N. S.) 810. (Architect inserted different prices in the copies of the contract delivered to the owner and the contractor.)

— ⁵) *Raffles v. Wichelians*, (1864) 2 H. & C. 906. — ⁶) *Kyle v. Kavanagh*, (1869) 103 Mass. 356; *Wald's Pollock on Contracts*, (3d ed.) p. 599, note.

a message wrongly transmitted if the receiver had no reason to know that an error had occurred¹).

d) Error in persona. — If goods ordered of A are furnished by B, and used by C unwittingly, he is not liable in contract. Everyone has the right to select and determine with whom he will contract, and the offer to A is not an offer to B. C might be held liable in quasi-contract, however, for any benefit received²).

e) Subjective or unilateral error. — In general in case of discrepancy between what one says and what one means, the "declared intention" prevails over the "real intention" which exists in the recesses of the mind. It results from the requirements of ordinary intercourse that one is bound by his expression even if it does not rightly give effect to his will. A mistake of one party only, of which the other contracting party is entirely ignorant and to which he does not contribute, either in the expression of his agreement, or as to the subject matter and basis of the bargain, not known to the other, does not affect its binding force³). Thus, a mistaken idea of the nature, quality, or value of an object, an error in computation, the quoting of a lower rate than the real rate, if not caused by or known to the other, is not ground for avoidance or rescission of the contract⁴).

f) Mistake as to tenor of words. — If the original proposal is by any inadvertence wrongly expressed, as when price and quantity are misquoted, the proposer cannot avoid such declaration on the ground that he did not mean it. He can only show that the acceptor could not have reasonably supposed the offer, in its actual form, to have conveyed his real intention. If that is the case and the acceptor snaps at an offer which he must have known perfectly well to have been made by mistake, it would be unfair to permit him to retain such an advantage⁵). So, conversely, one is bound by an acceptance of an erroneously understood proposal if the proposer is misunderstood by the acceptor; it is for him to show that the misunderstanding was reasonable. He cannot be allowed to avoid his engagement by a simple statement that he made a mistake.

If a deed or contract is falsely read over to one and he then signs it and delivers it under a false impression, relief is granted on the ground of fraud⁶); but one able to read is bound by a contract which he signs without reading, even if he misunderstood its contents and effect. The contractor must stand by the words of his contract. It will not do for him to say, when called upon to abide by its terms, that he did not know what it contained. Even where one is blind or illiterate, or unable to read the language, he must procure someone to read and explain it to him before he signs it, unless he is prevailed upon by fraud or undue influence of the other party. The substitution of one document for another may prevent any agreement from being executed, but it is only where by trick or device an instrument has been obtained which the party did not intend to give, as by misreading, or the surreptitious substitution of one paper for another that one may escape from the terms of a paper which he has signed or accepted in ignorance of its contents, if open to ordinary observation⁷).

g) Fundamental error or mutual mistake. — Where a bargain is founded upon an erroneous assumption made by both parties as the basis of dealing, the transaction must stand or fall with the assumption upon which it is founded⁸). If A agrees to buy and B agrees to sell "these barrels of mackerel" and the barrels in question turn out to be salt, the assumption upon which the parties is false, and either party may avoid the contract. It would be grossly unfair and unjust to let one gain any advantage over the other by a mutual mistake which goes to the very root of the bargain⁹). Thus, if a bar is sold to a man as gold, but is in fact brass, although the vendor is innocent of fraud, the buyer may recover his money. The

¹) Postal Teleg. Co. v. Schaefer, (Ky. 1901) 62 S. W. 1119; compare Ayer v. Western Union Tel. Co., (1887) 79 Me. 493; Germain Fruit Co. v. Western Union Tel. Co., (1902) 137 Cal. 598. — ²) Burton Lumber Co. v. Wilder, (1895) 108 Ala. 669. — ³) Tatum v. Coast Lumber Co., (Idaho, 1909), 23 L. R. A. (N. S.) 1109, note, 16 Ida. 471. — ⁴) Steinmeyer v. Schroepel, (1907) 10 L. R. A. (N. S.) 114, note; Dalhoff Const. Co. v. Block, (1907) 17 L. R. A. (N. S.) 419, note; cf. Moffett

H. & C. Co. v. Rochester, (1900) 178 U. S. 373. — ⁵) Hume v. U. S., (1889) 132 U. S. 406. — ⁶) Western Mfg. Co. v. Cotton & Long, (1907) 12 L. R. A. (N. S.) 427; 126 Ky. 749. — ⁷) Hale v. Hale, (1908) 14 L. R. A. (N. S.) 221, 62 W. Va. 609; Griffin v. Roanoke R. & Lumber Co., (1906) 6 L. R. A. (N. S.) 463, note. — ⁸) Long v. Athol, (1907) 17 L. R. A. (N. S.) 96; 196 Mass. 497. — ⁹) Gardner v. Lane, (1865) 91 Mass. 492.

basis of the bargain, is not merely this object, but the assumption that this object is golden¹).

1. Error as to subject matter. — Where the subject matter of the contract is not in existence, as where the horse to be sold is dead, or the house is burned down, or the cargo is lost, and both parties are ignorant of this fundamental fact, this is clearly outside the realm of bargain²). So where there is a substantial variance in the quantity of land in a given tract, and the quantity specified in the contract, or even if the essential qualities attributed to the subject matter by the parties are misapprehended, this may constitute fundamental error³). But if facts are doubtful and the parties treat upon the basis that a certain element is speculative, they assume the risk of the truth of such fact as a part of the bargain. Even if the underlying principle were clearly perceived there would unavoidably be conflicting cases as to where the line should be drawn as to mistakes within and without the realm of bargain. This is particularly the case in the matter of value. Thus where both buyer and seller of a stone thought it was of small value while it was really a precious jewel, the fact that both mistook the value was held no ground of rescission⁴). In another case, however, A agreed to sell a blooded cow as a barren cow for \$ 80.00. As a breeder the cow was worth about \$ 1000. Before transfer of possession A discovered that the cow was with calf. It was held he could rescind the bargain⁵).

Where the parties having entered upon the commercial arena are dealing on a common basis, not upon some false assumption made by both which vitiates the whole sense and fairness of their dealings, mistake as to value or essential qualities has no effect. Each contracting party must take the care of himself; upon the field of speculation or bargain each seeks his own advantage. One cannot expect the law or the other party to correct his judgment as to the matter of his bargain or guarantee that he understands its terms.

2. Mistake in expression of true agreement. — Mistakes in expressing the true agreement usually occur in a written document where the terms used do not represent the meaning intended. While at law extrinsic evidence is not admissible to contradict and add to or vary the document, equity will rectify and reform its contents in accordance with the actual agreement reached if a common intention different from the expressed intention is proved⁶). The mistake of one party alone may be ground for rescinding, but not for reforming an instrument⁷). Where the mistake is obvious, such as a mere clerical error, the court may recognize the true agreement by ordinary rules of construction⁸). In the case of any vital discrepancy between the written document purporting to embody the agreement of the parties and the actual bargain, reformation is necessary.

4. MISREPRESENTATION AND FRAUD. — a) Misrepresentation without fraud. — At common law an innocent misrepresentation or non-disclosure of facts misleading one to his prejudice did not affect the contract unless the transaction was one of a special class, or unless the person affected stood in a relation of trust or confidence, so that the utmost good faith and fairness were required. Innocent misrepresentation was, however, a ground of voidability in a court of equity and furnished cause for rescinding a contract on the ground of mistake⁹). Where an error is induced by the conduct of the other party, the law will not permit him to take advantage even of his innocent misstatements¹⁰).

b) Rescission for fraud. — False representations made dishonestly entitle a party deceived to avoid his contract for any mistake so induced whereby his consent to the bargain was procured unfairly. The party defrauded may rescind, however, only where misled by a false representation of a material fact which would affect the judgment of a reasonable man; not by mere representation of law, of motive or intention, or mere opinion of value¹¹). Persons are not supposed to rely on dealers' talk as to value or to take literally the exaggerated eloquence of the other party¹²).

¹) Wald's Pollock on Contracts (3d ed.) p. 607. — ²) *Duncan v. N. Y. Ins. Co.*, (1893) 138 N. Y. 88; *Vinal v. Continental Co.*, (1887) 32 Fed. 343. — ³) *Gallup v. Bernd*, (1892) 132 N. Y. 370; *Cardinal v. Hadley*, (1893) 158 Mass. 352. — ⁴) *Wood v. Boynton*, (1885) 64 Wis. 265. — ⁵) *Sherwood v. Walker*, (1887) 66 Mich. 568. — ⁶) See exhaustive note, 28 L. R. A. (N. S.) 785; *Hunt v. Rousmaniere's Admr.*, (1828)

1 Pet. 1. — ⁷) *Hearne v. Ins. Co.*, (1874) 20 Wall. 488, 494. — ⁸) *Railroad Co. v. Spear*, (1861) 32 Ga. 550. — ⁹) *Wasatch Mining Co. v. Crescent M. Co.*, (1893) 143 U. S. 29. — ¹⁰) *Loewer v. Harris*, (1893) 57 Fed. 368. — ¹¹) *Sturm v. Boker*, (1893) 150 U. S. 312; *Southern Development Co. v. Silva*, (1888) 125 U. S. 247. — ¹²) See note in 35 L. R. A. 147.

c) **Fraudulent concealment.** — As a general rule the mere failure to disclose facts is not such fraud as will entitle the other party to avoid his contract. Unless the circumstances are such as to impose a natural duty to disclose the facts, a cunning reserve or shrewd acquiescence in another's ignorance or misapprehension of the circumstances, allowing him to proceed on an erroneous belief, which he has himself formed, are permitted by the rules of bargain and commercial dealing¹). Ordinarily it is only where the parties stand in a fiduciary relationship or in circumstances justifying reliance and confidence, that there is a positive duty to disclose facts²). It is only an industrious concealment which actually suppresses facts and deceives inspection that is considered fraudulent. The purchaser, for instance, is under no duty to announce to the seller the existence of a gold mine, or disclose facts which increase the value of the land³).

d) **Effect of fraud.** — A contract rendered unfair by fraud, misrepresentation, or other improperly created motives is voidable, not void. The aggrieved party may either ratify and affirm the contract or rescind it and recover that from which he has been unfairly separated. In case of an election to avoid the contract, this must be made within a reasonable time and must be communicated to the other party. There must also be a complete restoration of the consideration which the party has received, unless it be worthless. Some authorities very justly permit the rescinder to credit what he has received on his own demand where restoration would enhance completion of the fraud, and involve the surrender of the little indemnity that exists⁴).

The affirmance of the contract is not a waiver of the fraud and does not bar an action to enforce the contract as represented, but bars a subsequent rescission. Bringing an action to enforce a contract, or the acceptance of benefits under it, is a waiver of the right of rescission and restitution⁵).

5. **DURESS AND UNDUE INFLUENCE.** — The fairness of a bargain may be affected by duress or physical constraint, threatened violence or imprisonment, or by undue influence or mental constraint, where the will of one party is so much under the other's power and influence as not to be able to exercise its own deliberate choice.

a) **Duress at common law.** — At common law only such violence and threats as would deprive a constant and courageous man of his free will, and the resisting power which he ought to exercise for his own protection, amounted to duress⁶). Threats of injury to property, of detention of goods, or of trespassing on land, did not constitute legal duress. Even threats of battery not amounting to mayhem were not regarded as so operating on the mind to overcome the will and make the contract voidable for duress.

The modern doctrine, however, inquires whether the oppressed party was actually deprived of the exercise of his free will, by any show or threat of violence. Even threats as to property or contracts, or of criminal prosecution of a relative where one is in a position to dictate terms to the other, are regarded as wrongful compulsion vitiating the bargain⁷).

b) **Undue influence.** — Mental constraint which precludes the exercise of free and deliberate judgment was formerly relievable only in equity, as a ground for setting aside a will, conveyance, or contract so procured. Any abuse of power which circumstances have given to the will of one individual over that of another, whereby he obtains in his own favor a contract or other advantage is now recognized as such unfairness as invalidates the transaction in point of law⁸). There is a general presumption of undue influence, (that dominion of one will over another which constrains such other to do what he would otherwise refuse), which arises in three classes of cases:

a) **Family or fiduciary relationship;**⁹)

¹) *Laidlaw v. Organ*, (1817) 2 Wheat. 178.
²) There is a duty of disclosure of material facts in the case of marine insurance, life insurance, and between partners and fiduciaries; *Hanley v. Sweeny*, (1901) 109 Fed. 712; *McLanahan v. Ins. Co.*, (1828) 1 Pet. (U. S.) 170, 185; *Phoenix Ins. Co. v. Raddin*, (1887) 120 U. S. 183, 192. — ³) *Harris v. Tyson*, (1855) 24 Pa. St. 347; *Caples v. Steel*, (1879) 7 Oreg. 491. — ⁴) *Thackrah v. Haas*, (1886) 119 U. S. 499. — ⁵) *Dibblee v. Sheldon*, (1872)

10 Blatchf. 178; *Droege v. Ahrens, etc., Co.*, (1900) 163 N. Y. 466. — ⁶) *U. S. v. Huckabee*, (1872) 16 Wall. 414, 432. — ⁷) *French v. Shoemaker*, (1872) 14 Wall. 314, 332; note to *City Nat. Bank v. Kusworm*, (1894) 26 L. R. A. 48; note to *Williamson, etc., Co. v. Ackerman*, (1908) 20 L. R. A. (N. S.) 484. — ⁸) *Fisher v. Bishop*, (1888) 108 N. Y. 25; note to *Joellson v. Rowell*, (1889) 4 L. R. A. 640. — ⁹) *White v. Warren*, (1898) 120 Cal. 322; *Kisling v. Shaw*, (1867) 33 Cal. 425.

- b) Mental weakness from age, illness, or ignorance¹);
- c) A condition of necessity or distress²).

This presumption operates to render the contract voidable as for fraud, unless the promisee is able to show the dealing to be fair, just, and reasonable. Where an advantage is procured, the value of which exceeds the value of the consideration to such an extent that there is gross inadequacy and disproportion, this is strong evidence of undue influence and that a contract so unreasonable and unconscionable was procured by imposition³).

F. Invalidity by Reason of Incapacity. — Contracts may be rendered invalid by reason of the incapacity, partial or total, of one of the parties. Capacity of parties is treated from the point of view of disabilities as all persons are presumed to be competent until the contrary is shown.

1. **INFANTS.** — An infant is disabled from binding himself conclusively by contract, but his disabilities are really privileges in order to secure him from hurting himself by his own improvident acts. His contracts are not void, but merely voidable or confirmable at his option⁴). The adult cannot refuse to perform because of the infant's inability to bind himself conclusively; one is bound, but not the other, an exception to the general rule that a contract must be mutually binding to bind either. The infant may thus sue for a breach though not liable to be sued⁵).

a) Avoidance. — The infant may avoid his contracts of a personal kind either during minority or within a reasonable time after coming of full age⁶). Any attempted affirmance during infancy is ineffectual⁷). After majority the contract must be affirmed to become obligatory, although some courts hold the transaction valid until rescinded. But, in general, the mere acquiescence or failure to disaffirm the contract is not sufficient for ratification unless the infant retains and accepts the benefit of the consideration after coming of age⁸).

b) Restoration of the consideration. — If the infant still possesses the consideration in specie this must be restored by him upon rescission⁹), but the other party has no remedy for deterioration, waste, or consumption by the infant. If the infant no longer possesses the consideration received by him, having consumed or disposed of it during infancy, he may avoid the contract and recover anything which he has given, without putting the other party in statu quo¹⁰).

c) Necessaries. — The only contract binding upon an infant is the constructive contract to pay the reasonable value of necessaries, which is created by law from the receipt of the articles. Such an obligation arises to pay for things necessary to the infant's support, use, and comfort according to his state and condition in life, if he be not already sufficiently provided¹¹).

2. **NON COMPOS MENTIS.** — There is considerable conflict in American courts as to contracts of lunatics. A contract, deed of conveyance, or power of attorney entered into by a person who is so drunk, idiotic, or insane as to be incapable of understanding what he is doing is at least voidable at his option¹²), and in some few jurisdictions absolutely void¹³). If by reason of lunacy, idiocy, senile dementia, imbecility, or habitual drunkenness, a person be incapable of understanding the nature of his contract, it is thereby rendered voidable, even if he were not entirely wanting in reason¹³). Moreover, the consideration need not be restored if the other party knew of the insane person's infirmity and took advantage of it¹⁴). It is the better opinion, however, that the contract may not be avoided without restoring the other to his

¹) *Allore v. Jewell*, (1876) 94 U. S. 506, 511; *Griffith v. Godey*, (1885) 113 U. S. 89, 95. — ²) *Wheeler v. Smith*, (1850) 9 How. (U. S.) 55; *Kelley v. Caplice*, (1880) 23 Kas. 474. — ³) *Eyre v. Potter*, (1853) 15 How. 42, 59, 60; *Adams v. Cowen*, (1900) 177 U. S. 471, 484. — ⁴) *Shropshire v. Burn* (1871) 46 Ala. 108; *McDonald v. Sargent*, (1898) 171 Mass. 492. — ⁵) *Sims v. Everhardt*, (1880) 102 U. S. 300; *Insurance Co. v. Hilliard*, (1900) 63 Ohio St. 478, 491; *Atwell v. Jenkins*, (1895) 163 Mass. 362; note to 26 L. R.A. 177. — ⁶) *Gillis v. Goodwin*, (1901) 180 Mass. 140; *Shipman v. Horton*, (1846) 17 Conn. 481. — ⁷) *Sanger v. Hibbard*, (1900) 104 Fed. 455.

— ⁸) *Sims v. Everhardt*, (1880) 102 U. S. 300, 312. — ⁹) *Brandon v. Brown*, (1883) 106 Ill. 519, 527. — ¹⁰) *Tucker v. Moreland*, (1836) 10 Pet. 58, 73. — ¹¹) *Beardsley v. Hotchkiss*, (1884) 96 N. Y. 201; *Bank v. Strauss*, (1893) 137 N. Y. 148, 152. — ¹²) *Bush v. Breinig*, (1886) 113 Pa. 310; *Luhns v. Hancock*, (1901) 181 U. S. 567, 574. — ¹³) *Atwell v. Jenkins*, (1895) 163 Mass. 362; (A distinction is sometimes drawn between contracts and deeds of conveyance, holding the latter absolutely void, the former voidable merely.) *Dexter v. Hall*, (1872) 15 Wall. 9. — ¹⁴) *English v. Porter*, (1884) 109 Ill. 285.

former position, where the insane person has received a benefit under it and the other party acted in good faith and in ignorance of the other's infirmity¹).

Insane persons are liable like infants quasi ex contractu for necessities suitable to their station and condition in life, if furnished to themselves, their wives or children²).

3. DRUNKEN PERSONS. — Drunken persons stand much on the same footing as those who are insane, if intoxication is so deep and excessive as to deprive one of his reason and understanding altogether, this would seem to make the contract null and void as lacking the elements of agreement³). Where intoxication is only so great as to give the other party an unfair advantage, which he employs to impose on the intoxicated party, this would seem to render the contract merely voidable and he must take steps within a reasonable time to disaffirm it⁴). If one can remember on the following day what he has done and the circumstances under which he contracted, this would seem to show that he had not been rendered incompetent by intoxication⁵).

4. MARRIED WOMEN. — a) Common law and equity rules. — At common law the effect of a marriage was to deprive the wife of all separate legal existence, her husband and herself being deemed at law but one person. Her attempted contracts were absolutely null and void. But courts of equity followed to a great extent the more liberal doctrines of the civil law, and held her separate estate liable for all debts, charges, and incumbrances which she expressly or by implication charged thereon, either before or during coverture⁶).

b) Statutory removal of disabilities. — By statute the common law disabilities of married women have been to a great extent removed, so that they may contract and incur liabilities as if unmarried.

These statutes vary exceedingly and their terms and interpretation by the courts must be consulted. In some States married women are merely authorized to make contracts with reference to their separate estates, and such statutes do not remove their general disability of contract which exists at common law⁷). The statutes in some States require the husband's consent to the wife's contracts⁸). In some States contracts of suretyship for the husband or others are expressly or impliedly excluded from her contractual powers, and the disability of coverture as to such contracts remains as it was at common law⁹).

c) Conflict of laws as to capacity of married women to contract. — By the weight of authority the *lex loci contractus* prevails over the *lex domicilii* (and also over the *lex rei sitae*) as to personal contracts and contracts in relation to personal property, although the contrary is held in England¹⁰). The *lex rei sitae* prevails over the *lex loci contractus*, as to contracts in relation to real property. There is a conflict of authority, as to personal contracts, whether the *lex loci contractus* prevails over the *lex loci solutionis*, irrespective of the intention of the parties expressed or implied¹¹).

d) Statutes of various States. — In California married women may contract as if sole¹²). The wife may without the consent of the husband convey her separate property¹³). The community property is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband¹⁴). The earnings of the wife are not liable for the debts of the husband¹⁵). The separate property of the wife is liable for her own debts contracted before or after marriage, but is not liable for her husband's debts¹⁶).

¹) *Brodrig v. Brodrig*, 1880) 56 Cal. 563; *Insurance Co. v. Hunt*, (1880) 79 N. Y. 541.

— ²) *Re Renz*, (1890) 79 Mich. 216. — ³) See notes to *Wright v. Waller*, (1900) 54 L. R. A. 440; *Kuhlman v. Wieben*, (1905) 2 L. R. A. (N. S.) 666; *Miller v. Sterringer*, (1909) 25 L. R. A. (N. S.) 596. — ⁴) *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473. *Kelly v. Louisville and N. R. Co.* (1908) 154 Ala. 573. — ⁵) *Martin v. Harsh*, (1907) 231 Ill. 384; 13 L. R. A. (N. S.) 1000. — ⁶) *Miller v. Newton*, (1863) 23 Cal. 554. — ⁷) Note to *Bank v. Bowers*, (1908) 17 L. R. (N. S.) 676; note to *Harrington v. Towe*, (1906) 4 L. R. A. (N. S.) 547; *Vann v. Edwards*,

(1904) 135 N. C. 661; 67 L. R. A. 461. — ⁸) *Wood v. Potts*, (1904) 140 Ala. 425; 37 So. 253. — ⁹) Note to 17 L. R. A. (N. S.) 676; *Field v. Campbell*, (1904) 164 Ind. 389; 72 N. E. 260; *Wiltbank v. Tobler*, (1897) 181 Pa. St. 103; 37 Atl. 188. — ¹⁰) See note in 57 L. R. A. 523 to *Union Nat. Bank v. Chapman*, (1902). — ¹¹) See note to *Mayer v. Roche*, (1909) 26 L. R. A. (N. S.) 764; note to *International Co. v. McAdam*, (1910) 26 L. R. A. (N. S.) 774. — ¹²) Civ. Code sec. 158. — ¹³) Civ. Code, sec. 162. — ¹⁴) Civ. Code, sec. 167. — ¹⁵) Civ. Code, sec. 168. — ¹⁶) Civ. Code, sec. 171.

The management, control, and disposition of community property belong to the husband, with the like absolute power of disposition, other than testamentary, that he has of his separate estate¹).

In Illinois the husband and wife are not liable for each other's debts²). Contracts may be made and liabilities incurred by a wife as if she were unmarried, but she may not in general carry on any partnership business without the consent of her husband³).

In Massachusetts a married woman may make contracts in the same manner as if she were sole. She is not liable for her husband's debts⁴).

In Louisiana the wife cannot bind herself for debts contracted by her husband before or during the marriage⁵). Debts contracted during the marriage must be satisfied out of the community property⁶). By the civil law, as it obtains in Louisiana, the wife's contract may be authorized by the husband. This is presumed when he contracts jointly with his wife or permits her to trade in her own name⁷). The authorization does not make the husband personally liable⁸).

In New York a married woman has all the rights in respect to property, real and personal, and the same capacity to make contracts and to carry on business, as if she were unmarried⁹). A contract made by a married woman does not bind her husband or his property¹⁰).

In Pennsylvania a married woman may own and dispose of property to the same extent as an unmarried person, but may not mortgage or convey her real property unless her husband join in the conveyance. She may make contracts with reference to her separate property, but may not become a guarantor or surety for another¹¹).

5. **ALIENS.** Alien friends have as a general rule the same power to enter into contracts as citizens¹²). The existence of a state of war, however, dissolves commercial agencies and partnerships between citizens of the belligerents, suspends the right of an alien to sue, and trading without a license is illegal¹³). The right of aliens to take and hold real estate is a matter of State regulation.

G. Statute of Frauds. — The English Statute of Frauds, which was enacted by Parliament in 1676, has been substantially reenacted by most of the American States, and provides that certain contracts shall be unenforceable unless there be some sufficient memorandum of the contract in writing. The principal classes of such contracts are:

1. Contracts for the sale of real property or any interest in land, though leases for one year or less are usually excepted;
2. Contracts for sale of goods over a certain value, varying from \$ 50 to \$ 200. Several States do not have this provision at all¹⁴).
3. Contracts to answer for the debt, default, or miscarriage of another¹⁵).
4. Contracts which by their terms are not to be performed within the space of one year from the time of making; but if such contract be capable of being fully performed within one year or if the contract is executed on one side, the statute does not apply¹⁶).

In many states other contracts require written evidence, as for example a promise to pay a debt barred by the Statute of Limitations, building contracts, and others.

VIII. JOINT AND SEVERAL CONTRACTS. — A. Joint Liability. — When two or more persons are bound under one undertaking, their duties with relation to one another may be either a) Several; b) Joint or c) Joint and several. The effect of such an undertaking, as far as the relative liabilities of the obligors is concerned, is to be ascertained from the intention of the parties as disclosed by the provisions of the contract¹⁷). There are, however, certain well defined rules for the construction of such contracts.

1. **CONSTRUCTION OF OBLIGATION.** — The general rule is that when a promise is made by several persons together, the obligation is presumptively joint

¹) Civ. Code, sec. 172. — ²) Hurd's Rev. St., Illinois, c. 89, sec. 5. — ³) Sec. 6, *ibid.* — ⁴) Rev. Laws, c. 153, sec. 2. — ⁵) Rev. Civil Code of La., (1909) sec. 2398. — ⁶) Sec. 2403, *ibid.* — ⁷) Calhoun v. Lane, (1887) 39 La. Ann. 594, 2 So. 219. — ⁸) Lehman v. Barrow, (1871) 23 La. Ann. 185. — ⁹) Cons. Laws, (1909), Art. IV, sec. 50. — ¹⁰) Sec. 55, *ibid.* — ¹¹) Act of June 8, 1893, p. 2449, 2451, Purdon's Digest,

par. 35, 40. — ¹²) Milliken v. Barrow, (1893) 55 Fed. 148. — ¹³) McKee v. U. S. (1868) 8 Wall. 163. — ¹⁴) See article by Professor Mc Murray on Sales, *infra.* — ¹⁵) See Suretyship & Guaranty, *infra.* — ¹⁶) Fraser v. Gates, (1885) 118 Ill. 99, 112, 20 Cyc. p. 199. — ¹⁷) New Haven, etc., Co. v. Hayden, (1876) 119 Mass. 361.

in default of evidence of a contrary intention¹). This principle is qualified by the following subsidiary rules of construction:

1. The words "I promise," signed by several, import a several obligation²);
2. The words "we promise," signed by several, import a joint obligation³);
3. The words "we promise jointly and severally," or "we promise for ourselves and each of us," import a joint and several obligation⁴).

2. **RESPECTIVE LIABILITY OF JOINT OBLIGORS.** — 1. When the obligation is several, the obligee may sue anyone of the obligors or each in turn⁵). A suit against one affords no bar to action against another⁶). They cannot be sued jointly in the absence of statute. In short, each is liable individually.

2. When the obligation is joint, each is liable to the full extent of the undertaking⁷). They must be sued jointly and are not subject to be sued severally, unless that right is conferred by statute.

3. **SURVIVAL OF JOINT LIABILITY.** — On the death of one joint obligor the surviving obligors alone remain liable⁸). The decedent's estate is not liable at law, although by statute in many States the joint debt survives against the estate as well as against the survivors⁹). Upon the death of all but one obligor the duty becomes several, and upon the death of this last survivor the obligation devolves upon his representatives¹⁰).

A judgment against one joint obligor or a release given him by the obligee operates to discharge the remaining obligors¹¹). This rule has likewise been largely changed by statute.

4. **CONTRIBUTION.** — If one joint obligor performs the promise in which the others united, he is entitled to equal contribution from the surviving obligors and from the representatives of any deceased obligor who participated equally in the benefit of the consideration¹²). There is, of course, no contribution in case of the joint obligation of principal and surety. If one joint obligor be insolvent, the contribution due from the others is increased proportionally¹³). Such is the liability as between the several joint obligors, since between themselves they are liable in equal shares, and one who has satisfied more than his share of the claim against all ought to have proportional contribution from those joined with him.

5. **PARTNERSHIP CONTRACTS.** — Partnership contracts are joint. Each partner is liable jointly with his co-partner for all the obligations of the partnership, and in equity the estate of a deceased partner is also liable¹⁴).

B. Joint and Several Liability. — When the obligation is joint and several, suit may be instituted against all jointly or each singly¹⁵). If the action is brought against one severally the others may nevertheless be sued severally in their turn¹⁶). If all are sued jointly the prevailing American rule is that the judgment merges the obligation and subsequent actions are not maintainable¹⁷). In England, however, and in some of the States, the obligee may pursue his remedies both jointly and severally until satisfaction is obtained¹⁸). Similarly, if one is sued severally subsequent, suit against all jointly is barred.

C. Joint Rights. — As to the obligee's rights, they may be either joint or several; they cannot, in the very nature of things, be both joint and several¹⁹).

1. **CONSTRUCTION OF OBLIGATION.** — When a promise is made to several persons together, their relative rights are dependent upon their respective interests in the obligation²⁰).

¹ Brady v. Reynolds, (1859) 13 Cal. 31; Eller v. Lacy, (1894) 137 Ind. 436. — ² 9 Cyc. 660. — ³ 9 Cyc. 660. — ⁴ Davis v. Shafer, (1892) 50 Fed. 764; Carter v. Carter, (1807) 2 Day (Conn.) 442. — ⁵ Fuselier v. Lacour, (1848) 3 La. Ann. 162. — ⁶ Colt v. Learned, (1875) 118 Mass. 380. — ⁷ Meyer v. Estes, (1895) 164 Mass. 457. — ⁸ Moore v. Rogers, (1857) 19 Ill. 347; Comins v. Pottle, (1880) 22 Hun (N. Y.) 287. — ⁹ Harbeck v. Pupin, (1890) 123 N. Y. 115. — ¹⁰ Moore v. Rogers, (1857) 19 Ill. 347; New Haven, etc., Co. v. Hayden, (1876) 119 Mass. 361; Comins v. Pottle, (1880) 22 Hun (N. Y.) 287. — ¹¹ Hale v. Spaulding, (1888) 145 Mass. 482; Mason v. Eldred, (1867) 6 Wall. 231. —

¹² Corrigan v. Foster, (1894) 51 Ohio St. 225. — ¹³ Kincaid v. Hocker, (1832) 7 J. J. Marsh (Ky.) 333. — ¹⁴ Harter v. Songer, (1894) 138 Ind. 161. And see article on Partnership by Mr. Lichtenberger, *infra*. — ¹⁵ Winslow v. Herrick, (1861) 9 Mich. 380; Simonds v. Center, (1809) 6 Mass. 18. — ¹⁶ Schilling v. Black, (1892) 49 Kas. 552. — ¹⁷ U. S. v. Price, 9 How. (U. S. 1850) 83—93. — ¹⁸ Prosser v. Evans, (1895) 1 Q. B. 108; People v. Harrison, (1876) 82 Ill. 84; Simonds v. Center, (1809) 6 Mass. 18. — ¹⁹ Starret v. Gault, (1896) 165 Ill. 99. — ²⁰ St. Louis, etc., Ry. Co. v. Coultas, (1864) 33 Ill. 188; Goldsmith v. Sachs, (1882) 17 Fed. 726.

2. RESPECTIVE RIGHTS OF OBLIGEES. — The joint obligees must bring suit jointly, they cannot sue the obligor severally¹). The obligor, on the other hand, cannot be called upon to perform his promise more than once and payment to one joint obligee, or release by one, will discharge the obligor's duty to the others²). If a release is given by one joint obligee in collusion with the obligor to defraud the other obligees, their rights remain unaffected.

3. CONTRIBUTION. — As between themselves, joint creditors are entitled to equal shares, and, if one of them obtains satisfaction, each of the others is entitled to claim from him his ratable part of the benefit of performance³).

4. SURVIVAL OF RIGHTS. — If one joint obligee dies the joint claim survives to the others and ultimately the claim becomes several and passes to the representative of the last survivor⁴).

IX. CONTRACTS FOR THE BENEFIT OF THIRD PERSONS. — A. Strangers to the Contract. — Performance of a contract may be stipulated for by the promisee in favor of one who is not a party to the bargain, with the effect of giving a direct right to such third party to claim the promised benefit. The commonest instance is that of a life insurance policy for the benefit of wife, children, or other beneficiary. Such persons who do not participate in the bargain are called "third persons"⁵).

1. ENGLISH LAW. — It is held by the English Courts that "a third person" is not entitled to sue on a contract made by others for his benefit; that the contract cannot have the effect of conferring any claim upon him, since he does not furnish the consideration nor enter into any privity with the contractors.

2. AMERICAN LAW. — In the United States the majority of jurisdictions recognize the claim of the beneficiary at least in two classes of cases: 1. Where the express object of the contract is a donation to the third party, as in case of life insurance; 2. Where the performance of the contract goes to discharge some legal or moral obligation of the promisee to the beneficiary, as in case of a promise to a debtor to pay his debt. While the claims of the beneficiary are recognized in these cases, the greatest confusion prevails as to the underlying principle on which the cases go, and the true principle is obscured by ill-conceived analogies in an attempt to justify the right on ordinary principles of contract as arising from the promise.

B. True Basis in Implied or Constructive Obligation to Perform Undertaking. — Since the promise is not an assurance to the beneficiary, but to the promisee, there is no promise or obligation running to the beneficiary, unless one is created by law on the basis of the facts of the case. "The law, operating on the act of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded"⁶). The bargain enures in favor of the beneficiary, not by his own merit on principles of contract, but by vicarious merit on principles of gift and quasi-contract. His acceptance is not essential to the acquisition any more than in a declaration of trust or a gift of property. Since the obligation is a constructive one declared by law after the manner of quasi-contract, whether the beneficiary has an enforceable right depends on the object of the contract, the nature of the undertaking of the promisor and the relations in fact arising from the circumstances.

1. RECEIPT OF PROPERTY AND ASSUMPTION OF LIABILITY TO THIRD PARTIES. — This is well illustrated by those cases where the debtor or benefactor pays money or property as a fund into the hands of another to enable him to pay his debts, or confer a benefit upon his friends⁷). Even in England when a settlement of property is made in contemplation of marriage, the children of the marriage may enforce any covenant for their benefit contained in the settlement⁸). The receipt of the property is a clear basis of a natural obligation to perform the undertakings contracted in behalf of the beneficiary. Such is the case of a deposit in a savings bank for the benefit of relatives, which involves an extension of the idea of trust⁹).

2. DONATION OF CLAIM. — The case of life insurance involves an extension of the idea of gift. Although the beneficiary is not a party to the contract, he is the

¹) *Marie v. Garrison*, (1880) 83 N. Y. 14.

— ²) *Myrick v. Dame*, (1852) 9 Cush. 248.

— ³) *Hayden v. Eagleson*, (1888) 15 N. Y.

St. Rep. 200. — ⁴) *Smith v. Franklin*, (1805)

1 Mass. 480. — ⁵) See Professor Williston's

masterly treatment of this subject in his edition (the third) of *Wald's Pollock on Contracts*,

pp. 237—278. — ⁶) *Lawrence v. Fox*, (1859)

20 N. Y. 268; *Brewer v. Dyer*, (1851) 7 Cush.

337, 340. — ⁷) *Zimmer v. Sennott*, (1890) 134

Ill. 505; *Prentice v. Brimhall*, (1877) 123 Mass.

291, 293. — ⁸) *Wald's Pollock on Contracts*,

(3d ed.) p. 231. — ⁹) See *Rogers Locomotive & Machine Works v. Kelley*, (1882) 88 N. Y. 235.

real party in interest and justice requires that his claim to enforce the benefit be recognized. The issue of the policy is, in effect, an executed gift of the claim which confers on the beneficiary a vested right which no act of the insured can impair¹).

3. PROVISION FOR DISCHARGE OF AN OBLIGATION. — Where a debtor procures another to assume and promise to pay his debt, the motive of the contract is undoubtedly the benefit of the original debtor; yet the object of the contract is accomplished by giving the creditor the immediate benefit by a direct claim, and letting him undertake the burden of collecting from the party liable to the debtor. The promisee seeks indirectly to discharge an obligation of his own to the beneficiary by means of a contract. The new promisor is, as between himself and the original debtor, bound to satisfy the obligation, and the creditor has a legitimate interest in this provision made by his debtor²). Since two parties are interested in the claim, either should be allowed to sue joining the other. The creditor is almost universally allowed to sue where the grantee of realty subject to a mortgage or lien assumes and agrees to pay the mortgage debt of the grantor as part consideration for the conveyance³).

4. INCIDENTAL BENEFITS RAISE NO CLAIM. — The fact that a person may have a vital interest in a contract being faithfully carried out is not enough to give a right of action to the third person. It must be the direct object of the contract to stipulate for his benefit or advantage. Thus, if A promise B to pay him money for his expenses, this is not enforceable by a creditor of B. So where a water company contracts to furnish water for the hydrants of a town, the owner of a house lost by fire, owing to the failure of the water company to keep its promise to the town, has no claim on the contract; the object of the promise was to benefit the community as a whole and no benefit to the owner was necessarily expected to result⁴).

5. WHEN DOES CLAIM OF BENEFICIARY VEST? — May the promisee destroy the claim of the beneficiary by a rescission or release of the contract? The promisee is under no obligation to make the contract, or to proceed with the consideration when made; until the consideration is executed the contract is like an executory gift. Thus, non-performance by the promisee is a good defence against the beneficiary. The promisor need not carry out his undertaking if he has not received what he bargained for as the basis of his duty⁵). When the claim has been perfected, however, the promisee cannot revoke the gift and take back the claim he has given by rescission or release. In most jurisdictions, however, the distinction is not taken between executed and executory consideration; but a rescission or release is held operative prior to assent or acting upon the promise by the beneficiary, but not afterward⁶).

X. ASSIGNMENT OF CONTRACTS. — A. Assignment of Claims (Choses in Action). — Claims to money or property arising out of contract are treated as the property of the claimant or creditor and may generally be transferred by him⁷).

1. WHAT CLASSES OF RIGHTS CAN BE ASSIGNED. — Claims to personal services where the nature of the transaction involves personal confidence are by nature unassignable, since the duty would alter in character if the claim were exercisable by other than the original creditor. Such claims are unlike those which relate merely to the payment of money or the delivery of a thing (choses in action), where it does not matter to the debtor whether he performs for one creditor or another⁸).

2. CHOSSES IN ACTION NOT ASSIGNABLE BY OLDER LAW. — The older English law did not recognize even the assignment of choses in action. This was attributed to the policy of discouraging maintenance and litigation, but was rather based on the personal character of contracts⁹).

¹) 3 Am. & Eng. Encyc. of Law p. 980.

— ²) The only jurisdictions which do not accept the doctrine of *Lawrence v. Fox*, (1859) 20 N. Y. 268 to this effect, are Massachusetts, Connecticut, Michigan, North Carolina; also the United States Supreme Court, Maryland, New Hampshire and Pennsylvania. —

³) The only state where the mortgagee cannot proceed against the grantee who assumes the mortgage is Massachusetts. *Rice v. Sanders*, (1890) 152 Mass. 108. There is plain reason for implying a promise in such cases. *Keller v. Ashford*, (1890) 133 U. S. 610; *Johns v. Wilson*, (1901) 180 U. S. 440; *Fanning*

v. Murphy, (1906) 126 Wis. 538, 5 Am. & Eng. Ann. Cas. 435. — ⁴) *Allen, etc., Mfg. Co. v. Shreveport Water Works Co.*, (1905) 113 La. 1091; see note to 9 Am. & Eng. Ann. Cas. 1070; 2 Am. & Eng. Ann. Cas. 479. — ⁵) *Episcopal Mission v. Brown*, (1895) 158 U. S. 222; *Willard v. Wood*, (1896) 164 U. S. 502, 521; *Loeb v. Willis*, (1885) 100 N. Y. 231. — ⁶) *Biddell v. Brizzolara*, (1883) 64 Cal. 354; *Gifford v. Corrigan*, (1889) 117 N. Y. 257. — ⁷) Cal. Civ. Code, Sec. 1458. — ⁸) *Arkansas Smelting Co. v. Belden*, (1877) 127 U. S. 379; *Burck v. Taylor*, (1894) 152 U. S. 634. — ⁹) *Wald's Pollock on Contracts*, p. 278.

3. EFFECT OF ASSIGNMENT. — When assignments came to be recognized, it was rather on the theory of an irrevocable power of attorney, given the assignee by the assignor, to collect the claim in the name of the assignee.

B. Suit by Assignee. — The right of the assignee of a contract to bring suit for breach is now uniformly recognized, although in some jurisdictions the action must still be brought in the name of the assignor¹⁾.

The right of the assignee (the real party in interest) to sue in his own name is now conferred by statute in a number of States²⁾.

1. SUCCESSIVE ASSIGNEES. — The prevailing American rule is that when there are successive assignments of a single chose in action, the assignee who is first in point of time will have priority³⁾. The English rule, on the contrary, is that the assignee who first gives notice of assignment to the obligor will be preferred⁴⁾, and this view has been accepted in several States⁵⁾. The English cases seem to be in accord with the principles of Civil Law generally⁶⁾, although the German law is otherwise⁷⁾.

An important qualification of the American doctrine is that the subsequent assignee is entitled to protection in the following instances:

a) If novation has been effected in his favor, i. e., if the old obligation has been supplanted by an obligation running to the assignee direct⁸⁾.

b) If he pursues his claim to judgment⁹⁾;

c) If the obligation is embodied in an instrument under seal of which he obtains possession¹⁰⁾;

d) If he secures payment from the obligor in good faith¹¹⁾.

2. ASSIGNEE'S RIGHTS AS AFFECTED BY DEFENSES OF DEBTOR AGAINST ASSIGNOR. — The assignee's right to enforce the obligation is subject generally to all the defenses that would be available to the obligor in a suit by the assignor¹²⁾. Inasmuch as the assignee really "stands in the shoes" of the assignor, he can claim no larger rights. The obligor, however, cannot set up any defenses which arise subsequent to assignment and after notice thereof¹³⁾, but he may rely upon any defenses acquired prior to notice¹⁴⁾.

3. LATENT EQUITIES IN FAVOR OF THIRD PERSONS. — In England the assignee's rights are also subject to unknown equities in favor of others than the debtor¹⁵⁾ and this rule is followed in New York, but the prevailing rule is otherwise¹⁶⁾.

4. CONTRAST WITH NEGOTIABLE INSTRUMENTS. — The rights of the assignee of an ordinary debt or contract are far more restricted than the rights of a transferee of a negotiable instrument. The transferee of negotiable paper in good faith and without notice takes free and clear of all equities¹⁷⁾.

C. Suit against Assignee of Contract. — The assignee of a contract is not liable to suit for breach of the contractual obligation¹⁸⁾. Contracts, by reason of their very nature, are not truly and completely assignable. The benefits incident to a contract may be assigned, as previously set forth, and the assignee is permitted to maintain suit for their enforcement, except where the contract is of such a personal nature as to render assignment impossible. The burdens attaching to a contract, however, are incapable of assignment¹⁹⁾.

1. NOVATION AN APPARENT EXCEPTION. — In certain instances where contract liabilities are apparently assigned, the real effect of the negotiations is novation, i. e., the substitution of an entirely new obligation for the obligation

1) 4 Cyc. 92, 93. — 2) *Herman v. Hecht*, (1897) 116 Cal. 553; *Spofford v. Norton*, (1879) 126 Mass. 533; *Sheridan v. N. Y.*, (1876) 68 N. Y. 30. — 3) *Fortunato v. Patten*, (1895) 147 N. Y. 277; *Thayer v. Daniels*, (1873) 113 Mass. (1873) 129; *Sutherland v. Reeve*, (1894) 151 Ill. 384. — 4) *Dearle v. Hall*, (1824) 2 L. J. Ch. O. S. 62, 3 Russ. 1; *Loveridge v. Cooper* (1823—7) 3 Russ. 31, 27 Rev. Ry. 1; *Foster v. Cockerell* (1835), 3 Ch. & F. 456, 39 R. R. 24. — 5) *Graham Paper Co. v. Pembroke*, (1899) 124 Cal. 117; *Copeland v. Morton*, (1872) 22 Ohio St. 398. — 6) *Pothier, Contrat de Vente*, secs. 560, 554, et seq. — 7) *Harv. Law Rev.* 309, note 2. — 8) *New York Co. v. Schuyler*, (1865) 34 N. Y. 30. — 9) *Judson v. Corcoran*, (1854) How. 612. — 10) *Bridge v. Conn. Ins. Co.*, (1890) 152 Mass. 343. — 11) *Bentley v. Root*, (1836) 5 Paige (N. Y.) 632. — 12) *McCarthy v. Mt. Tecarte Co.*, (1896) 110 Cal. 687; *Barker v. Barth*, (1901) 192 Ill. 460. — 13) *Wilson v. Stilwell*, (1863) 14 Ohio St. 464; *Chicago Title Co. v. Smith*, (1895) 158 Ill. 417. — 14) *Parmly v. Buckley*, (1882) 103 Ill. 115. — 15) *Ames' Cases on Trusts*, 309, note. — 16) *First Bank v. Perris*, (1895) 107 Cal. 55; *Humble v. Curtis*, (1895) 160 Ill. 193. — 17) *Goodman v. Simonds*, (1857) 20 How. 343; *Shreeves v. Allen*, (1875) 79 Ill. 553; *International Trust Co. v. Wilson*, (1894) 161 Mass. 80. — 18) *Adams v. Wadhams*, (1862) 40 Barb. 225. — 19) *Smith v. Kellogg*, (1874) 46 Vt. 560.

previously existing¹). One of the parties to the original contract is relieved from responsibility, and a new contract between the other party and a third person is brought into being²). Either party to the new undertaking is, of course, liable to suit thereon. We have considered above the assumption of debts under contracts for the benefit of a third person. It is self-evident that the rights and liabilities arising from novation afford no exception to the general principle that a stranger to a contract can be held to no liability under its provisions.

2. CONTRAST WITH GERMAN CIVIL LAW. — Under the modern German Civil Law there may be a transfer of liability in the same way as the transfer of a right, subject, however, to the requirement of the creditor's assent. The assumption of the burden of the contract is not regarded as the creation of a new obligation, but the taking over of the old, subject to the ratification or repudiation of the creditor. The new debtor is entitled to avail himself of the same defenses as the original debtor³).

XI. PRINCIPAL AND AGENT⁴). — **A. Scope of Authority.** — A contract entered into by a lawfully authorized agent within the scope of his authority is in law the contract of the principal, who is entitled to the benefits of the undertaking and subject to its liabilities⁵). No very definite rule can be laid down for ascertaining the measure of an agent's authority. The basic principle is that when an agent has been endowed with express authority to take certain action he is thereby impliedly empowered to take such steps as are ordinarily proper and necessary to the execution of that authority⁶). Although the principal may give the agent instructions designed to diminish the customary limits of his authority, third persons are not affected by such limitations in the absence of knowledge⁷).

1. AGENTS FOR PARTICULAR PURPOSES. — If an agent is appointed for a particular purpose the scope of his authority is necessarily far more narrow than that of an agent invested with more general powers. The exact extent of his powers is dependent upon the particular nature of the undertaking. For example, an agent who has authority to sell is not endowed with authority to buy⁸). Authority to buy for cash does not comprehend authority to buy on credit⁹). Authority to buy implies authority to make payment¹⁰). Power to sell goods carries with it power to warrant the title of the owner, and, if it is the custom of the trade for the seller to warrant the quality or condition of the goods, this power is likewise implied¹¹).

2. RATIFICATION. — Although the contract entered into by the agent may exceed the scope of his authority, the principal may subsequently ratify the contract and thereby secure the same rights and subject himself to the same liability as if the contract had been binding in the first instance¹²).

B. Action upon a Contract by the Principal. — When a contract is made by an agent on behalf of his principal, the principal may sue the third party for a breach thereof¹³). Whether the principal was disclosed¹⁴) or undisclosed¹⁵) at the time the contract was made, and whether he is a foreigner¹⁶) or a citizen of the United States, are immaterial considerations. This right of the principal to sue is a necessary consequence of the legal theory that the real party to the undertaking is the principal, — the agent is merely the medium through whom the negotiations were consummated.

If, however, the agency was completely undisclosed at the time when the contract was made and the third person expressly indicated that he was willing to contract only with the individual conducting the negotiations, suit is not maintainable by the principal¹⁷). One cannot be forced into a contract with another in invitum.

C. Action by Agent upon Contract. — The agent himself may sue to enforce an obligation entered into on behalf of his principal: a) When he is properly empowered¹⁸);

¹) *Dick v. Flanagan*, (1890) 122 Ind. 277;

Munson v. Magee, (1899) 161 N. Y. 182. —

²) *Cornwell v. Megins*, (1888) 39 Minn. 407.

— ³) Schuster, *Principles of the German Civil Law*, pp. 201, 202. — ⁴) The special rules governing Factors and Brokers are set forth in the article on Factors and other Commercial agents,

by Professor McMurray, *infra*. — ⁵) *Grand Pacific Hotel Co. v. Pinkerton*, (1905) 217 Ill.

61. — ⁶) *Hilliard v. Weeks*, (1899) 173 Mass. 304.

— ⁷) *Rathbun v. Snow*, (1890) 123 N. Y. 343.

— ⁸) *Hood v. Adams*, (1880) 128 Mass. 207.

— ⁹) *Saugerties, etc., Co. v. Miller*, (1902) 78

N. Y. Supp. 451. — ¹⁰) *Perin v. Parker*, (1888)

126 Ill. 201. — ¹¹) 31 Cyc. 1353. — ¹²) *Kraft*

v. Wilson, (Cal. 1894) 37 Pac. 790. — ¹³) *Birkett*

v. Postal Tel. Cable Co., (1905) 94 N. Y. Supp.

591. — ¹⁴) *Raud v. Moulton*, (1902) 76 N. Y.

Supp. 174. — ¹⁵) *Foster v. Graham*, (1896) 166

Mass. 202. — ¹⁶) *Barry v. Page*, (1858) 10 Gray

398. — ¹⁷) *Cowan v. Curran*, (1905) 216 Ill. 598.

— ¹⁸) *Mills v. Jensen*, (1897) 75 Ill. App. 644.

b) When he is personally interested in its fulfilment¹); c) When the agency is entirely undisclosed²). The authorities seem to be agreed that under the conditions named the agent is really a privy to the contract.

D. Actions against the Principal. — A principal may be sued on contracts made in his behalf by an agent within the scope of his authority whether the agency was disclosed or undisclosed at the time the contract was made³). If, however, the contract made by the agent is entirely outside the scope of his real or apparent authority, it is not binding upon the principal, unless he subsequently ratifies it⁴).

E. Action against Agent. — The agent may in turn be sued upon the contract if the agency was completely undisclosed at the time the contract was made⁵), or if the fact of agency was disclosed but the identity of the principal concealed⁶). It is the view of the law that under such circumstances the parties contemplate that the agent shall be directly bound. If, however, it appears that the parties intended that the agent should not be bound in any event, the agent is subject to no liability⁷).

The agent cannot be sued upon a contract if the fact of the agency and the identity of the principal were made known at the time the contract was entered into⁸). If, however, the agent exceeded his contractual authority he is liable to the other contracting party for breach of an implied contract of warranty of authority⁹); he cannot be sued upon the contract itself.

ELECTION. — While the third party may sue either the principal or the agent under certain circumstances as indicated, he cannot sue both; having elected to sue one, he is thereby precluded from suing the other¹⁰).

XII. SURETYSHIP AND GUARANTY. — **A. Definitions.** — Suretyship is properly a generic word embracing all "triangular" contracts where one person is primarily liable and another is secondarily liable for the payment of some debt or the performance of some obligation to the creditor. Guaranty is one species of suretyship, embracing express, special, and formal contracts to answer for the debt, default, or miscarriage of another person who is liable in the first instance¹¹). A surety may be bound jointly with the principal on the original contract, while the guarantor becomes responsible for the principal debtor on a contract separate, collateral, and secondary in form to make good in case the principal fails. The distinction is formal¹²). A joint debtor who is an apparent principal may show that he is in fact a surety¹³). Thus, if a grantee assume the mortgage debt, the creditor, on being notified, must respect the rights of the grantor as surety¹⁴).

B. What Law Governs. — If an offer of guaranty is made in one State and the acceptance by word or act is made in another, it is held to be governed by the law of the State in which the final assent was given¹⁵).

C. Creation of Guaranty. — **1. GUARANTY MUST BE IN WRITING.** — Most of the States have adopted a provision similar to the fourth section of the English Statute of Frauds, which declares that no action shall be brought upon any promise to answer for the debt, default, or miscarriage of another, unless the agreement on which the action is brought shall be evidenced by some memorandum in writing, signed by the party to be charged therewith or by his agent. Every collateral undertaking to be responsible for the co-existing debt of another person must, therefore, be in writing under the statute.

There has been much litigation, however, as to what contracts are "collateral" to the debt of another, and so required to be written, and what contracts are "original," and so valid even if unwritten, although the incidental effect may be the payment of the debt of another¹⁶). If the sole object of a contract is to save the creditor harmless and furnish security against the default of another, the contract must

¹) *Thompson v. Kelly*, (1869) 101 Mass. 291. — ²) *Ludwig v. Gillespie*, (1887) 105 N. Y. 653; see note, 1 L. R. A. (N. S.) 303. — ³) *Dewar v. Montreal Bank*, (1885) 115 Ill. 22. — ⁴) *Alcorn v. Buschke*, (1901) 133 Cal. 655. — ⁵) *Knapp v. Simon*, (1884) 96 N. Y. 284. — ⁶) *MacDonald v. Bond*, (1902) 195 Ill. 122. — ⁷) 31 Cyc. 1555. — ⁸) *Murphy v. Helmrich*, (1884) 66 Cal. 69. — ⁹) *Dung v. Parker*, (1873) 52 N. Y. 494. — ¹⁰) *Berry v. Chase*, (1906) 146 Fed. 625. — ¹¹) *Holm v. Jamieson*, (1898) 173 Ill. 295, 40 L. R. A.

154; *Fanning v. Murphy*, (1906) 26 Wis. 538; 4 L. R. A. (N. S.) 666. — ¹²) An indorser of a bill, note, or check is a kind of surety, with responsibility much like that of a guarantor, conditional, however, on due presentment and notice. *Jones v. Goodwin*, (1870) 39 Cal. 493. — ¹³) *Scott v. Scruggs*, (1894) 60 Fed. 721; *Brandt on Suretyship*, sec. 84; — ¹⁴) *Union Mutual Life Ins. Co. v. Hanford*, (1891) 143 U. S. 187. — ¹⁵) *Milliken v. Pratt*, (1877) 125 Mass. 374. — ¹⁶) See cases, 20 Cyc. 164; Cal. Civ. Code, sec. 2794.

be in writing. But where this result is merely incidental to a transaction having some other object in view, the contract is not "collateral," as where the promise is made to pay the debt out of funds received by one who undertakes to apply them for that purpose¹).

2. **NECESSITY OF A CONSIDERATION.** — Where a guaranty is entered into at the same time with the original obligation, no other consideration need be furnished by the creditor, as the consideration which supports the principal contract supports also the subsidiary one. In case of guaranties relating to past transactions there must be a consideration distinct from that of the original obligation²). There is, however, much authority for the view that a past contract accompanied by the promise to furnish a surety for its faithful performance, affords sufficient consideration for the guaranty when it is subsequently given, although no new consideration passes³).

3. **NECESSITY OF NOTICE OF ACCEPTANCE TO BIND THE GUARANTOR.** — There is much confusion in the authorities as to whether the creditor must notify the guarantor of his extension of credit on the faith of a guaranty for future advances. No notice of acceptance is necessary where a consideration moves directly to the guarantor⁴), or where the offer is to guarantee the payment of a note or definite, existing debt⁵). But in the case of an offer or proposal to become responsible for future advances or credit, which may or may not be extended to another, it is generally held that the rule differs from that applicable to unilateral contracts in general, and that the guarantor must be notified within a reasonable time of the extension of credit.⁴) There is, however, irreconcilable conflict as to whether such notice is an element in the formation of the contract or merely a condition to the liability of the guarantor thereon⁶).

D. Rule of Strict Construction in Favor of Surety. — The liability assumed by a guarantor is construed strictly and will not be extended by implication or construction beyond the plain and strict letter of its terms⁷). Thus, a guaranty to a firm of a customer's running account terminates after the admission into the firm of a new member, except as to goods already sold or credits already extended, in the absence of anything to show that a change in the firm was contemplated by the guarantor⁸).

E. Special Defences of Sureties and Guarantors. — From earliest adjudications the courts have treated the contract of suretyship and guaranty as one of great burden to the surety, because of the fact that it was usually entered into for accommodation merely, without any participation in the benefits of the principal contract⁹). The guarantor is a favorite of the law and the courts have gone to an extreme in relieving him from liability upon the slightest excuse.

1. **INVALIDITY OF PRINCIPAL CONTRACT.** — As a general rule the liability of a guarantor or surety is conditional upon the liability of the principal debtor, and if the main contract is invalid by reason of illegality, usury, failure or lack of consideration, or fraud, the surety is relieved. But defences personal to the principal do not avail the surety, as that the principal is an infant, a married woman, or that a corporation contract is *ultra vires*¹⁰). So a discharge of the principal in bankruptcy does not release the surety.

2. **DEALINGS WITH DEBTOR WHICH EXONERATE SURETY.** — Alteration or extension. A surety is released where the original obligation of the principal is altered in any respect without the consent of the surety, or the rights and remedies of the creditor are in any way impaired or suspended. A mere voluntary promise to give an extension of time, however, or neglect or delay on the part of the creditor to enforce his remedies, do not operate as a release. If the creditor surrenders to the debtor any security for the performance of the obligation, the surety is released *pro tanto*, according to the value of the security surrendered¹¹).

¹) Cal. Civ. Code, sec. 2794. — ²) Kennedy v. Steamship Co., (1899) 123 Cal. 584; Cal. Civ. Code, sec. 2792. — ³) See note to Faust v. Rodelheim, (1909) 27 L. R. A. (N. S.) 189. — ⁴) Davis v. Wells, F. & Co., (1881) 104 U. S. 159; Davis Sewing Machine Co. v. Richards, (1885) 115 U. S. 524. — ⁵) Lee v. Dick, (1836) 10 Pet. 482. — ⁶) Bishop v. Eaton, (1884) 161 Mass. 496, 37 N. E. 665; see elaborate note 16 L. R. A. (N. S.) 352, 368; Douglas v. Howland, (1840)

24 Wend. 35, 50; J. Am. Lead. Cas. (5th ed.) 59, 94. — ⁷) 32 Cyc. Principal and Surety, p. 73; 13 L. R. A. 418, note; 19 L. R. A. 186, 680, notes. — ⁸) Note to Lyon v. Plum, (1908) 14 L. R. A. (N. S.) 1231. — ⁹) Stearns on Suretyship, p. 2. — ¹⁰) Brown v. Bank, (1895) 33 L. R. A. 359, note; Gates v. Tibbets, (1909) 20 L. R. A. 119. — ¹¹) Am. Bonding Co. v. Pueblo Inv. Co., (1907) 150 Fed. 17; see 1 L. R. A. (N. S.) 305.

F. Steps Necessary on Default to Fix Liability of Guarantor. — A guaranty of payment differs from a guaranty of collection. In general no demand on the principal or notice of default or exercise of due diligence to collect the debt are annexed as conditions to the contract of guaranty of payment or performance. The guarantor is liable to the creditor immediately upon the default of the principal without demand or notice¹). But a guaranty that an obligation is "good" or "collectible" imposes the condition upon the creditor of making reasonable efforts to collect the debt²).

Notice of default is by most jurisdictions not required except in case of a guaranty of future advances or contingent sales or matters which are not within the guarantor's knowledge or which depend upon the creditor's option³). Lack of notice will ordinarily be held material only where damage or prejudice has resulted to the guarantor⁴).

G. Subrogation of Surety to Rights and Remedies of Creditor. — A surety who pays his principal's debt is entitled to stand in the place of the creditor as to collateral securities which the creditor held either against the principal debtor or a co-surety, in order that he may realize thereon to reimburse himself. He is entitled to have transferred to him or wielded in trust by the creditor for his use, any judgment against his principal and to collect it by the issue of execution against the principal⁵). He is also entitled to his pro rata benefit of any security held by a co-surety in respect to the guaranteed debt, as well as pro rata contribution from his co-sureties.

XIII. CHARTER PARTIES. — A. As Contract of Affreightment⁶. — There are two kinds of contracts passing under the general name of "charter party" differing from each other very widely in their nature, their provisions and their legal effects. In one the owner lets the use of his ship to freight, he himself retaining the legal possession, and remaining liable as owner and common carrier. The master is his agent, and the mariners are in his employment. Such a charter party is a mere covenant for the transportation of merchandise or passengers⁷).

B. As Demise of Ship. — In the other variety there is a demise or lease of the vessel. The charterer becomes the owner pro hac vice during the term of the contract. If he ships his own goods he is his own carrier. If goods are taken on freight, the freight is due to him, and if the shippers suffer a loss, he must answer for it⁸). The presumption is that the charter party is a contract of affreightment rather than a demise of the ship, unless its terms show a clear intention to make a demise to the charterer⁹). Where the charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire, and a stipulation exempting the vessel from liability for negligence is valid¹⁰).

C. Liens. — In the case of a contract of affreightment the shipowner has a lien on the goods of the charterer and upon the goods of each sub-freighter for the amount of freight due on his shipment¹¹). In the case of a demise of the ship, the general owner has no remedy for the charter of his vessel but his personal action on the covenants of the charter party. It is a contract in which he trusts to the personal credit of the charterer¹²).

D. Relation of Bills of Lading to Charter Party. — 1. WHERE THE CHARTERER IS THE SHIPPER. — As between the shipowner and the charterer, bills of lading do not operate as new contracts, or as modifying the contract in the charter party. "The charter is the deliberate and controlling document; and, where the intent of the charter is clear, a bill of lading given under it, and referring to it, as between the ship and the charterer, does not supersede the express provisions of the charter party." To control the charter party there must be sufficient evidence of a new contract between the parties¹³). The bill of lading in such cases is deemed merely a receipt for the goods taken on board and a document of title¹⁴).

¹) Cal. Civ. Code, sec. 2807. — ²) Dillman v. Nadelhoffer, (1895) 160 Ill. 121, 43 N. E. 378; Salt Springs Nat. Bank v. Sloan, (1892) 135 N. Y. 371; 32 N. E. 231. — ³) Taussig v. Reed, (1893) 145 Ill. 488; 32 N. E. 918. — ⁴) See note to Heyman v. Dooley, (1893) 20 L. R. A. 257. — ⁵) See elaborate note to Nelson v. Webster, (1904) 68 L. R. A. 513. — ⁶) As to contracts of affreightment, see further the article on Carriers and Warehousemen, by Professor McMurray,

infra. — ⁷) Drinkwater v. The Spartan, (1828) 1 Ware. 145; 7 Fed. Cas. No. 4085. — ⁸) Drinkwater v. The Spartan, supra. — ⁹) Reed v. U. S. (1870) 11 Wall. 591; Grimberg v. Columbia Packers Ass'n., (1905) 47 Oreg. 257; 114 Am. St. Rep. 927. — ¹⁰) The Fri, (1907) 154 Fed. 333. — ¹¹) The Ontario Johanna 1 Wheat. 159. — ¹²) Drinkwater v. The Spartan, Fed. Cas. No. 4085. — ¹³) The Chadwicke, (1887) 29 Fed. 521. — ¹⁴) The Fri, (1907) 154 Fed. 333.

2. BETWEEN THE SHIPOWNER AND SHIPPERS OTHER THAN THE CHARTERER. — Between shipowner and shippers other than the charterer, bills of lading may or may not be made "subject to all of the provisions of the charter-party." Such a clause would bind the consignee receiving the goods under the bill of lading to pay the charter rates of demurrage. The indorsee and purchaser of the goods has, however, the right to rely on the bill of lading as the contract between him and the ship, and as the only contract, where the bill of lading makes no reference to any charter and the indorsee has no notice of it. "Justice requires that the master of the ship, when he signs bills of lading presented by the charterer, making the goods deliverable to order, should insert either the charter rates of demurrage, or some clause adopting the charter's provisions, if he would enforce against bona fide indorsees, the rates contracted by the charter"¹). It is well settled that where a shipowner who has chartered out the hold of his ship retains control of navigation, and bills of lading containing the contract of affreightment are issued by the master to shippers, who have no notice of a charter party, such bills of lading are binding on the owner, notwithstanding provisions in the charter party inconsistent therewith. Moreover, according to the weight of authority the bills of lading would govern, whether the shippers had notice of the charter party or not. In *Carver's Carriage by Sea* — a leading authority on this subject — it is said: "The shipowner is generally bound by the bill of lading contracts which the master has made, and he cannot, as against strangers to the charter, who have shipped goods, or have become consignees or indorsees of bills of lading for value, set up rights under the charter party which are inconsistent with the terms of those bills of lading, although notice of the existence of the charter party be given by the bills of lading themselves"²). But where the bill of lading expressly incorporates the terms of the charter party and provides for the payment of freight and "all other conditions as per charter-party", this provision imposes upon the consignee something more than charter-freight, and includes the obligations of the charter party respecting the rate of delivery and the payment of the demurrage specified³).

XIV. BOTTOMRY AND RESPONDENTIA. — A. Definitions. — Bottomry is a contract by which a ship or its freightage is hypothecated as security for the repayment of a loan to supply the necessities of the ship⁴). The bond may be enforced in case of the ship's safe arrival at the port of destination, but becomes absolutely void and of no effect in case of her loss before arrival⁵).

B. Authority of Master. — The owner of a ship may hypothecate her or her freightage upon bottomry at any time, but in a foreign port the master of a vessel may hypothecate her upon bottomry only when a loan is necessary for the purpose of procuring repairs or supplies which are needed to accomplish the voyage⁶). His implied authority arises when he cannot otherwise relieve the necessities of the ship, and is unable to communicate with the owner or obtain funds upon his personal credit⁷). The lender upon a contract of bottomry made by the master of a ship may enforce the contract, though the circumstances necessary to authorize the master did not exist, if he had reasonable grounds to believe, and did in good faith believe, in the circumstances of urgent necessity for the loan⁸).

C. Nature and Priority of Liens. — A bottomry lien is independent of possession, and is lost by omission to enforce it within a reasonable time⁹).

D. Respondentia. — A respondentia bond is a contract by which a ship's cargo, or some part of it, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks. It requires a more urgent necessity to authorize the master to hypothecate the cargo than to borrow on security of the ship¹⁰). In general the law as to these loans and liens is the same.

E. Liens for Supplies, Repairs, and other Necessaries. — For supplies furnished a foreign vessel on the order of the master in the absence of the owner the general ad-

¹) *The Pietro G.*, (1889) 39 Fed. 366. —

²) *Robinson v. Holst*, (1895) 96 Ga. 19, 23 S. E. 76; see *O'Connell v. One Thousand and Two Bales*, (1896) 75 Fed. 410. — ³) *Burrell v. Crossman*, (1894) 65 Fed. 104. — ⁴) The case of *O'Brien v. Miller*, (1897) 168 U. S. 287, contains a form of bottomry bond printed in full.

⁵) — *The Grapeshot*, (1869) 9 Wall. 129; Cal. Civ. Code, sec. 3017; a rate of interest higher than

that allowed on other loans may be exacted. Cal. Civ. Code, sec. 3022; in the case of partial loss the lender upon bottomry can recover only to the extent of the net value to the owner of the part saved. Cal. Civ. Code, sec. 3025. — ⁶) Cal. Civ. Code, sec. 3019. — ⁷) Cal. Civ. Code, sec. 3020. — ⁸) Cal. Civ. Code, sec. 3023. — ⁹) Cal. Civ. Code, sec. 3027. — ¹⁰) *The Julia Blake*, (1883) 107 U. S. 418.

miralty law confers a lien¹). For supplies or other necessities furnished a domestic vessel there is no implied lien although a lien is generally given by local statutes²). But while a State statute may create a maritime lien, it cannot confer jurisdiction upon the State courts to enforce it by a proceeding in rem directly against the vessel³). The better opinion is that in the case of domestic vessels also the presumption is against a lien if the supplies are ordered by the owner or by the master when the owner is in port⁴).

F. Priority of Liens. — Of two or more bottomry liens on the same ship, the later in date has preference, if created out of necessity, the theory being that the last is for the benefit of the preceding ones and contributes to saving the ship⁵).

A bottomry lien, if created out of real or apparent necessity, in good faith, is preferred to every other lien or claim upon the ship, save only a lien for seamen's wages, a subsequent lien of material men for supplies or repairs indispensable to the safety of the ship, and a subsequent lien for salvage⁶).

¹) *St. Jago de Cuba*, (1824) 9 Wheat. 416; (1875) 21 Wall. 558. — ³) *The Glide*, (1897) 167 U. S. 606. — ⁴) See *The Kate*, (1896) 164 U. S. 458. — ⁵) Cal. Civ. Code, sec. 3029. — ⁶) Cal. Civ. Code, sec. 3023.

V.

BANKS AND BANKING

Banks and Banking.

(By William Underhill Moore, A. M., LL. B., Professor of Law, University of Wisconsin [Madison].)

Analysis.

I. SCOPE OF ARTICLE, 123

II. DEFINITIONS

- A. Commercial Banking, 123*
- B. Banker, 123*
- C. Bank, 123*
- D. Savings Banks and Trust Companies, 123*

III. PERSONS WHO MAY BE BANKERS: CLASSIFICATIONS OF BANKS

- A. Who may be Bankers, 124*
- B. Private Bankers; National Banks; State Banks, 124*

IV. GOVERNMENTAL REGULATION AND CONTROL OF COMMERCIAL BANKING

- A. Power to Regulate, 125*
 - 1. Federal Government, 125*
 - 2. State Governments, 125*
- B. Governmental Regulations, 125*
 - 1. Federal Regulations, 125*
 - 2. State Regulations, 125*

V. THE BUSINESS OF COMMERCIAL BANKING

- A. Deposits, 126*
 - 1. General and Special Deposits Distinguished, 126*
 - 2. Special Deposits, 127*
 - a) Nature and Extent of Banker's Obligation to Depositor, 127*
 - b) Kinds of Special Deposits, 128*
 - 1. Deposits for Collection, 128*
 - 2. Deposits of Collateral Security, 128*
 - 3. General Deposits, 128*
 - a) Nature and Extent of Banker's Obligation to Depositor, 128*
 - b) Set-off against General Deposits: Banker's Lien, 129*
 - c) Assignment of Deposit by Depositor, 129*
 - d) When Equities against Depositor Available against Bank, 129*
- B. Loans, Discounts, and the Purchase and Sale of Property, 130*
 - 1. Loans, 130*
 - a) Formal Loans, 130*
 - Restrictions, 130*
 - b) Overdrafts, 130*
 - c) Lending of Credit, 131*
 - 2. Purchases, 131*
 - a) Property Generally, 131*
 - b) Negotiable Instruments, 131*
 - 1. Authority to Purchase or Discount, 131*
 - 2. Distinction between Purchase and Loan: Usury, 131*
- C. Collections, 132*
 - 1. Mode of Deposit for Collection: Title to Paper Deposited, 132*
 - 2. Authority of Bank of Deposit, 133*
 - 3. Obligations of Bank of Deposit, 133*
 - a) Presentment, Protest, and Notice of Dishonor, 133*
 - 1. Protest, 133*
 - 2. Notice of Dishonor, 133*
 - b) Bringing of Action, 133*
 - c) Proceeds after Collection, 134*
 - 4. Collection through Correspondent, 134*
 - a) Responsibility of Bank of Deposit for Negligence of Correspondent, 134*
 - b) Rights and Obligations of Depositor and Correspondent Bank, 134*

*D. Bank Notes, 135**1. Nature and Obligation, 135**a) Definition, 135**b) Presentment, 135**c) Interest, 136**d) Statute of Limitations, 136**2. Authority to Issue, 136**a) Private Bankers and State Banks, 136**b) National Banks, 136**3. Bank Notes as Legal Tender, 136**a) Bank Notes of Private Bankers and State Banks, 136**b) Bank Notes of National Banks, 136*

I. SCOPE OF ARTICLE. — "Banks and Banking" is the title under which will be briefly stated the leading rules and principles of the common law, the law merchant, and the Federal and State statutes, which govern in the transaction of the business of commercial banking in the United States.

II. DEFINITIONS. — A. Commercial Banking. — Commercial banking is a business that may in the light of history¹) and present practice be described as the business (1) of receiving upon general deposit the money of others to form a fund for (a) the purpose of making temporary loans and discounts, and for (b) the purpose of dealing in negotiable instruments, coin, bullion, and credits, or (c) for either of those purposes; or (2) of issuing bank notes, i. e., negotiable promissory notes payable on demand to bearer intended to circulate as money. In addition to these distinguishing activities of the business of commercial banking there are several other activities which, though not in themselves peculiar to banking, are usually carried on by bankers, viz., the receiving of special deposits and the collecting of negotiable paper²).

B. Banker. — A banker (or "bank") is a person, natural or artificial, who is engaged in the business of banking³).

C. Bank. — A bank is the apartment or office where the business of banking is transacted⁴).

D. Savings Banks and Trust Companies. — The business of a savings bank or trust company does not normally include either of the characteristic activities of the commercial bank. In the first place, although the business of such institutions is to accumulate a fund by receiving the money of others on deposit, the fund so accumulated is not used for the making of temporary loans and discounts, or for dealing in negotiable paper, coin, bullion, or credits, but is used for making loans upon and dealing in real property and mortgages thereon and stocks, bonds, and government securities designated by law. In the second place, they do not issue bank notes intended to circulate as money⁵).

¹) "Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally, the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe keeping until the depositor should see fit to draw it out for use; but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes, and to loan money upon mortgage, pawn, or other security, and, at a still later period, to issue notes of their own, intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions; but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense." *Oulton v. Savings Inst.*, (1872) 17 Wall. (U. S.) 118. See also *Weston Investment Co. v. Murray*, (1899) 56 Pac. 728, 731. — ²) *Morse, Banks and Banking*, (4th ed. 1903),

sec. 2; *Hamilton Bank v. Trust Co.*, (1902) 92 N. W. 189, 190; *Auten v. U. S. Bank*, (1899) 174 U. S. 125; *State v. Comptoir Nat. D'Escompte de Paris*, (1899), 26 So. 91, 96.

— ³) *Uniform Negotiable Instruments Law*, Cons. Laws of New York, 1909, c. 38, sec. 1.

— ⁴) *Wells v. Ry. Co.*, (1884) 23 Fed. 469, 471; *Rominger v. Keyes*, (1881) 73 Ind. 375, 377; *Reed v. People*, (1888) 125 Ill. 592, 596; *Western Investment Co. v. Murray*, (1899) 56 Pac. 728, 731. — ⁵) *Savings banks*: "A savings bank in this Commonwealth is an institution formed for the purpose of receiving deposits of money for the benefit of the depositors investing the same, accumulating the profit or interest thereof, paying such profit or interest to the depositor, or retaining the same for his greater security, and further of returning the deposit itself. The regulations as to the payments of interest and return of deposit are prescribed partly by statute and partly by the institution itself. There is no capital stock, and there are no stockholders

If, however, a "trust company" does discount negotiable paper and deal in exchange, it is carrying on the business of commercial banking and is, therefore, a commercial bank¹). So also any corporation, such as one engaged primarily in the business of operating a railroad, a mine, or of insurance, may be authorized to engage in the business of commercial banking²).

III. PERSONS WHO MAY BE BANKERS: CLASSIFICATION OF BANKS.

— **A. Who may be Bankers.** — Any natural person, partnership, or corporation chartered with banking powers, is legally qualified to engage in the business of commercial banking except the issuing of bank notes to circulate as money³). It is, however, within the police power of the legislature to prohibit the carrying on of the banking business by a natural person or partnership⁴). Of course since the exercise of corporate powers is itself a franchise, the legislature may refuse to charter corporations with banking powers; or if it does grant a charter, may restrict as it will the business to be transacted by the corporation. The legislature unquestionably may withhold from any person, natural or artificial, the right to issue bank notes to circulate as money, for such a right is a franchise existing in hands of a subject only by the grant of the sovereign⁵).

B. Private Bankers; National Banks; State Banks. — Persons engaged in the business of commercial banking are classified with reference to the mode of their organization as private bankers, i. e., natural persons not acting under a charter of incorporation; national banks, i. e., corporations organized under the National Bank Act of the United States; state banks, i. e., corporations organized under the laws of one of the States.

who are entitled to receive profits from the business. All these belong to the depositors, and nothing is deducted therefrom except the necessary expenses of transacting the business. Its affairs are administered by a board of trustees, the securities in which the deposits shall be invested are prescribed by law, and returns are made to commissioners of savings banks, who may examine the institution at any time, so that the conduct of its affairs may be constantly under public supervision. Although termed a bank, it has few characteristics of a commercial bank of discount and deposit, a large part of whose business consists in dealing in exchange and negotiable paper for the benefit of its stockholders, and to which, when done by its proper officers, the rules of such dealing are applicable. It affords a convenient mode of taking care of sums individually small, (as only deposits to a limited amount are permitted), but often large in the aggregate, and its purpose is a public advantage without any interest in the members of the corporation." *Commonwealth v. Reading Savings Bank*, (1882) 133 Mass. 16, 19; "Savings banks are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation and interest. Banks, in a commercial sense, are of three kinds: First, of deposit; second, of discount; and, third, of circulation. All or any two of those functions may be and frequently are exercised by the same association, but savings banks are usually banks of the first class, without authority to make discounts or issue a circulating medium. 7 Words and Phrases, p. 6338, paraphrasing *Bank for Savings v. Collector*, (1865) 70 U. S. 495, 513. Trust companies: "Trust companies, however, in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have

the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the state and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that State. It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." *Mercantile Bank v. New York*, (1886) 121 U. S. 138, 159. See also, *Venner v. Trust Co.*, (1900) 66 N. Y. Supp. 773, 775; *Jenkins v. Neff*, (1900) 163 N. Y. 320.

¹) Bolles, *Banks and Banking*, p. 6, sec. 7.

— ²) *Kiggins v. Munday*, (1898) 19 Wash. 233.

— ³) *Augusta Cummings v. Earle*, (1839) 13 Pet. (U. S.) 519; *People v. Utica Insurance Co.*, (1818) 15 Johns. (N. Y.) 358; *State v. Scougal*, (1892) 3 S. D. 55. — ⁴) *Blaker v. Hood*, (1894) 53 Kas. 499; *Cummings v. Spaunhorst*, (1877) 5 Mo. App. 21; *People v. Utica Insurance Co.*, supra; *State v. Woodmansee*, (1890) 1 N. D. 246; *Noble Bank v. Haskell*, (1910) 31 Sup. Ct. Rep. 186; *Shallenberger v. First Bank*, (1910) 31 Sup. Ct. Rep. 189; *Engel v. O'Malley*, (1910) 31 Sup. Ct. Rep. 190. Contra, *State v. Scougal*, supra. — ⁵) *State v. Scougal*, supra.

IV. GOVERNMENTAL REGULATION AND CONTROL OF COMMERCIAL BANKING. — A. Power to Regulate. — 1. FEDERAL GOVERNMENT. — The Federal government has no power to regulate the business of banking by a private banker or a State bank, except that it may under the constitution of the United States restrict the issue of bank notes¹). Over the conduct of the business of banking by national banks the Federal government has complete and exclusive control²).

2. STATE GOVERNMENTS. — A State has no power to regulate the transaction of the business of banking by a national bank³); but a State not only has complete and exclusive power to regulate private banking within its jurisdiction, and its own State banks, but may exclude the State banks of another State from the transaction within its territory of all business except interstate and foreign business⁴). Since it may exclude, a State may, generally speaking, admit subject to such restrictions and regulations as it will, the State banks of another State⁵).

B. Governmental Regulations. — Governmental regulation and control of the banking business may be either direct, viz., statutes regulating banking generally by whomever carried on; or indirect, viz., statutes providing for the organization of banking corporations and for the powers, duties, and management of banks organized under them.

1. FEDERAL REGULATIONS. — The regulation by the Federal government of national banks is of the latter character. Private banking is not authorized or permitted under the Federal law. The national banking statutes provide the mode of organization, fix the liabilities and duties of stockholders and directors, establish a system of supervision by special examination and reports, determine the reserve, regulate the making of loans and discounts, and authorize the issue of bank notes. A compilation of these statutes is printed below.

2. STATE REGULATIONS. — The regulation by the several States of banking is for the most part confined to the regulation of State banking corporations, although it is not always clear whether some of their provisions are not also applicable to private bankers. However, it is the tendency to extend to private bankers the same or similar regulations as those governing State banks. Thus although Illinois does not regulate private banking⁶), and Louisiana, notwithstanding an express statutory recognition of private bankers⁷), apparently does not subject them to the same restrictions as State banking corporations, Pennsylvania does subject private bankers to the same supervision as State banks⁸), and in New York and California private bankers holding themselves out as such are for the most part subject to the same regulations as State banks⁹). And in Massachusetts, although natural persons are not prohibited from transacting the business of banking, no such person is permitted to hold himself out as a banker, by the use of the words "bank" or "banking," as descriptive of his business¹⁰).

¹) *Veazie Bank v. Fenno*, (1869) 8 Wall. (U. S.) 533. — ²) See IV, A, (2), note 3. — ³) *Farmers' & Mech. Nat. Bank v. Dearing*, (1875) 91 U. S. 29, 34; *McCullough v. State*, (1819) 4 Wheat. (U. S.) 316; *Brown v. State*, (1827) 12 Wheat. (U. S.) 419; *Weston v. City of Charleston*, (1829) 2 Pet. (U. S.) 449, 466; *Dobbins v. Erie Co.*, (1842) 16 Pet. (U. S.) 435; *Bank of Commerce v. New York City*, (1862) 2 Black (U. S.) 620; *Bank Tax Case*, (1864) 2 Wall. (U. S.) 200; *Welles v. Graves*, (1890) 41 Fed. 469; *May v. Buchanan Co.*, (1886) 29 Fed. 469; *Wiley v. Starbuck*, (1873) 44 Ind. 298; *State v. Menke*, (1895) 56 Kas. 77; *First Nat. Bank v. Commonwealth*, (1896) 33 S. W. (Ky.) 1105; *First Nat. Bank v. Childs*, (1882) 133 Mass. 248; *Central Nat. Bank v. Pratt*, (1874) 115 Mass. 539; *Davis v. Randall* (1874) 115 Mass. 547; *Commonwealth v. Felton*, (1869) 101 Mass. 204; *People v. Fonda*, (1886) 62 Mich. 401; *State v. Haight*, (1866) 31 N. J. L. 399; *Doty v. First Nat. Bank*, (1892) 3 N. Dak. 9; *First Nat. Bank v. Garlinghouse*, (1872) 22 Ohio St. 492; *City of Pittsburgh v. First Nat. Bank*, (1867) 55 Pa. 45; *Brown v. Second Nat. Bank*, (1872)

72 Pa. 209; *Allen v. Carter*, (1888) 119 Pa. 192; *Commonwealth v. Ketner*, (1880) 92 Pa. 372. — ⁴) *Paul v. Virginia*, (1868) 8 Wall. (U. S.) 168. The buying and selling of foreign bills is not interstate or foreign business. *Nathan v. Louisiana*, (1850) 8 How. (U. S.) 73. — ⁵) *Paul v. Virginia*, supra; *Blake v. McClung*, (1898) 172 U. S. 239, s. c. 176 U. S. 64; *Orient Insurance Co. v. Daggs*, (1898) 172 U. S. 557; *Waters-Pierce Oil Co. v. Texas*, (1899) 177 U. S. 28; *Sully v. The American Bank*, (1899) 178 U. S. 289; *W. U. Tel. Co. v. Kansas*, (1909) 216 U. S. 1; *Pullman Co. v. Kansas*, (1909) 216 U. S. 56. — ⁶) *Welldon*, *Digest State Banking Statutes*, (Report of National Monetary Commission, Senate Doc. No. 353, 61st Cong., Second Sess.), pp. 146—152. — ⁷) *Laws of Louisiana*, 1902, No. 179, sec. 1. — ⁸) *Laws of Pennsylvania*, 1907, p. 461. — ⁹) *Cons. Laws of New York*, c. 2; *Laws of California*, 1909, c. 76; *Welldon*, *Digest State Banking Statutes*, (Report of National Monetary Commission, Senate Doc. No. 353, 61st Cong., Second Sess.), pp. 457, 461. — ¹⁰) *Laws of Massachusetts*, 1909, c. 491, sec. 4.

The statutes of the several States regulating the business of banking by State banks differ so materially that it is impossible to summarize them. All that can be done is to give some idea of their scope and content. With respect to organization, the number and qualifications of incorporators and directors are usually prescribed, the minimum capital stock — varying from \$ 10,000 to \$ 400,000 — and the amount which must be paid in before the beginning of business, is determined. Twenty-seven states, including New York, Illinois, Pennsylvania, and Texas, impose a liability upon each stockholder for the obligations of the bank equal to the par value of the shares held by him. All States provide a more or less adequate system of supervision by examination and reports, administered either by a special bank supervisor or by a general State officer, e. g., the State treasurer, auditor, or comptroller. A minimum reserve — varying from 10% to 25% of all deposits — is generally required. Loans upon, or purchases of, the bank's own stock are prohibited in most States. The owning of real property, except for a banking house, is almost uniformly prohibited, although the making of loans upon the security of mortgages on real property is, with restrictions, usually allowed. Five States have established a system for the guarantee of deposits. In Texas, Nebraska, and Oklahoma the system is compulsory; in Kansas and South Dakota, voluntary¹).

V. THE BUSINESS OF COMMERCIAL BANKING. — A. Deposits. — The accumulation of a fund by the receipt of deposits of money has been noted as one of the characteristic activities of commercial banking; and the receiving of special deposits, is one of the usual incidental activities of a commercial bank.

1. GENERAL AND SPECIAL DEPOSITS DISTINGUISHED. — Deposits are usually classified as general and special. A general deposit is the payment of money, or the transfer of negotiable paper, to a bank in exchange for the bank's promise to pay on demand a sum or sums of money equal to the amount or face value of the paper deposited, either with or without interest, to the depositor, or to the holder of the depositor's checks. Disregarding the obligation of the bank to honor checks, such a deposit creates the relation of debtor and creditor between the bank and the depositor²). A special deposit is the delivery of money or property to a bank in exchange for the bank's promise either to keep the money or property safely for the depositor, and to return it to him in specie, or to apply specifically the money or property so deposited to the use designated by the depositor. Such a

¹) See Welldon, *Digest State Banking Statutes*, (Report of National Monetary Commission, Senate Doc. No. 353, 61st Cong., Second Sess.), especially at p. 41. The statutes of Kansas, Nebraska, and Oklahoma, providing a system for the guarantee of bank deposits, have been passed upon by the Supreme Court of the United States, and declared constitutional. *Assaria Bank v. Dolley*, (1910) 31 Sup. Ct. Rep. 189; *Shallenberger v. First Bank*, (1910) 31 Sup. Ct. Rep. 189; *Noble Bank v. Haskell*, (1910) 31 Sup. Ct. Rep. 186. — ²) *Commercial Nat. Bank v. Armstrong*, (1892) 148 U. S. 50; *National Bank of Republic v. Millard*, (1869) 10 Wall. (U. S.) 152; *Thompson v. Riggs*, (1866) 5 Wall. (U. S.) 663; *Chicago Mar. Bank v. Fulton County Bank*, (1864) 2 Wall. (U. S.) 252; *Kentucky Bank v. Wister*, (1829) 2 Pet. (U. S.) 318; *Richmond First Nat. Bank v. Wilmington, etc., R. Co.*, (1896) 77 Fed. 401; *Balbach v. Frelinghuysen*, (1883) 15 Fed. 675; *In re Madison Bank*, (1874) 5 Biss. (U. S.) 515; *Bank of Commerce v. Russell*, (1873) 2 Dill. (U. S.) 215; *Wray v. Tuskegee Ins. Co.*, (1859) 34 Ala. 58; *Himstedt v. German Bank*, (1885) 46 Ark. 537; *Corbit v. Smyrna Bank*, (1837) 2 Harr. (Del.) 235; *Collins v. State*, (1894) 33 Fla. 429; *Union Nat. Bank v. Citizens Bank*, (1899) 153 Ind. 44; *McLain v. Wallace*, (1885) 103 Ind. 562; *Coffin v. Anderson*, (1837) 4 Blackf. (Ind.) 395; *Re Louisiana Bank*, (1888) 40 La. Ann. 514; *Schmidt v.*

Barker, (1865) 17 La. Ann. 261; *Matthews v. Their Creditors*, (1855) 10 La. Ann. 344; *Hardy v. Chesapeake Bank*, (1879) 51 Md. 562; *Taft v. Quinsigamond Nat. Bank*, (1899) 172 Mass. 363; *Freeman's Nat. Bank v. National Tube Works Co.*, (1890) 151 Mass. 413; *Manufacturers' Nat. Bank v. Continental Bank*, (1889) 148 Mass. 553; *Carr v. National Security Bank*, (1871) 107 Mass. 45; *Pacific Bank v. Mitchell*, (1845) 9 Metc. (Mass.) 297; *Neely v. Rood*, (1884) 54 Mich. 134; *St. Paul Third Nat. Bank v. Stillwater Gas Co.*, (1886) 36 Minn. 75; *Knecht v. U. S. Savings Inst.*, (1876) 2 Mo. App. 563; *Aetna Nat. Bank v. New York City Fourth Nat. Bank*, (1871) 46 N. Y. 82; *Marsh v. Oneida Cent. Bank*, (1861) 34 Barb. (N. Y.) 298; *Gordon v. Rasines*, (1893) 5 Misc. (N. Y.) 192; *Commercial Bank v. Hughes*, (1837) 17 Wend. (N. Y.) 94; *Commercial Nat. Bank v. Davis*, (1894) 115 N. C. 226; *Richmond First Nat. Bank v. Davis*, (1894) 114 N. C. 343; *Boyden v. Cape Fear Bank*, (1871) 65 N. C. 13; *National Bank of Commerce v. Johnson*, (1896) 6 N. D. 180; *Marysville Bank v. Windisch-Muhlhauser Brewing Co.*, (1893) 50 Ohio St. 151; *North Liberties Bank v. Jones*, (1862) 42 Pa. St. 536; *Dabney v. State Bank*, (1871) 3 S. C. 124; *Baker v. Kennedy*, (1880) 53 Tex. 200; *Robinson v. Gardiner*, (1868) 18 Gratt. (Va.) 509; *Hallam v. Tillinghast*, (1898) 19 Wash. 20.

deposit results, depending upon whether the title to the money or property deposited passes to the bank, in a bailment or a trust¹).

The importance of the distinction between general and special deposits is manifest. In the case of the general deposit the obligation of the bank to pay, like other common law debts, may be extinguished only by performance, release, or accord and satisfaction. But the obligation of the bank, arising from a special deposit, to keep safely and to return or apply, is satisfied, as in other cases of bailments or of trusts, by the exercise of due care and good faith on the part of the bank in keeping and applying the res²).

Whether a deposit is general or special depends, of course, upon the contract, express or implied in fact, between the bank and the depositor; but presumptively a deposit of money is deemed general³).

2. SPECIAL DEPOSITS. — *a) Nature and Extent of Banker's Obligation to Depositor.* — Since a special deposit results in either a bailment or a trust, the property or money so deposited does not become part of the assets of the bank. In the event of insolvency special deposits are not applicable to the payment of the liabilities of the bank⁴), and if not applied in accordance with the terms of the trust or bailment, must be returned to the depositor⁵). The authority of the bank under a special deposit may be terminated by the bailee or cestui que trust at any time before its exercise⁶).

Any application of the deposited property in violation of the bailment contract or trust, even in satisfaction of, or as collateral to, a debt due the bank from the depositor, is a conversion or breach of trust⁷). In the event of a conversion or misappropriation of the special deposit, the depositor may reclaim the property from whomsoever has received it, unless it is money or negotiable paper, in which case he may follow it until it has passed into the hands of an innocent purchaser for value; or, he may compel the application of the proceeds of the converted or misappropriated property so long as they can be specifically pointed out and until they pass into the hands of an innocent purchaser for value⁸).

The degree of care exacted of the bank in the case of special deposits is a matter of some judicial confusion. On the one hand, it is clear that the bank is not an insurer of the safety of the special deposit⁹), unless it assumes an insurer's liability by special contract¹⁰). On the other, since the bank is usually a gratuitous bailee in such cases, the bank is generally said to be liable only for "gross" negligence¹¹). A more intelli-

¹) Mutual Assn. v. Jacobs, (1892) 141 Ill. 261; Star Co. v. Smith, (1890) 37 Ill. App. 212; Ellicott v. Barnes, (1884) 31 Kas. 170; Harrison v. Smith, (1884) 83 Mo. 210; National Bank v. Speight, (1872) 47 N. Y. 668; Pattison v. National Bank, (1880) 80 N. Y. 82; People v. City Bank, (1884) 96 N. Y. 32. — ²) See V. A. 2, a. — ³) Commonwealth Bank v. Wister, (1829) 2 Pet. (U. S.) 318; Alston v. State, (1890) 92 Ala. 125; Dawson v. Real Estate Bank, (1841) 5 Ark. 297; Boettcher v. State Nat. Bank, (1890) 15 Colo. 22; Ward v. Johnson, (1880) 95 Ill. 215; Brahm v. Adkins, (1875) 77 Ill. 263; Keene v. Collier, (1859) 1 Metc. (Ky.) 415; Ruffin v. Orange County, (1873) 69 N. C. 498; Lilly v. Cumberland County, (1873) 69 N. C. 300; Marysville Bank v. Windisch-Muhlhauser Brewing Co., (1893) 50 Ohio St. 151. — ⁴) Star Co. v. Smith, (1890) 37 Ill. App. 212; Harrison v. Smith, (1884) 83 Mo. 210. — ⁵) Henderson v. O'Connor, (1895) 106 Cal. 385; Lamb v. Morris, (1888) 118 Ind. 179; Tyson v. Bank, (1893) 77 Md. 412; National Bank v. Hubbell, (1889) 117 N. Y. 384. — ⁶) Scranton Bank v. Higbee, (1885) 109 Pa. St. 130. — ⁷) Bundy v. Monticello, (1882) 84 Ind. 119; U. S. Bank v. Macalester, (1848) 9 Pa. St. 475; German Bank v. Foreman, (1890) 138 Pa. St. 474. — ⁸) Massey v. Fisher, (1894) 62 Fed. 958; Illinois Trust Bank v. Buffalo, First Nat. Bank, (1883) 21 Blatchf. (U. S.) 275; Anderson v.

Pacific Bank, (1896) 112 Cal. 598; Mayer v. Chattahoochee Nat. Bank, (1874) 51 Ga. 325; Howard College v. Pace, (1854) 15 Ga. 486; Star Cutter Co. v. Smith, (1890) 37 Ill. App. 212; Brockmeyer v. Washington Nat. Bank, (1888) 40 Kas. 376; Sherwood v. Milford State Bank, (1892) 94 Mich. 78; Kimmel v. Dickson, (1894) 5 S. D. 221. — ⁹) Isham v. Post, (1894) 38 Am. St. Rep. 766; Ouder Kirk v. Central Bank, (1890) 119 N. Y. 263. — ¹⁰) Hale v. Rawallie, (1871) 8 Kas. 136; Maury v. Coyle, (1870) 34 Md. 235. — ¹¹) Carlisle First Nat. Bank v. Graham, (1879) 100 U. S. 699; Chattahoochee Nat. Bank v. Schley, (1877) 58 Ga. 369; Merchants' Nat. Bank v. Guilmartin, (1892) 88 Ga. 797; Hale v. Rawallie, (1871) 8 Kas. 136; Dunn v. Kyle, (1879) 14 Bush (Ky.) 134; Foster v. Essex Bank, (1821) 17 Mass. 479; Smith v. Westfield First Nat. Bank, (1868) 99 Mass. 605; Lyons First Nat. Bank v. Ocean Nat. Bank, (1875) 60 N. Y. 278; Pattison v. Syracuse Nat. Bank, (1880) 80 N. Y. 82; Ouder Kirk v. Central Nat. Bank, (1890) 119 N. Y. 263; Lloyd v. West Branch Bank, (1850) 15 Pa. St. 172; Lancaster County Nat. Bank v. Smith, (1869) 62 Pa. St. 47; Scott v. National Bank, (1873) 72 Pa. St. 471; DeHaven v. Kensington Nat. Bank, (1876) 81 Pa. St. 95; Allentown First Nat. Bank v. Rex, (1879) 89 Pa. St. 308; Whitney v. Brattleboro First Nat. Bank, (1882) 55 Vt. 154.

gible and generally as accurate a statement of the bank's responsibility in this regard is that the bank must use such care as a reasonable prudent person would exercise under the same circumstances¹). If the special deposit is not a gratuitous bailment, as, for example, in the case of a special deposit of securities as a pledge to the bank, the responsibility of the bank is uniformly stated to be to exercise the care of a reasonably prudent man under the circumstances²).

b) *Kinds of Special Deposits.* — The most common instances of special deposits are: 1. Deposits of negotiable paper for collection; 2. Deposits of securities or other property as collateral to loans made by the bank to the depositor; 3. Deposit of securities or other property for safe keeping; 4. Deposits of money to be specifically applied by the bank in payment of a maturing obligation of the depositor to a third person; and 5. Deposits of money to be invested for the depositor.

1. DEPOSITS FOR COLLECTION. — The receipt of negotiable paper for collection constitutes such an important activity of the banking business that such deposits will be treated under a separate heading³).

2. DEPOSITS OF COLLATERAL SECURITY. — Deposits of securities or other property as collateral to loans made by the bank to the depositor are hypothecations and are governed by the rules applicable to pledges generally. The pledge must be foreclosed by action or by a public sale after notice to the pledgor unless another method of foreclosure, as, for example, private sale without notice, is expressly stipulated for⁴). If the pledge is negotiable paper, in the absence of special agreement it may not be sold but must be held and collected by the bank at its maturity⁵). Upon the satisfaction of the principal debt, the bank may not retain the pledge as security for another obligation of the depositor to the bank, unless the contract between the parties, as is commonly the case, gives the bank that right⁶). The degree of diligence required of the bank in the safe keeping of the security is the same as that required of pledgees generally, viz., the diligence which an ordinarily prudent man would exercise under the same circumstances⁷).

With respect to the other kinds of special deposits, no special comment is necessary.

3. GENERAL DEPOSITS. — a) *Nature and Extent of Banker's Obligation to Depositor.* — The effect of a general deposit on the title of the deposited property and the obligations assumed by the bank have been noted. The title passes to the bank, and the bank assumes an obligation to pay upon demand to the depositor or to the holders of his checks. Apart from the right of the depositor to draw, and of the bank to honor, checks, the relation between them is substantially that of debtor and creditor⁸). However, the obligation of the bank differs from that of the ordinary promisor in that a demand by the depositor is a condition precedent to an action by him to recover the deposit⁹).

¹) Preston v. Prather, (1890) 137 U. S. 604; Gray v. Merriam, (1893) 148 Ill. 179; Maury v. Coyle, (1870) 34 Md. 235; Mansfield Bank v. Zent, (1883) 39 Ohio St. 105. — ²) Prather v. Kean, (1887) 29 Fed. 498; Second Nat. Bank v. Ocean Nat. Bank, (1873) 11 Blatchf. (U. S.) 362; Fleming v. Northampton Nat. Bank, (1881) 9 Fed. Cas. No. 4862a; Gray v. Merriam, (1893) 148 Ill. 179; Jenkins v. National Village Bank, (1870) 58 Me. 275; Dearbourn v. Union Nat. Bank, (1870) 58 Me. 273; Baltimore Third Nat. Bank v. Boyd, (1875) 44 Md. 47; Hollister v. Central Nat. Bank, (1890) 119 N. Y. 634; Ouderkirk v. Central Nat. Bank, (1890) 119 N. Y. 263; Cutting v. Marlbor, (1879) 78 N. Y. 454; Ashton's Appeal, (1873) 73 Pa. St. 153; Scott v. Crews, (1871) 2 S. C. 522. — ³) See V, c, infra. — ⁴) Schouler, Bailments, secs. 227—230. — ⁵) Schouler, Bailments, sec. 236. — ⁶) Armstrong v. Chemical Nat. Bank, (1890) 41 Fed. 234; Reynes v. Dumont, (1888) 130 U. S. 391; Dawson v. Real Estate Bank, (1841) 5 Ark. 284; Wilson v. Dawson, (1876) 52 Ind. 513; Bundy v. Monticello, (1882) 84 Ind. 119; Woolley v. Louisville Banking Co., (1883) 81 Ky. 527; Masonic Sav. Bank v. Bangs, (1886) 84 Ky. 137; Teutonia Nat. Bank v. Loeb, (1875) 27 La. Ann. 110; Neponset Bank v. Leland, (1842) 5 Metc. (Mass.) 259; Brown v. New Bedford Sav. Inst., (1884) 137 Mass. 262; National Bank v. Speight, (1872) 47 N. Y. 668; Duncan v. Brennan, (1881) 83 N. Y. 487; Wyckoff v. Anthony, (1882) 90 N. Y. 442; U. S. Bank v. Macalester, (1848) 9 Pa. St. 475; German Nat. Bank v. Foreman, (1890) 138 Pa. St. 474; Continental Nat. Bank v. Weems, (1888) 69 Tex. 489; Carroll v. Exchange Bank, (1887) 30 W. Va. 518. — ⁷) V, A, 2, a, note. — ⁸) V, A, 1. — ⁹) Mitchell v. Beckman, (1883) 64 Cal. 117; Green v. Odd Fellows' Sav. Bank, (1884) 65 Cal. 71; Johnston v. Farmers' Bank, (1832) 1 Harr. (Del.) 117; Munnerlyn v. Augusta Savings Bank, (1891) 88 Ga. 333; Brahm v. Adkins, (1875) 77 Ill. 263; Brown v. McElroy, (1876) 52 Ind. 404; Makin v. Portland Sav. Inst., (1844) 23 Me. 350; Union Bank v. Planters' Bank, (1838) 9 Gill & J. (Md.) 439; Watson v. Phoenix Bank, (1844) 8 Metc. (Mass.) 217; Branch v. Dawson, (1885) 33 Minn. 399;

b) *Set-off against General Deposits: Banker's Lien.* — Since the relation is substantially that of debtor and creditor, if the depositor is indebted to the bank when the deposit is made, or if the depositor subsequently becomes indebted to the bank on another account, the bank may set off its obligation to pay the depositor against his indebtedness to the bank¹), even though there be checks outstanding at the time²). This right of set-off, however, does not arise until the depositor's debt to the bank is due³). Nor is it available with respect to a deposit known to be made in a fiduciary capacity⁴).

c) *Assignment of Deposit by Depositor.* — Again, since the obligation is a debt, the depositor instead of demanding and receiving the money in person or drawing his checks, may assign his rights against the bank by parol⁵). But the delivery of the pass book or a deposit slip is not by itself an assignment⁶).

Such an assignment operates like the assignment of any other chose in action. In consequence payment by the bank before notice of the assignment effects its discharge⁷).

The drawing of checks is not an assignment of the depositor's rights against the bank, but vests in the payee or holder a right against the drawer contingent upon the dishonor of the check by the bank⁸). But before the adoption of the Uniform Negotiable Instruments Law many States held that a check did operate as an assignment and gave the holder a right of action against the bank. This view still obtains in South Carolina, in which State the Uniform Negotiable Instruments Law has not been adopted⁹).

d) *When Equities against Depositor Available against Bank.* — The fact that the title to negotiable instruments delivered to a bank as a general deposit passes to the bank does not imply that the bank takes the paper free of equities, unless the bank is a holder for value without notice¹⁰). The bank does not become a holder for value so long as the amount to the depositor's credit is sufficient to enable the bank to charge off the credit given for the paper deposited by him wrongfully, and then only to the amount that the credit balance of the depositor is insufficient¹¹). Notice to the bank of the equities of a third person may, of course, come through any channels and take any form. Thus it is held that any words appended to the name of the depositor in a negotiable instrument deposited by him, indicating a fiduciary relation, such, for example, as "trustee,"¹²) or the description of himself by the depositor upon opening the account, as "trustee," puts the bank on inquiry¹³).

Matter of Franklin Bank, (1828) 1 Paige (N. Y.) 249; Willets v. Phoenix Bank, (1853) 2 Duer (N. Y.) 121; Downes v. Phoenix Bank, (1844) 6 Hill (N. Y.) 297; Adams v. Orange County Bank, (1836) 17 Wend. (N. Y.) 514; Howell v. Adams, (1877) 68 N. Y. 314; Thomson v. Bank of British North America, (1880) 82 N. Y. 1; Bank of British North America v. Merchants' Nat. Bank, (1883) 91 N. Y. 106; Girard Bank v. Penn Tp. Bank, (1861) 39 Pa. St. 92; Humphrey v. Clearfield Coun. Nat. Bank, (1886) 113 Pa. St. 417; McGough v. Jamison, (1884) 107 Pa. St. 336; Bellows Falls Bank v. Rutland County Bank, (1867) 40 Vt. 377.

¹) Commercial Bank v. Henninger, (1884) 105 Pa. St. 496. — ²) Fort Dearborn Bank v. Blumenzweig, (1892) 46 Ill. App. 297. — ³) Beckwith v. Union Bank, (1851) 4 Sand. (N. Y.) 604; s. c. 9 N. Y. 211; Newcomb v. Almy, (1884) 96 N. Y. 308; Richards v. La Tourette, (1890) 119 N. Y. 54; Oatman v. Bank, (1890) 77 Wis. 501. — ⁴) National Bank v. Ins. Co., (1881) 104 U. S. 54; Union Bank v. Gillespie, (1890) 137 U. S. 411; Bundy v. Monticello, (1882) 84 Ind. 119; St. Paul Bank v. Gas Co., (1886) 36 Minn. 75; Clark v. Bank, (1894) 57 Mo. App. 277. — ⁵) McEwen v. Davis, (1872) 39 Ind. 109; Risley v. Bank, (1881) 83 N. Y. 318; Union Mills Bank v. Clark, (1892) 134 N. Y. 368. — ⁶) Union Bank v. Clark, supra. — ⁷) Griffin

v. Rice, (1856) 1 Hilt. (N. Y.) 184. — ⁸) Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, sec. 325. — ⁹) Fogarties v. Bank, (1860) 12 Rich. Law (S. C.) 518; Simmons Co. v. Bank, (1893) 41 S. C. 177. — ¹⁰) Levi v. National Bank, (1878) 5 Dill. (U. S.) 104; Marine Bank v. Fulton Bank, (1864) 2 Wall. (U. S.) 256; National Gold Bank, etc., Co., v. McDonald, (1875) 51 Cal. 64; Armstrong v. Boyertown Nat. Bank, (1890) 90 Ky. 431; Manufacturers' Nat. Bank v. Continental Bank, (1889) 148 Mass. 553; Chosen Freeholders v. State Bank, (1880) 32 N. J. Eq. 467; Hazlett v. Commercial Nat. Bank, (1890) 132 Pa. St. 118; Rapp v. National Security Bank, (1890) 136 Pa. St. 426; Columbia Second Nat. Bank v. Cummings, (1890) 89 Tenn. 609. — ¹¹) City Bank v. Green, (1906) 130 Iowa, 384; McNight v. Parsons, (1907) 136 Iowa, 390; Mann v. Bank, (1883) 30 Kas. 412; Citizens' Bank v. Cowles, (1905) 180 N. Y. 346; Albany Bank v. Ice Co., (1904) 92 N. Y. App. Div. 47; Consolidated Bank v. Kirkland, (1904) N. Y. 99 App. Div. 121; Hodge v. Smith, (1906) 130 Wis. 326. — ¹²) Third Bank v. Lange, (1878) 51 Md. 138; Sturtevant v. Jaques, (1867) 14 Allen (Mass.) 523; Ford v. Brown, (1904) 114 Tenn. 467. — ¹³) Bundy v. Monticello, (1882) 84 Ind. 119; Ihl v. Bank, (1887) 26 Mo. App. 129; see also, National Bank v. Ins. Co., (1881) 104 U. S. 54.

If the bank has notice of the equities of a third person against the depositor, and participates in, or knowingly permits, the misappropriation of the deposit, it is responsible to the person defrauded¹). And if the depositor made the deposit to his general credit, the person defrauded is entitled to have any balance remaining to the credit of the depositor specifically applied to the reduction of his claim against the depositor²).

B. Loans, Discounts, and the Purchase and Sale of Property. — The fund accumulated by the receipt of general deposits is employed in the business of banking in making loans, discounting negotiable paper, and in purchasing and selling negotiable paper, coin, bullion, and credits.

1. LOANS. — *a) Formal Loans.* — A loan is an advance of money made in exchange for the borrower's promise to repay the amount advanced, with or without interest, on demand or at a specified future time. In the absence of statutory restrictions a bank or banker may loan at the dictate of his business judgment, any amount to any person upon the security, if any is taken, of any property, whether real or personal³).

Restrictions. — National banks, however, are forbidden to loan any one person more than ten per centum of their capital and surplus⁴), and similar restrictions with respect to State banks are in force in some States⁵). Loans to officers and directors are sometimes also specially regulated⁶). National banks are forbidden to loan upon the security of their own stock or of real property⁷). Although most States permit a State bank to loan upon real property, loans on its own stock are generally forbidden⁸). But notwithstanding these restrictions as to the security upon which loans may be made, national banks as well as State banks, are permitted to take real or other property to secure themselves from losses on loans already advanced⁹). But national banks are required to dispose of property thus acquired within five years¹⁰).

b) Overdrafts. — The effect of a bank's paying a check for an amount in excess of the drawer's credit balance is to make the drawer the debtor of the bank to the amount of the overdraft¹¹). If the payment of the overdraft was in pursuance of a previous agreement on the part of the bank, the transaction differs in no material

¹) Walker v. Manhattan Bank, (1885) 25 Fed. 247; East Hartford v. American Nat. Bank, (1882) 49 Conn. 539; Myers v. Board of Education, (1893) 51 Kas. 87; Greensboro Bank v. Clapp, (1877) 76 N. C. 482; Commercial, etc., Bank v. Jones, (1857) 18 Tex. 811. — ²) Wetherell v. O'Brien; (1892) 140 Ill. 146; Importers, etc., Nat. Bank v. Peters, (1890) 123 N. Y. 272; Van Alen v. American Nat. Bank, (1873) 52 N. Y. 1; — ³) Natl. Bank v. Case, (1878) 99 U. S. 628; Bates v. Bank (1841), 2 Ala. 451; Martinez Bank v. Hemme Orchard Co., (1895) 105 Cal. 376; Deloach v. Jones, (1841) 18 La. 447; Third Bank v. Boyd, (1875) 44 Md. 47; Detroit Bank v. Truesdail, (1878) 38 Mich. 430; Commercial Bank v. Nolan, (1843) 7 How. (Miss.) 508; Westminster Bank v. N. E. Electrical Works, (1906) 73 N. H. 465; Union Bank v. Improvement Co., (1901) 95 N. W. 489. — ⁴) U. S. Rev. Stat. sec. 5200, as amd. 34 U. S. Stat. L. 451. — ⁵) Bolles, Banks and Banking, pp. 236—237, sec. 23. — ⁶) Bolles, Banks and Banking, p. 213, sec. 11. — ⁷) U. S. Rev. Stat., secs. 5136, 5201; Bullard v. Bank, (1873) 18 Wall. 589; Second Bank v. National State Bank, (1874) 10 Bush (Ky.) 367; Conklin v. Second Bank, (1871) 45 N. Y. 655; Goodbar v. City Bank, (1890) 78 Tex. 461; Feckheimer v. National Ex. Bank, (1884) 79 Va. 80. — ⁸) Bolles, Banks and Banking, p. 218; Wellton, Digest State Banking Statutes, (Report of National Monetary Commission, Senate Doc. No. 353; 61st Cong., Second Sess.), p. 41. —

⁹) First Nat. Bank v. National Ex. Bank, (1875) 92 U. S. 122; Reynolds v. Crawfordsville First Nat. Bank, (1884) 112 U. S. 405; Reynolds v. Simpson, (1885) 74 Ga. 454; Worcester Nat. Bank v. Cheeney, (1878) 87 Ill. 602; Mapes v. Scott, (1880) 94 Ill. 379; Libby v. Union Nat. Bank, (1881) 99 Ill. 622; Gaar v. First Nat. Bank, (1886) 20 Ill. App. 611; Heath v. Second Nat. Bank, (1880) 70 Ind. 106; Holmes v. Boyd, (1883) 90 Ind. 332; Spafford v. First Nat. Bank, (1873) 37 Iowa, 181; Fidelity Ins. Co. v. German Sav. Bank, (1905) 127 Iowa, 591; First Nat. Bank v. Elmore, (1879) 52 Iowa, 541; State Security Bank v. Hoskins, (1906) 106 N. W. (Iowa), 764; German Sav. Bank v. Wulfekuhler, (1877) 19 Kas. 60; Ornn v. Merchants' Nat. Bank, (1876) 16 Kas. 341; Upton v. National Bank, (1880) 120 Mass. 153; Union Nat. Bank v. Hunt, (1879) 7 Mo. App. 42; Richards v. Kountze, (1876) 4 Neb. 200; Merchants' State Bank v. Tufts, (1905) 103 N. W. (N. Dak.) 760; Tourtelot v. Whithed, (1900) 9 N. Dak. 467; Silver Lake Bank v. North, (1820) 4 Johns. Ch. (N. Y.) 370; Coppin v. Greenlees, (1882) 38 Ohio St. 275, 279; Taylor v. Miami Ex. Co., (1833) 6 Ohio, 176; Allen v. First Nat. Bank, (1872) 23 Ohio St. 97; Morgan v. Lewis, (1888) 46 Ohio St. 1, 6; Woods v. People's Nat. Bank, (1876) 83 Pa. 57; Alexander v. Brummett, (1896) 42 S. W. (Tenn.) 63; Farmers & Millers' Bank v. Detroit R., (1863) 16 Wis. 372. — ¹⁰) U. S. Rev. Stat., sec. 5137. — ¹¹) Franklin Bank v. Byram, (1855) 39 Me. 489.

respect from a regular loan¹). If the overdraft was paid through inadvertence, or for reasons of business policy, and without previous agreement on the part of the bank, the bank may recover as for money paid at the request of the drawer²). Loaning by paying overdrafts is forbidden or restricted in only a few States³).

c) *Lending of Credit*. — The loaning of a bank's credit by assuming the obligation of a party to a negotiable instrument for the accommodation of another, or in any manner becoming surety, is not an activity of the business of banking. Neither national or State banks, therefore, are permitted to engage in it⁴). A bank may, however, indorse negotiable paper or guarantee other choses in action belonging to it, upon transferring them for its own benefit by way of sale or as collateral to loans⁵).

2. PURCHASES. — a) *Property Generally*. — Since the purchase and sale of property other than coin, bullion, and negotiable instruments is outside the sphere of the business of banking, national banks, and State banks generally, are excluded by law from engaging in such traffic⁶). This inhibition, however, does not prevent banks from taking real or any other kind of property on account of existing debts⁷), or from dealing with such property when taken in such manner as to avoid or diminish loss to the bank⁸). A bank, either State or national, may also acquire real property for its banking house⁹).

b) *Negotiable Instruments*. — Authority to Purchase or Discount. — The discounting of negotiable paper signifies the acquisition of it for value, less than its face, paid at the time of transfer. Discounting, therefore, includes both purchasing and loaning. In consequence, it is generally held that the grant of power to a bank in its charter or a general banking law, to discount, gives it the power to purchase as well as to loan upon negotiable paper¹⁰).

Distinction between Purchase and Loan: Usury. — A loan upon the collateral security of negotiable paper differs in principle from a purchase of negotiable paper.

¹) Bolles, Banks and Banking, p. 199, sec. 3. — ²) Thomas v. Bank, (1892) 46 Ill. App. 461. — ³) Welldon, Digest State Banking Statutes, (Report of National Monetary Commission, Senate Doc. No. 353, 61st Cong., Second Sess.) p. 41. — ⁴) West St. Louis Sav. Bank v. Parmalee, (1877) 95 U. S. 557; National Bank of Commerce v. Atkinson, (1893) 55 Fed. 456; Aetna Nat. Bank v. Charter Oak L. Ins. Co., (1882) 50 Conn. 167; Lucas v. White Line Transfer Co., (1886) 70 Iowa, 541; Monument Nat. Bank v. Globe Works, (1869) 101 Mass. 57; National Park Bank v. German American Mut. Warehousing, etc., Co., (1889) 116 N. Y. 281; Genesee Bank v. Patchin Bank, (1855) 13 N. Y. 309; Bridgeport City Bank v. Empire Stone Dressing Co., (1858) 26 Barb. (N. Y.) 23; Farmers', etc., Bank v. Empire Stone Dressing Co., (1859) 5 Bosw. (N. Y.) 275; Morford v. Farmers' Bank, (1857) 26 Barb. (N. Y.) 568. — ⁵) Wheeler v. Home Bank, (1900) 188 Ill. 34; Talmán v. Bank, (1854) 18 Barb. (N. Y.) 312. — ⁶) U. S. Rev. Stat., sec. 5137; California Nat. Bank v. Kennedy, (1896) 167 U. S. 362; Schofield v. Goodrich Bros. Banking Co., (1899) 98 Fed. 271; Mechanics', etc., Mut. Sav. Bank v. Meriden Agency Co., (1855) 24 Conn. 159; Hill v. Nisbet, (1884) 100 Ind. 341; Franklin Co. v. Lewiston Sav. Inst., (1877) 68 Me. 43; Ingraham v. Speed, (1855) 30 Miss. 410; Bank of Commerce v. Hart, (1893) 37 Neb. 197; Nassau Bank v. Jones, (1884) 95 N. Y. 115; Talmage v. Pell, (1852) 7 N. Y. 328; Berry v. Yates, (1857) 24 Barb. (N. Y.) 199. — ⁷) U. S. Rev. Stat., sec. 5137; German Bank v. Wulfekuhler, (1877) 19 Kas. 60; Taylor v. Miami Co., (1833) 6 Ohio, 176; Farm-

ers' Bank v. R. R. Co., (1863) 17 Wis. 372. — ⁸) Reynolds v. Simpson, (1885) 74 Ga. 454; Brown v. Hogg, (1852) 14 Ill. 219; Bank of North America v. Tamblin, (1879) 7 Mo. App. 570; Williams v. McKay, (1889) 46 N. J. Eq. 25; Sackets' Harbor Bank v. Lewis County Bank, (1851) 11 Barb. (N. Y.) 213; Gillett v. Campbell, (1845) 1 Den. (N. Y.) 520; Lippincott v. Longbottom, (1889) 6 Pa. Co. Ct. 503; Farmers', etc., Bank v. Detroit, etc., R. Co., (1863) 17 Wis. 372. — ⁹) U. S. Rev. Stat., sec. 5137; Sparks v. State Bank, (1845) 7 Blackf. (Ind.) 469; Thweatt v. Hopkinsville Bank, (1883) 81 Ky. 1; Legget v. New Jersey Mfg., etc., Co., (1832) 1 N. J. Eq. 541; State Banks v. Poitiaux, (1825) 3 Rand. (Va.) 136. — ¹⁰) State Bank v. Criswell, (1854) 15 Ark. 230; Ayres v. Dorsey Co., (1897) 101 Ia. 141; Pape v. Capital Bank, (1878) 20 Kas. 440; U. S. Bank v. Norton, (1821) 3 A. K. Marsh (Ky.) 422; Nicholson v. Bank, (1891) 92 Ky. 251; Prescott Nat. Bank v. Butler, (1892) 157 Mass. 548; Atlas Nat. Bank v. Savery, (1879) 127 Mass. 75; National Pemberton Bank v. Porter, (1877) 125 Mass. 333; Rochester First Nat. Bank v. Harris, (1871) 108 Mass. 514; Contra: Rochester Bank v. Pierson, (1877) 24 Minn. 140; McIntyre v. Ingraham, (1858) 35 Miss. 25; Salmon Falls Bank v. Leyser, (1893) 116 Mo. 51; Atlantic Bank v. Savery, (1879) 18 Hun (N. Y.) 36; Tracy v. Talmage, (1854) 18 Barb. (N. Y.) 456; Smith v. Exchange Bank, (1875) 26 Ohio St. 141; Niagara County Bank v. Baker, (1864) 15 Ohio St. 68; Com. v. Commercial Bank, (1857) 28 Pa. St. 383; Union Bank v. Rowan, (1885) 23 S. C. 339.

In both cases money is advanced to the transferor of the paper and the title to the paper passes to the transferee. But in the case of the loan, the lender holds the pledged collateral, subject to an equitable obligation to utilize it for his security only, while in the case of the purchase, the transferee holds his legal rights on the paper free from any equities of the vendor. Furthermore in the case of the loan, the lender can exact as compensation not exceeding the maximum rate of interest prescribed by law¹), while a purchaser of negotiable paper may buy it for any sum agreed upon regardless of the face value of the paper. In consequence a bank may purchase negotiable paper for any price that may be agreed upon²); but in loaning, whether upon the security of negotiable paper or otherwise, a bank, in the absence of special statutory exemptions, is subject to the usury statutes³). National banks, however, are expressly forbidden to purchase negotiable paper at a discount larger than the maximum interest, allowed by the laws of the State where the bank is located, (or, if none is prescribed by the State, 7%) plus the current rate of exchange on sight drafts, when the instrument is payable at another place than the place of purchase⁴).

C. Collections. — The collection of negotiable instruments for depositors or other customers has been noted as one of the important, though incidental, activities of the banker.

1. MODE OF DEPOSIT FOR COLLECTION; TITLE TO PAPER DEPOSITED. — The deposit for collection of negotiable instruments is accomplished by the delivery of the paper to the bank with instructions to collect. The instrument may be delivered either generally endorsed, restrictively endorsed, or without endorsement. In the latter case the title does not pass, but the bank obtains a power of attorney to collect⁵). In the first two cases title does pass, but the bank takes as trustee for the depositor⁶). The difference between the two forms of endorsement is that a general endorsement does not disclose the purpose of the transfer, i. e., the trust; while a restrictive endorsement does. "Pay to X. Bank for my use," or "for collection," are examples of restrictive endorsement⁷). It is, however, usual to speak of a bank as the agent of the depositor even in such cases⁸).

The crediting of the depositor's account with the face of the instrument deposited for collection, does not change the obligation of the bank from that of trustee or agent to that of debtor; for by banking custom the bank may cancel the credit if the instrument is not paid⁹).

¹) See table of legal and maximum interest rates appended to the article on Negotiable Instruments. — ²) *Moncure v. Dermott*, (1839) 13 Pet. (U. S.) 345; *Nichols v. Fearson*, (1833) 7 Pet. (U. S.) 103; *Saltmarsh v. Planters, etc., Bank*, (1850) 17 Ala. 761; *Tuttle v. Clark*, (1822) 4 Conn. 153; *State Bank v. Coquillard*, (1855) 6 Ind. 232; *National Bank v. Green*, (1871) 33 Iowa, 141; *Metcalf v. Pilcher*, (1846) 6 B. Mon. (Ky.) 529; *Oldham v. Turner*, (1843) 3 B. Mon. (Ky.) 67; *Shackleford v. Morris*, (1829) 1 J. J. Marsh (Ky.) 497; *Lane v. Steward*, (1841) 20 Me. 98; *Farmer v. Sewall*, (1840) 16 Me. 456; *French v. Grindle*, (1838) 15 Me. 163; *Churchill v. Suter*, (1808) 4 Mass. 156; *Binghampton Trust Co. v. Clark*, (1898) 32 N. Y. App. Div. 151; *Ingalls v. Lee*, (1850) 9 Barb. (N. Y.) 647; *Rapelye v. Anderson*, (1842) 4 Hill (N. Y.) 472; *Cram v. Hendricks*, (1831) 7 Wend. (N. Y.) 569; *Rice v. Mather*, (1830) 3 Wend. (N. Y.) 62; *Powell v. Waters*, (1830) 8 Cow. (N. Y.) 669; *Munn v. Commission Co.*, (1818) 15 Johns. (N. Y.) 44; *Holmes v. Williams*, (1843) 10 Paige (N. Y.) 326; *Holford v. Blatchford*, (1845) 2 Sandf. Ch. (N. Y.) 149; *King v. Johnson*, (1825) 3 McCord (S. C.) 365; *May v. Campbell*, (1846) 7 Humph. (Tenn.) 450; *Hansbrough v. Baylor*, (1811) 2 Munf. (Va.) 36; See also, *Morse, Banks and Banking*, (4th ed. 1903), p. 135. — ³) *Alexandria Bank*

v. Mandeville, (1809) 1 Cranch (C. C.) 552; *Lumberman's Bank v. Bearce*, (1856) 41 Me. 505; *Commercial Bank v. Nolan*, (1843) 7 How. (Miss.) 508; *Planters Bank v. Sharp*, (1844) 4 Smed. & M. (Miss.) 75; *Tishimingo Sav. Inst. v. Buchanan*, (1882) 60 Miss. 496; *Farmers, etc., Bank v. Harrison*, (1874) 57 Mo. 503; *Farmers' Bank v. Hale*, (1874) 59 N. Y. 53; *Russell v. Failor*, (1853) 1 Ohio St. 327; *Chafin v. Lincoln Sav. Bank*, (1872) 7 Heisk. (Tenn.) 499; *Stribbling v. Bank of the Valley*, (1827) 5 Rand. (Va.) 132; *Brower v. Haight*, (1864) 18 Wis. 102; *Rock River Bank v. Sherwood*, (1860) 10 Wis. 230; *Durkee v. City Bank*, (1860) 13 Wis. 216. In some States, corporations, including banks, are not permitted to take advantage of the usury laws. — ⁴) U. S. Rev. Stat., secs. 5197, 5198; *Morse, Banks and Banking*, (4th ed. 1903), p. 138. — ⁵) Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, sec. 79. — ⁶) *Idem*, secs. 66, 67. — ⁷) *Idem*, sec. 67; *Cody v. Bank*, (1884) 55 Mich. 379. — ⁸) See Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, sec. 66, subdivision 2. — ⁹) *Levi v. National Bank*, (1878) 5 Dill. (U. S.) 104; *Marine Bank v. Fulton Bank*, (1864) 2 Wall. (U. S.) 256; *National Gold Bank, etc., Co. v. McDonald*, (1875) 51 Cal. 64; *Armstrong v. Boyertown Nat. Bank*, (1890) 90 Ky. 431; *Manufacturers' Nat. Bank v. Continental*

2. **AUTHORITY OF BANK OF DEPOSIT.** — The result of the deposit for collection is to vest in the bank the right to demand and receive payment¹), and the right to bring an action on the instrument against all parties liable on it, in its own name if the instrument has been endorsed²).

These rights of the bank are subject to revocation³), unless the instrument has been negotiated to a holder in due course⁴). But, of course, a restrictive endorsement affects all subsequent holders with notice of the depositor's rights⁵). The revocation may be by the act of the depositor, or result from the insolvency and suspension of the bank⁶).

3. **OBLIGATIONS OF BANK OF DEPOSIT.** — The diligence of a reasonably prudent man is required of the bank in making the collection.

a) *Presentment, Protest, and Notice of Dishonor.* — Due diligence must be exercised by the bank in making presentment and demand for payment, in default of which the bank will be responsible for the consequent loss to the depositor⁷).

1. **Protest.** — If the instrument is a bill of exchange, the protest of which is necessary, a notary must be chosen with reasonable care, and if the bank discharges its duty in this regard, it will not be held liable for loss resulting from the notary's negligence⁸). But in some States it is held that the notary is the subagent of the bank, and that, in consequence, the bank is chargeable with his negligence⁹).

2. **Notice of Dishonor.** — That the bank must use due diligence in giving due notice of dishonor to its indorser, i. e., the depositor, is well settled. The bank, however, may be required by express contract or usage to notify the drawer and all indorsers¹⁰).

b) *Bringing of Action.* — Although the bank may, it is not required, to put the instrument in suit¹¹).

Bank, (1889) 148 Mass. 553; Chosen Freeholders v. State Bank, (1880) 32 N. J. Eq. 467; Hazlett v. Commercial Nat. Bank, (1890) 132 Pa. St. 118; Rapp v. National Security Bank, (1890) 136 Pa. St. 426; Columbia Second Nat. Bank v. Cummings, (1891) 89 Tenn. 609.

¹) Ward v. Smith, (1868) 7 Wall. (U. S.) 451; Hazlett v. Bank, (1890) 132 Pa. St. 118; Alley v. Rogers, (1869) 19 Gratt. (Va.) 366. — ²) Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, sec. 67, subdivision 2. — ³) Crown Point Bank v. Bank, (1881) 76 Ind. 561; Scott v. Bank, (1861) 23 N. Y. 289. — ⁴) Cody v. Bank, (1884) 55 Mich. 379. — ⁵) Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, sec. 67. — ⁶) Audenried v. Betteley, (1864) 8 Allen (Mass.) 302; Crown Point First Nat. Bank v. Richmond First Nat. Bank, (1881) 76 Ind. 561; Manufacturers' Nat. Bank v. Continental Bank, (1889) 148 Mass. 553; Jockusch v. Towsey, (1879) 51 Tex. 129. — ⁷) National Bank of Commerce v. Merchants' Nat. Bank, (1875) 91 U. S. 92; Exchange Nat. Bank v. New York Third Nat. Bank, (1884) 112 U. S. 276; Trinidad First Nat. Bank v. Denver First Nat. Bank, (1878) 4 Dill. (U. S.) 290; Branch of State Bank v. Knox, (1840) 1 Ala. 148; Mobile Bank v. Huggins, (1841) 3 Ala. 206; German Nat. Bank v. Burns, (1889) 12 Colo. 539; Merchants', etc., Bank v. Stafford Nat. Bank, (1877) 44 Conn. 564; State Nat. Bank v. Henderson, (1872) 46 Ga. 487; American Express Co. v. Haire, (1863) 21 Ind. 4; Tyson v. State Bank, (1842) 6 Blackf. (Ind.) 225; Chapman v. McCrea, (1878) 63 Ind. 360; Locke v. Merchants' Nat. Bank, (1879) 66 Ind. 353; Lindsborg Bank v. Ober, (1884) 31 Kas. 599; Moore v. State Nat. Bank, (1892) 44 La. Ann. 99; Armington v. Gas Light, etc., Co., (1840) 15 La. 414; Dorchester, etc., Bank

v. New England Bank, (1848) 1 Cush. (Mass.) 177; Warren Bank v. Suffolk Bank, (1852) 10 Cush. (Mass.) 582; Febens v. Mercantile Bank, (1839) 23 Pick. (Mass.) 330; West v. St. Paul Nat. Bank, (1893) 54 Minn. 466; Jagger v. National German-American Bank, (1893) 53 Minn. 386; Capitol State Bank v. Lane, (1876) 52 Miss. 677; Steele v. Russell, (1876) 5 Neb. 211; Davey v. Jones, (1880) 42 N. J. L. 28; McKinstor v. Utica Bank, (1832) 9 Wend. (N. Y.) 46; Montgomery County Bank v. Albany City Bank, (1852) 7 N. Y. 459; Walker v. State Bank, (1854) 9 N. Y. 582; Veale v. Parrish, (1859) 20 N. Y. 407; Meadville First Nat. Bank v. New York Fourth Nat. Bank, (1879) 77 N. Y. 320; New Hanover Bank v. Kenan, (1877) 76 N. C. 340; Hazlett v. Commercial Nat. Bank, (1890) 132 Pa. St. 118; Thompson v. State Bank, (1836) 3 Hill L. (S. C.) 77. — ⁸) Britton v. Nicolls, (1881) 104 U. S. 757; Citizens' Bank v. Howell, (1855) 8 Md. 530; Warren Bank v. Suffolk Bank, (1852) 10 Cush. (Mass.) 582; Tiernan v. Commercial Bank, (1843) 7 How. (Miss.) 648; Agricultural Bank v. Commercial Bank, (1846) 7 Smed. & M. (Miss.) 592; Bowling v. Arthur, (1857) 34 Miss. 41; Gallipolis First Nat. Bank v. Butler, (1885) 41 Ohio St. 519; Stacy v. Dane County Bank, (1860) 12 Wis. 629. — ⁹) Davey v. Jones, (1880) 42 N. J. L. 28; Allen v. Merchants' Bank, (1839) 22 Wend. (N. Y.) 215; Ayrault v. Pacific Bank, (1872) 47 N. Y. 570; Mead v. Engs, (1826) 5 Cow. (N. Y.) 303; Thompson v. State Bank, (1836) 3 Hill L. (S. C.) 77. See also, Gerhardt v. Saving Inst., (1866) 38 Mo. 60. — ¹⁰) Phipps v. Bank, (1844) 8 Metc. (Mass.) 79; State Bank v. Bank, (1864) 41 Barb. (N. Y.) 343; Smedes v. Bank, (1824) 20 Johns. (N. Y.) 372; s. c. 3 Cow. (N. Y.) 662. — ¹¹) Crow v. Bank, (1856) 12 La. Ann. 692.

c) *Proceeds after Collection.* — If the instrument is paid to the bank, the relation between the bank and its depositor ceases to be that of trustee and cestui que trust, or agent and principal, and becomes that of debtor and creditor. The proceeds become the property of the bank, and the bank, now a debtor, is absolutely responsible for the payment of an equivalent sum to its creditor, the depositor¹).

4. COLLECTION THROUGH CORRESPONDENT. — a) *Responsibility of Bank of Deposit for Negligence of Correspondent.* — If the place for the presentment of the paper deposited for collection is not the situs of the bank, banking usage authorizes the employment of a correspondent to make the collection. The bank of deposit must exercise reasonable diligence in selecting a correspondent. Whether, having fulfilled this duty, it is responsible for the negligence of the correspondent is a matter upon which the courts are divided. In some States it is held that the correspondent is the subagent of the bank of deposit, and not the agent of the depositor, and in consequence that the bank of deposit is responsible²). In other jurisdiction, however, it is held that the bank of deposit has discharged its duty by the exercise of due care in the employment of the correspondent, and that the latter is substituted in the place of the former as agent for collection. In such jurisdictions, the bank of deposit is not responsible for the negligence of the correspondent³).

b) *Rights and Obligations of Depositor and Correspondent Bank.* — The correspondent bank which receives negotiable paper for collection from the bank of deposit with notice, either from the form of the endorsement or otherwise, of the depositor's rights, holds the paper subject to them⁴). But after the collection the correspondent does not hold the proceeds in trust but by banking usage becomes a debtor to the depositor⁵). In the event, then, of the insolvency of the correspondent before col-

¹) *Marine Bank v. Fulton Bank*, (1864) 2 Wall. (U. S.) 252; *Commercial Nat. Bank v. Armstrong*, (1892) 148 U. S. 50; *Hosmer v. Jewett*, (1872) 6 Ben. (U. S.) 208; *Levi v. National Bank*, (1878) 5 Dill. (U. S.) 104; *Marine Bank v. Rushmore*, (1862) 28 Ill. 463; *Tinkham v. Heyworth*, (1863) 31 Ill. 519; *Briggs v. Central Nat. Bank*, (1882) 89 N. Y. 182; *People v. City Bank*, (1883) 93 N. Y. 582; *National Butchers', etc., Bank v. Hubbell*, (1889) 117 N. Y. 384; *Richmond First Nat. Bank v. Davis*, (1894) 114 N. C. 343. — ²) *Exchange Nat. Bank v. New York City Third Nat. Bank*, (1884) 112 U. S. 276; *Washington Bank v. Triplett*, (1828) 1 Pet. (U. S.) 25; *Taber v. Perrot*, (1815) 2 Gall. (U. S.) 665; *Eufaula Grocery Co. v. Missouri Nat. Bank*, (1897) 118 Ala. 408; *Masich v. Citizens' Bank*, (1882) 34 La. Ann. 1207; *Simpson v. Waldbey*, (1886) 63 Mich. 439; *Streissguth v. National German-American Bank*, (1890) 43 Minn. 50; *Titus v. Mechanics' Nat. Bank*, (1871) 35 N. J. L. 588; *Kirkham v. Bank of America*, (1900) 165 N. Y. 132; *Castle v. Corn Exch. Bank*, (1895) 148 N. Y. 122; *St. Nicholas Bank v. State Nat. Bank*, (1891) 128 N. Y. 26; *Naser v. New York City First Nat. Bank*, (1889) 116 N. Y. 492; *Ayrault v. Pacific Bank*, (1872) 47 N. Y. 570; *Commercial Bank v. Union Bank*, (1854) 11 N. Y. 203; *Montgomery County Bank v. Albany City Bank*, (1852) 7 N. Y. 459; *Allen v. Merchants' Bank*, (1839) 22 Wend. (N. Y.) 215; *Commercial Bank v. Red River Valley Nat. Bank*, (1899) 8 N. D. 382; *Reeves v. State Bank*, (1858) 8 Ohio St. 465; *Mound City Paint, etc., Co. v. Commercial Nat. Bank*, (1886) 4 Utah, 353. — ³) *East-Haddam Bank v. Scovil*, (1837) 12 Conn. 303; *Lawrence v. Stonington Bank*, (1827) 6 Conn. 521; *Fay v. Strawn*, (1863) 32 Ill. 295; *Aetna Ins. Co. v. Alton City Bank*, (8611) 25 Ill. 243; *Guelich v. National State*

Bank, (1881) 56 Iowa, 434; *Lindsborg Bank v. Ober*, (1884) 31 Kas. 599; *Citizens Bank v. Howell*, (1855) 8 Md. 530; *Jackson v. Union Bank* (1824) 6 Harr. & J. (Md.) 146; *Warren Bank v. Soffolk Bank*, (1852) 10 Cush. (Mass.) 582; *Dorchester, etc., Bank v. New England Bank*, (1848) 1 Cush. (Mass.) 177; *Fabens v. Mercantile Bank*, (1839) 23 Pick. (Mass.) 330; *Louisville Third Nat. Bank v. Vicksburg Bank*, (1883) 61 Miss. 112; *Bowling v. Arthur*, (1857) 34 Miss. 41; *Agricultural Bank v. Commercial Bank*, (1846) 7 Sm. & M. (Miss.) 592; *Tiernan v. Commercial Bank*, (1843) 7 How. (Miss.) 648; *Daly v. Butchers', etc., Bank*, (1874) 56 Mo. 94; *Omaha First Nat. Bank v. Moline First Nat. Bank*, (1898) 55 Neb. 303; *Pawnee City First Nat. Bank v. Sprague*, (1892) 34 Neb. 318; *Hazlett v. Commercial Nat. Bank*, (1890) 132 Pa. St. 118; *Merchants' Nat. Bank v. Goodman*, (1885) 109 Pa. St. 422; *Wingate v. Mechanics' Bank*, (1848) 10 Pa. St. 104; *Columbia Second Nat. Bank v. Cummings*, (1890) 89 Tenn. 609; *Louisville Bank v. Knoxville First Nat. Bank*, (1874) 8 Baxt. (Tenn.) 101; *Stacy v. Dane County Bank*, (1860) 12 Wis. 629. — ⁴) *Crown Point First Nat. Bank v. Richmond First Nat. Bank*, (1881) 76 Ind. 561; *Meridian First Nat. Bank v. Strauss*, (1889) 66 Miss. 479; *Dickerson v. Wason*, (1872) 47 N. Y. 439; *National Park Bank v. Seaboard Bank*, (1889) 114 N. Y. 29; *Yerkes v. National Bank*, (1877) 69 N. Y. 382. — ⁵) *Marine Bank v. Fulton*, (1864) 2 Wall. (U. S.) 252; *Planters' Bank v. Union Bank*, (1872) 16 Wall. (U. S.) 483, 501; *Phoenix Bank v. Risley*, (1883) 111 U. S. 125; *Balbach v. Frelinghuysen*, (1883) 15 Fed. 675; *Nat. Bank v. Miller*, (1884) 77 Ala. 168; *Marine Bank v. Chandler*, (1862) 27 Ill. 525; *Marine Bank v. Rushmore*, (1862) 28 Ill. 463; *Tinkham v. Heyworth*, (1863) 31 Ill. 519; *Clark v. Merchants' Bank*, (1849) 2 N. Y. 380;

lection, the depositor is entitled to reclaim the paper¹), but in case of insolvency after collection the depositor, or his bank of deposit, must share pro rata with the other creditors of the correspondent²).

If the correspondent bank receives the paper from the bank of deposit without notice of the rights of the depositor, his equities are not available against the correspondent, provided the latter gave value for the paper. The depositor's rights, both before and after the collection, are then against the bank of deposit³).

What is sufficient to constitute the correspondent bank a holder for value is a matter upon which the authorities are in conflict. In most States, if by express contract or the custom of business, the correspondent bank holds the paper as collateral security for the obligations of the bank of deposit, the former is held a holder for value⁴). In some States, however, the holding of the paper as collateral for pre-existing obligations of the bank of deposit does not constitute the correspondent a holder for value⁵). In consequence, in the former group of States, the collecting bank, in the event of the insolvency of the bank of deposit, is entitled to credit the proceeds of the paper when collected on the indebtedness of the bank of deposit⁶), leaving the depositor to prove his claim against the insolvent bank of deposit and share pro rata with its creditors. In the latter group, the depositor may recover the amount of the collection from the correspondent, notwithstanding, the existence of an indebtedness due it from the bank of deposit⁷).

D. Bank Notes. — An activity which, equally with the accumulation of a fund by receiving general deposits to be used in the making of loans and discounts, and in the buying and selling of coin, bullion, and exchange, characterizes a business as that of banking, is the issuance of bank notes.

1. NATURE AND OBLIGATION. — a) *Definition.* — Bank notes are the negotiable promissory notes of a private banker, State bank, or national bank, payable to bearer on demand, designed to circulate as money⁸).

b) *Presentment.* — Although bank notes are negotiable notes payable on demand, the better view is that, unlike other demand notes⁹), they do not mature until presentment and demand¹⁰).

People v. Merchants' Bank, (1879) 78 N. Y. 269; Briggs v. Central Bank, (1882) 89 N. Y. 182; People v. City Bank, (1883) 93 N. Y. 582; Nat. Bank v. Hubbell, (1889) 117 N. Y. 384; Jockusch v. Towsey, (1879) 51 Tex. 129.

¹) Scott v. Ocean Bank, (1861) 23 N. Y. 289; Second Bank v. Cummings, (1891) 18 S. W. (Tenn.) 115; See also note 1, supra. — ²) Commercial Bank v. Armstrong, (1892) 148 U. S. 50; Merchants', etc., Bank v. Austin, (1891) 48 Fed. 25; Philadelphia Nat. Bank v. Dowd, (1889) 38 Fed. 172; Billingsley v. Pollock, (1892) 69 Miss. 759; People v. City Bank, (1883) 93 N. Y. 582; National Butchers', etc., Bank v. Hubbell, (1889) 117 N. Y. 384; Richmond First Nat. Bank v. Davis, (1894) 114 N. C. 343; Reeves v. State Bank, (1858) 8 Ohio St. 465; Henry v. Martin, (1894) 88 Wis. 367; Nonotuck Silk Co. v. Flanders, (1894) 87 Wis. 237. — ³) Cody v. Bank, (1884) 55 Mich. 379. — ⁴) Bank of Metrop. v. N. E. Bank, (1843) 1 How. (U. S.) 234; Vickery v. State Association, (1884) 21 Fed. 773; Wyman v. Colo. Bank, (1879) 5 Colo. 30; Coors v. German Bank, (1890) 14 Col. 202; Rathbone v. Sanders, (1857) 9 Ind. 217; Wood v. Boylston Bank, (1880) 129 Mass. 358; Cody v. City Bank, (1884) 55 Mich. 379; Edson v. Angell, (1885) 58 Mich. 336; Hoffman v. First Bank, (1884) 46 N. J. L. 604; Carroll v. Bank, (1887) 30 W. Va. 518. — ⁵) Van Amee v. Troy Bank, (1850) 8 Barb. (N. Y.) 312; Scott v. Ocean Bank, (1861) 23 N. Y. 289; Hoffman v. Miller (1862) 9 Bosw. (N. Y.) 334; Commercial Bank v. Marine Bank, (1867) 3 Keyes, (N. Y.)

337; Dod v. Fourth Bank, (1871) 59 Barb. (N. Y.) 265; Stark v. U. S. Bank, (1886) 41 Hun. (N. Y.) 506; First Bank v. Gregg, (1875) 79 Pa. 384; Hackett v. Reynolds, (1886) 114 Pa. 328. — ⁶) Bank of Metropolis v. New England Bank, (1843) 1 How. (U. S.) 234; Sweenyx v. Easter, (1863) 1 Wall. (U. S.) 166; Chicago First Nat. Bank v. Reno County Bank, (1880) 1 McCrary (U. S.) 491; Vickrey v. State Sav. Assoc., (1884) 21 Fed. 773; Wyman v. State Nat. Bank, (1879) 5 Colo. 30; Cecil Bank v. Farmers' Bank, (1864) 22 Md. 148; Miller v. Farmers', etc., Bank, (1868) 30 Md. 392; Millikin v. Shapleigh, (1865) 36 Mo. 596; Bury v. Woods, (1886) 17 Mo. App. 245; Carroll v. Exchange Bank, (1887) 30 W. Va. 518. — ⁷) Meridian First Nat. Bank v. Strauß, (1889) 66 Miss. 479; McBride v. Farmers' Bank, (1863) 26 N. Y. 450; Commercial Bank v. Marine Bank, (1867) 3 Keyes (N. Y.) 337; Corn Exch. Bank v. Farmers' Nat. Bank, (1890) 118 N. Y. 443; Van Amee v. Troy Bank, (1850) 8 Barb. (N. Y.) 312; West v. American Exch. Bank, (1865) 44 Barb. (N. Y.) 175; Lindauer v. New York Fourth Nat. Bank, (1869) 55 Barb. (N. Y.) 75; Dod v. New York Fourth Nat. Bank, (1871) 59 Barb. (N. Y.) 265. — ⁸) Morse, Banks and Banking, (4th ed. 1903), sec. 635; Daniel, Negotiable Instruments, (5th ed. 1903), sec. 1664. See 31 U. S. Stat. L. 49; Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, secs. 320, 20, 26, 28. — ⁹) Uniform Negotiable Instruments Law, Cons. Laws of New York, 1909, c. 38, sec. 130. — ¹⁰) Hinsdale v. Larned,

c) *Interest*. — In consequence the bank is not liable for interest until after presentment, demand, and dishonor¹). But it has been held that in the event of the bank's failure and suspension, interest may be recovered from that date in the absence of demand²).

d) *Statute of Limitations*. — The statute of limitations does not begin to run until after presentment and demand, or until the failure and suspension³).

2. **AUTHORITY TO ISSUE.** — a) *Private Bankers and State Banks*. — Although private bankers and State banks may with the authority of the State in which they are doing business issue bank notes, the imposition of a ten per centum tax by the Federal government on every person, natural or artificial, issuing his own bank notes or circulating or paying out those of another, has operated to prevent their issuance and circulation⁴).

b) *National Banks*. — Upon the deposit of United States bonds with the Treasurer of the United States, a national bank is authorized to issue, under the supervision of the Comptroller, bank notes to an amount equalling the par value of the bonds so deposited⁵).

3. **BANK NOTES AS LEGAL TENDER.** — a) *Bank Notes of Private Bankers and State Banks*. — Bank notes issued by a private banker or a State bank under the authority of a State are not legal tender; nor can the State invest them with that quality⁶).

b) *Bank Notes of National Banks*. — National bank notes are legal tender throughout the United States in payment of taxes, and all other dues to the Federal government, and also in payment of all debts owing by the Federal government except interest on the public debt, and in redemption of the national currency, but not in payment of other obligations⁷).

Federal Banking Statutes.⁸)

Chapter II. Organization and powers.

15. **Sec. 1. The National Bank Act. Act June 20, 1875.** An act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, shall hereafter be known as "the national bank act."

Act June 20, 1874, c. 343, sec. 1; 18 Stat. L., 123.

16. **Sec. 5133. Formation of national banking associations.** Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the comptroller of the currency, to be filed and preserved in his office.

Act June 3, 1864, c. 106, sec. 5; 13 Stat. L., 100.

(1819) 16 Mass. 65, 68; *Tower v. Appleton Bank*, (1862) 3 Allen (Mass.) 387; *Thurston v. Wolfborough Bank*, (1848) 18 N. H. 391; *Wilks v. Robinson*, (1832) 3 Rich. (S. C.) 182; *Bank of Memphis v. White*, (1855) 2 Sneed (Tenn.) 482. But see contra, *Bryant v. Damariscotta Bank*, (1841) 18 Me. 240; *Bank of Niagara v. McCracken*, (1821) 18 Johns. (N. Y.) 493; *Haxtun v. Bishop*, (1829) 3 Wend. (N. Y.) 21; *Greer v. Perkins*, (1845) 5 Humph. (Tenn.) 588.

¹) *Bank of Kentucky v. Thornsby*, (1842) 3 B. Mon. (Ky.) 519; *Bank Commissioners v. Bank*, (1843) 4 Edw. Ch. (N. Y.) 287; *Estate Bank's Appeal*, (1869) 60 Pa. St. 471. — ²) *Atwood v. Bank*, (1841) 10 Ohio, 526. — ³) *Bullard v. Bell*, (1817) 1 Mason (U. S.) 243; s. c. Fed. Cas. No. 2, 121; *Dougherty v. Western Bank*, (1853) 13 Ga. 287; *Bethune v. Dougherty*, (1860) 30 Ga. 770; *Ballard*

v. Greenbush, (1844) 24 Me. 336; *Hinsdale v. Larned*, (1819) 16 Mass. 65; *Ballard Thurston v. Wolfborough Bank*, (1848) 18 N. H. 391; *Long v. Yanceyville, Bank*, (1879) 81 N. C. 41; *Greer v. Perkins*, (1845) 5 Humph. (Tenn.) 588; *F. & M. Bank v. White*, (1855) 2 Sneed (Tenn.) 482. — ⁴) Act of Feb. 8, 1875, c. 36, secs. 19, 20; 18 U. S. Stat. L. 311. — ⁵) Act of March 14, 1900, c. 41, sec. 12; 31 U. S. Stat. L. 49. See generally compilation of United States banking statutes, c. III, printed below. — ⁶) U. S. Const., art. 1, sec. 10. — ⁷) Act of June 3, 1864, c. 106, sec. 23; 13 U. S. Stat. L. 106. — ⁸) These provisions are reprinted from the latest departmental compilation, with the omission of the less important enactments. The numeral prefixed to each section is an arbitrary one assigned by the department.

17. Sec. 5134. Requisites of organization certificate. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the comptroller of the currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory, or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title.

Act June 3, 1864, c. 106, sec. 6; 13 Stat. L., 101. For authority to change names or locations see act May 1, 1886, following section 5136.

18. Sec. 5135. How certificate shall be acknowledged and filed. The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the comptroller of the currency, who shall record and carefully preserve the same in his office.

Act June 3, 1864, c. 106, sec. 6; 13 Stat. L., 101.

19. Sec. 5136. Corporate powers of association. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power:

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.

Act June 3, 1864, c. 106, sec. 8; 13 Stat. L., 101. See secs. 5168, 5169, and 5170, post, relating to issuing and publishing of certificate authorizing association to begin business.

20. Sec. 1. Increase of capital stock. Act May 1, 1886.

[Relates to increase of capital stock and is inserted after section 5142, Revised Statutes.]

21. Sec. 2. May change name and location; how. Act May 1, 1886. Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same state, not more than thirty miles distant, with the approval of the comptroller of the currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location

selected shall be sent to the office of the comptroller of the currency; but no change of name or location shall be valid until the comptroller shall have issued his certificate of approval of the same.

Act May 1, 1886, c. 73, sec. 2; 24 Stat. L., 18.

22. Sec. 3. Debts not affected by change. Act May 1, 1886. All debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

Act May 1, 1886, c. 73, sec. 3; 24 Stat. L., 19.

23. Sec. 4. No release from liabilities. Act May 1, 1886. Nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested.

Act May 1, 1886, c. 73, sec. 4; 24 Stat. L., 19.

24. Sec. 4. National banks deemed citizens of states in which located. Act August 13, 1888. All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

Act Mar. 3, 1887, sec. 4; 24 Stat. L., 554, Act Aug. 13, 1888, c. 866, sec. 4; 25 Stat. L., 436.

25. Sec. 1. Extension of corporate existence. Act July 12, 1882. That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred and fifty-four of the revised statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the comptroller of the currency, to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

Act July 12, 1882, c. 290, sec. 1; 22 Stat. L., 162.

26. Sec. 2. Consent of two-thirds necessary. Act July 12, 1882. That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by the president or cashier, to the comptroller of the currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the comptroller; and such amended articles of association shall not be valid until the comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

Act July 12, 1882, c. 290, sec. 2; 22 Stat. L., 162.

27. Sec. 3. Special examination of bank and issue of certificate of approval by comptroller. Act July 12, 1882. That upon the receipt of the application and certificate of the association provided for in the preceding section, the comptroller of the currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise, it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

Act July 12, 1882, c. 290, sec. 3; 22 Stat. L., 163.

28. Sec. 4. Status not changed by extension, jurisdiction of suits by or against national banks. Act July 12, 1882. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the revised statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

Act July 12, 1882, c. 290, sec. 4; 22 Stat. L., 163. See also act of August 13, 1888, relating to citizenship of national banks and jurisdiction of the circuit and district courts, which follows sec. 5136, ante, sec. 24.

29. Sec. 5. Dissenting shareholders may withdraw. Act July 12, 1882. That when any national banking association has amended its articles of association as provided in this act, and the comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the comptroller of the currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder, from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: Provided, that in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.

Act July 12, 1882, c. 290, sec. 5; 22 Stat. L., 163.

30. Sec. 6. Redemption of circulating notes issued prior to extension. Act July 12, 1882. That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An act fixing the amount of United States notes, providing for redistribution of national bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the comptroller of the currency, and destroyed, as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the revised statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the secretary of the treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: Provided, however, that each banking association which shall obtain the benefit of this act shall reimburse to the treasury

the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

Act July 12, 1882, c. 290, sec. 6; 22 Stat. L., 163. Act of June 20, 1874, sect. 3, mentioned above, is inserted after Revised Statutes 5192. The destruction of bank notes by burning, as provided in sections 5184, 5225, Revised Statutes, is superseded by act of June 23, 1874, which requires bank notes to be macerated.

31. Sec. 7. Dissolution of banks not extending period of succession. Act July 12, 1882. That national banking associations whose corporate existence has expired or shall hereafter expire and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the revised statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the revised statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the revised statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

Act July 12, 1882, c. 290, sec. 7; 22 Stat. L., 164. Other sections of act July 12, 1882: Sec. 8. [Relates to bond deposits and circulating notes.] Follows Revised Statutes, section 5167. Sec. 9. [Relates to withdrawal of circulating notes.] Follows Revised Statutes, section 5167. Sec. 10. Repeals sections 5171—5176, Revised Statutes, and was superseded by act of March 14, 1900. (See section 5171, Revised Statutes.) Sec. 11. Authorizes the exchange of three per cent. bonds for outstanding three and one-half per cent bonds. Sec. 12. Authorizes the issue of gold certificates upon the deposit of gold coin. Inserted after section 5207. Sec. 13. [Relates to false certification of checks.] Follows Revised Statutes, section 5208.

32. Reextension of corporate existence. Act of April 12, 1902. That the comptroller of the currency is hereby authorized, in the manner provided by, and under the conditions and limitations of, the act of July 12, 1882, to extend for a further period of twenty years the charter of any national banking association extended under said act which shall desire to continue its existence after the expiration of its charter.

Act April 12, 1902, c. 503; 32 Stat. L., 102.

33. Sec. 5137. Power to hold real property. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Act June 3, 1864, c. 106, sec. 28, 13 Stat. L., 107.

34. Sec. 5138 [as amended 1900]. Requisite amount of capital. No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the secretary of the treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the secretary of the treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars.

Act June 3, 1864, c. 106, sec. 7; 13 Stat. L., 101. Act Mar. 14, 1900, c. 41, sec. 10; 31 Stat. L., 48.

35. Sec. 5139. Shares of stock and transfers. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Act June 3, 1864, c. 106, sec. 12; 13 Stat. L., 102.

36. Sec. 5140. How payment of the capital stock must be made and certified. At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the comptroller of the currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association.

Act June 3, 1864, c. 106, sec. 14; 13 Stat. L., 103.

37. Sec. 5141. Proceedings if shareholder fails to pay installments. Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

Act June 3, 1864, c. 106, sec. 15; 13 Stat. L., 103.

38. Sec. 5142. National banks may increase capital stock. Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the comptroller of the currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

Act June 3, 1864, c. 106, sec. 13; 13 Stat. L., 103.

39. Sec. 1. Increase of capital stock. Act May 1, 1886. That any national banking association may, with the approval of the comptroller of the currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said comptroller, notwithstanding the limit fixed in its original articles of association and determined by said comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

Act May 1, 1886, c. 73, sec. 1; 24 Stat. L., 18. Other sections of this act follow Revised Statutes, sec. 5136.

40. Sec. 5143. Reduction of capital stock. Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the comptroller of the currency and his approval thereof obtained.

Act June 3, 1864, c. 106, sec. 13; 13 Stat. L., 103.

41. Sec. 5144. Right of shareholders to vote; proxies authorized. In all elections of directors, and in deciding all questions at meetings of shareholders, each share-

holder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

Act June 3, 1864, c. 106, sec. 11; 13 Stat. L., 102. The Circuit Court of the United States, in *United States v. Barry*, 36 Fed. 246, held that the words "liability past due and unpaid" referred only to unpaid subscriptions for stock.

42. Sec. 5145. Election of directors. The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the comptroller of the currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

Act June 3, 1864, c. 106, secs. 9, 10; 13 Stat. L., 102.

43. Sec. 5146. [as amended 1905]. **Requisite qualification of directors.** Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory, or district in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own in his own right at least five shares of such capital stock. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

Act June 3, 1864, c. 106, secs. 9, 10; 13 Stat. L., 102. Act. Feb. 28, 1905; 33 Stat. L., 818, c. 1163.

44. Sec. 5147. Oath required from directors. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the comptroller of the currency, and shall be filed and preserved in his office.

Act June 3, 1864, c. 106, sec. 9; 13 Stat. L., 102.

45. Sec. 5148. Filling vacancies. Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

Act June 3, 1864, c. 106, sec. 10; 13 Stat. L., 102.

46. Sec. 5149. Proceedings where no election is held on the proper day. If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

Act June 3, 1864, c. 106, sec. 10; 13 Stat. L., 102.

47. Sec. 5150. Election of president of the board. One of the directors, to be chosen by the board, shall be the president of the board.

Act June 3, 1864, c. 106, sec. 9; 13 Stat. L., 102.

48. Sec. 5151. Individual liability of shareholders. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition

to the amount invested in such shares; except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter four¹) of this title.

Act June 3, 1864, c. 106, sec. 12; 13 Stat. L., 102. See act of June 30, 1876, following section 5238, Revised Statutes, for enforcement of liability prescribed by this section in cases of voluntary liquidation.

49. Sec. 5152. Executors, trustees etc., not personally liable. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name.

Act June 3, 1864, c. 106, sec. 63; 13 Stat. L., 118.

50. Sec. 5153 [as amended 1907]. National banking associations to be depositaries of public moneys. All national banking associations, designated for that purpose by the secretary of the treasury, shall be depositaries of public money, under such regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the government, as may be required of them. The secretary of the treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government: Provided, that the secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue, or for loans or stocks: Provided, that the secretary of the treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different states and sections.

Act June 3, 1864, c. 106, sec. 45; 13 Stat. L., 113. Act Mar. 3, 1901, c. 871, sec. 1; 31 Stat. L., 1448. Act Mar. 4, 1907; 34 Stat. L., 1290. For other provisions relating to duties and liabilities of depositaries see following sections of the Revised Statutes of the United States: Sec. 3640. Transfer of moneys from depositaries to treasury authorized. Sec. 3641. Transfer of postal deposits. Sec. 3642. Accounts of postal deposits. Sec. 3643. Entry of each deposit, transfer, and payment. Sec. 3644. Public moneys in treasury and depositories subject to draft of treasurer. Sec. 3645. Regulations for presentment of drafts. Sec. 3646. Duplicates for lost or stolen checks authorized. Sec. 3647. Duplicate check when officer who issued is dead. Sec. 3648. Advances of public moneys prohibited. Sec. 3649. Examination of depositaries. See also secs. 3620, 3847, 4046, 5488, and 5497, post.

51. Sec. 15. Interest on public deposits. Act May 30, 1908. That all national banking associations designated as regular depositaries of public money shall pay upon all special and additional deposits made by the secretary of the treasury in such depositaries, and all such associations designated as temporary depositaries of public money shall pay upon all sums of public money deposited in such associations interest at such rate as the secretary of the treasury may prescribe, not less, however, than one per centum per annum upon the average monthly amount of such deposits: Provided, however, that nothing contained in this act shall be construed to change or modify the obligation of any association or any of its officers for the safe-keeping of public money: Provided further, that the rate of interest charged upon such deposits shall be equal and uniform throughout the United States.

Act May 30, 1908, sec. 15.

¹) Chapter 5 of this compilation.

52. Sec. 5154. Conversion of state banks into national banking associations. Any bank incorporated by special law, or any banking institution organized under a general law of any state, may become a national association under this title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any state bank which is a stockholder in any other bank, by authority of state laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this title. When the comptroller of the currency has given to such association a certificate, under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this title.

Act June 3, 1864, c. 106, sec. 44; 13 Stat. L., 112.

53. Sec. 5155. State banks having branches. It shall be lawful for any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

Act Mar. 3, 1865, c. 78, sec. 7; 13 Stat. L., 484.

54. Sec. 5156. Reservation of rights of associations organized under act of 1863. Nothing in this title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this title, notwithstanding all the steps prescribed by this title for the organization of associations were not pursued, if such associations were duly organized under that act.

Act June 3, 1864, c. 106, sec. 62; 13 Stat. L., 118.

Chapter III. Obtainining and issuing circulating notes.

55. Sec. 5157. What associations are governed by chapters two, three, and four. The provisions of chapters two, three, and four¹⁾ of this title, which are expressed without restrictive words, as applying to "national banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of congress.

56. Sec. 5158. Registered bonds intended by the term "United States Bonds." The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

Act June 3, 1864, c. 106, sec. 4; 13 Stat. L., 100.

57. Sec. 5159. Deposit of bonds required before issue of circulating notes. Every association, after having complied with the provisions of this title, preliminary to

¹⁾ Chapters three, four, and five of this compilation.

the commencement of the banking business, and before it shall be authorized to commence banking business under this title, shall transfer and deliver to the treasurer of the United States any United States registered bonds, bearing interest, [*to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in.*] Such bonds shall be received by the treasurer upon deposit and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this title.

Act June 3, 1864, c. 106, sec. 16; 13 Stat. L., 104. The italicized words are held to be modified by the Acts of June 20, 1874, and July 12, 1882. Section 4, Act of June 20, 1874, which follows section 5167, provides in part that the amount of bonds on deposit for circulation shall not be reduced below \$50,000. This determines the amount of bonds required to be deposited by banks organizing with capital stock over \$150,000. Banks having a capital of \$150,000, or less, are not required to keep on deposit bonds in excess of one-fourth of the capital stock as security for their circulating notes, by act July 12, 1882, chapter 290, section 8. This Act follows section 5167, Revised Statutes, *infra*.

58. Panama canal bonds have all rights and privileges accorded to other two per cent bonds of the united states. Act December 21, 1905. That the two per cent. bonds of the United States authorized by section eight of the act entitled "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June twenty-eight, nineteen hundred and two, shall have all the rights and privileges accorded by law to other two per cent. bonds of the United States, and every national banking association having on deposit, as provided by law, such bonds issued under the provisions of said section eight of said act approved June twenty-eight, nineteen hundred and two, to secure its circulating notes, shall pay to the treasurer of the United States, in the months of January and July, a tax of one-fourth of one per cent each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per cent. bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the revised statutes.

Act Dec. 21, 1905; 34 Stat. L., 5.

59. Sec. 5160. Increase or reduction of deposit to correspond with capital. The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the treasurer registered United States bonds to the amount [*of at least one-third of its capital stock actually paid in.*] And any association that may desire to reduce its capital, or close up its business and dissolve its organisation, may take up its bonds upon returning to the comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond [*one-third of its capital stock*], and upon which no circulating notes have been delivered.

Act June 3, 1864, c. 106, sec. 16; 13 Stat. L., 104. In reference to italicized words see notes under section 5159, and Acts of June 20, 1874, and July 12, 1882, set forth in full following Revised Statutes, section 5167. These Acts fix the minimum of bonds as \$50,000 for all banks over \$150,000 capital and as one-fourth of the capital stock for all banks having a capital of \$150,000 or less.

60. Sec. 5161. Exchange of coupon for registered bonds. To facilitate a compliance with the two preceding sections, the secretary of the treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

Act June 3, 1864, c. 106, sec. 16; 13 Stat. L., 104.

61. Sec. 5162. Manner of making transfers of bonds. All transfers of United States bonds made by any association under the provisions of this title, shall be made to the treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the comptroller of the currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the treasurer shall be deemed valid unless countersigned by the comptroller of the currency.

Act June 3, 1864, c. 106, sec. 19; 13 Stat. L., 105.

62. Sec. 5163. Registry of transfers. The comptroller of the currency shall keep in his office a book in which he shall cause to be entered, immediately upon counter-

signing it, every transfer or assignment by the treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

Act June 3, 1864, c. 106, secs. 19—20; 13 Stat. L., 105.

63. Sec. 5164. Notice of transfer to be given to association interested. The comptroller of the currency shall, immediately upon countersigning and entering any transfer or assignment by the treasurer, of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made, of the kind and numerical designation of the bonds, and the amount thereof so transferred.

Act June 3, 1864, c. 106, sec. 19; 13 Stat. L., 105.

64. Sec. 5165. Examination of registry and bonds. The comptroller of the currency shall have at all times, during office hours, access to the books of the treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the comptroller to countersign; and the treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the comptroller shall also at all times have access to the bonds on deposit with the treasurer to ascertain their amount and condition.

Act June 3, 1864, c. 106, sec. 20; 13 Stat. L., 105.

65. Sec. 5166. Annual examination of bonds by association. Every association having bonds deposited in the office of the treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the comptroller of the currency and with the accounts of the association, and, if they are found correct, to execute to the treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the treasurer and the comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the treasurer, shall be retained by the association.

Act June 3, 1864, c. 106, sec. 25; 13 Stat. L., 106.

66. Sec. 5167. General provisions respecting bonds. The bonds transferred to and deposited with the treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, except as provided in this title. The comptroller of the currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the treasurer is reduced below the amount of the circulation issued for the same, the comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value or in money, from the association, to be deposited with the treasurer as long as such depreciation continues. And the comptroller, upon the terms prescribed by the secretary of the treasury, may permit an exchange to be made of any of the bonds deposited with the treasurer by any association for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: Provided, that the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this

title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

Act June 3, 1864, c. 106, sec. 26; 13 Stat. L., 107.

67. Sec. 4. Withdrawal of circulating notes on deposit of lawful money and withdrawal of bonds. Act June 20, 1874. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the nationalbank act; and the outstanding notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the treasury of the United States, and destroyed as now provided by law: Provided, that the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

Act June 20, 1874, c. 343, sec. 4; 18 Stat. L., 124. Other sections of this act referred to under Revised Statutes, section 5192. Section 19 of the National Bank Act is incorporated in Revised Statutes, sections 5162—5164.

68. Sec. 8. Amount of bonds required to be on deposit; reduction of amount or retirement in full of circulating notes. Act July 12, 1882. That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the treasurer of the United States United States bonds in excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law; [*provided, that the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided:*] Provided further, that the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June 20, 1874, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June 30, 1881.

Act July 12, 1882, c. 290, sec. 8; 22 Stat. L., 164. The limitation of the circulation not to exceed ninety per cent. of the bonds deposited is superseded by Act March 14, 1900, which follows Revised Statutes 5171. Act June 20, 1874, section 3, mentioned in this section, follows Revised Statutes, section 5192.

69. Sec. 10. Withdrawal of circulating notes on deposit of lawful money, and withdrawal of bonds. Not more than nine millions to be deposited during any calendar month. **Withdrawal of additional circulation on deposit of lawful money or national bank notes.** Act May 30, 1908. That section nine of the act approved July twelfth, eighteen hundred and eighty-two, as amended by the act approved March fourth, nineteen hundred and seven, be further amended to read as follows:

"Sec. 9. That any national banking association desiring to withdraw its circulating notes, secured by deposit of United States bonds in the manner provided in section four of the act approved June twentieth, eighteen hundred and seventy-four, is hereby authorized for that purpose to deposit lawful money with the treasurer of the United States and, with the consent of the comptroller of the currency and the approval of the secretary of the treasury, to withdraw a proportionate amount of bonds held as security for its circulating notes in the order of such deposits: Provided, that not more than nine millions of dollars of lawful money shall be so deposited during any calendar month for this purpose.

"Any national banking association desiring to withdraw any of its circulating notes, secured by the deposit of securities other than bonds of the United States, may make such withdrawal at any time in like manner and effect by the deposit of lawful money or national bank notes with the treasurer of the United States, and upon such deposit a proportionate share of the securities so deposited may be

withdrawn: Provided, that the deposits under this section to retire notes secured by the deposit of securities other than bonds of the United States shall not be covered into the treasury, as required by section six of an act entitled 'An act directing the purchase of silver bullion and the issue of treasury notes thereon, and for other purposes,' approved July fourteenth, eighteen hundred and ninety, but shall be retained in the treasury for the purpose of redeeming the notes of the bank making such deposit."

Act May 30, 1908, sec. 10.

70. Sec. 5168. Comptroller to determine if association can commence business. Whenever a certificate is transmitted to the comptroller of the currency, as provided in this title and the association transmitting the same notifies the comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this title required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

Act June 3, 1864, c. 106, sec. 17; 13 Stat. L., 104.

71. Sec. 5169. Certificate of authority to commence banking to be issued. If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this title.

Act June 3, 1864, c. 106, secs. 12, 18; 13 Stat. L., 102, 104.

72. Sec. 5170. Publication of certificate. The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

Act June 3, 1864, c. 106, sec. 18; 13 Stat. L., 104.

73. Sec. 5171.

[This section was repealed by Act of July 12, 1882, and the repealing section was superseded by Act of March 14, 1900, section 12, which follows.]

74. Sec. 12. Delivery of circulating notes. Act of March 14, 1900. That upon the deposit with the treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the comptroller of the currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking associations now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the comptroller of the currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: Provided, that nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-

seven of the revised statutes of the United States, authorizing the comptroller of the currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: And provided further, that the circulating notes furnished to national banking associations under the provisions of this act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this act, be entitled to receive from the comptroller of the currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: And provided further, that the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in: And provided further, that under regulations to be prescribed by the secretary of the treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the treasurer to secure circulation or to secure deposits of public money; and so much of an act entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other acts or parts of acts inconsistent with the provisions of this section are hereby repealed.

Act Mar. 14, 1900, c. 41, sec. 12; 31 Stat. L., 49.

75. Sec. 5172 [as amended May 30, 1908]. Printing denominations and form of the circulating notes. In order to furnish suitable notes for circulation, the comptroller of the currency shall, under the direction of the secretary of the treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, one thousand dollars, and ten thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall state upon their face that they are secured by United States bonds or other securities, certified by the written or engraved signatures of the treasurer and register and by the imprint of the seal of the treasury. They shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signature of the president or vice-president and cashier. The comptroller of the currency, acting under the direction of the secretary of the treasury, shall as soon as practicable cause to be prepared circulating notes in blank, registered and countersigned, as provided by law, to an amount equal to fifty per centum of the capital stock of each national banking association; such notes to be deposited in the treasury or in the subtreasury of the United States nearest the place of business of each association, and to be held for such association, subject to the order of the comptroller of the currency, for their delivery as provided by law: Provided, that the comptroller of the currency may issue national bank notes of the present form until plates can be prepared and circulating notes issued as above provided: Provided, however, that in no event shall bank notes of the present form be issued to any bank as additional circulation provided for by this act.

Act June 3, 1864, c. 104, sec. 22; 13 Stat. L., 105. Act May 30, 1908, sec. 11.

76. Sec. 5. Charter number to be printed on notes. Act June 20, 1874. That the comptroller of the currency shall, under such rules and regulations as the secretary of the treasury may prescribe, cause the charter numbers of the association to be printed upon all national bank notes which may be hereafter issued by him.

Act June 20, 1874, c. 343, sec. 5; 18 Stat. L., 124. Other sections of this act will be found under Revised Statutes, section 5192.

77. Sec. 1. Distinctive paper for printing notes. Act March 3, 1875. **** That the national-bank notes shall be printed under the direction of the secretary of the treasury, and upon the distinctive or special paper which has been, or may hereafter be, adopted by him for printing United States notes.

Act Mar. 3, 1875, c. 130, sec. 1; 18 Stat. L., 372; sundry civil bill.

78. Sec. 5173. Plates and dies to be under the control of the comptroller. The plates and special dies to be procured by the comptroller of the currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the bureau of the currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this title.

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111. See Act June 20, 1874, following Revised Statutes, 5192, and Act July 12, 1882, following Revised Statutes, 5136, requiring banks to pay cost of their plates.

79. Sec. 5174 [as amended 1877]. Examination of plates and dies. The comptroller of the currency shall cause to be examined, each year, the plates, dies, bed pieces, and other material from which the national bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed, under such regulations as shall be prescribed by the comptroller of the currency and approved by the secretary of the treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by congress for the special examination of national banks and bank-note plates.

Act Mar. 3, 1873, c. 269, sec. 4; 17 Stat. L., 603. Act Feb. 27, 1877, c. 69; 19 Stat. L., 252.

80. Sec. 5175. Limit to issue of notes under five dollars. Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

Act June 3, 1864, c. 106, sec. 22; 13 Stat. L., 105. Specie payments were resumed Jan. 1, 1879. (See act of March 14, 1900, section 12, following Revised Statutes, 5171, limiting the issue of five-dollar notes.)

81. Sec. 5176.

[Repealed by Act July 12, 1882, which in turn was superseded by act March 14, 1900. (See section 5171.)]

82. Sec. 5177.

[Repealed by Act January 14, 1875.]

83. Sec. 3. Aggregate amount of circulating notes not limited. Act January 14, 1875. That section 5177 of the revised statutes of the United States, limiting the aggregate amount of circulating notes of national banking associations, be and is hereby repealed; and each existing banking association may increase its circulating notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national bank currency among the several states and territories are hereby repealed.

Act Jan. 14, 1875, sec. 3, 18 Stat. L., 296.

84. Sec. 5178.

[Superseded by Act January 14, 1875.]

85. Sec. 5179.

[Superseded by Act January 14, 1875.]

86. Sec. 5180.

[Repealed by Act of January 14, 1875.]

87. Sec. 5181.

[Superseded by Act January 14, 1875.]

88. Sec. 5182. For what demands national-bank notes may be received. After any association receiving circulating notes under this title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

Act June 3, 1864, c. 106, sec. 23; 13 Stat. L., 106.

89. Sec. 5183 [as amended 1875]. **Issue of post notes, etc., prohibited.** No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this title.

Act June 3, 1864, c. 106, sec. 23; 13 Stat. L., 106. Act Feb. 18, 1875, c. 80; 18 Stat. L., 320.

90. Sec. 5184. Destroying and replacing worn-out and mutilated notes. It shall be the duty of the comptroller of the currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, [*shall be burned to ashes*] in presence of four persons, one to be appointed by the secretary of the treasury, one by the comptroller of the currency, one by the treasurer of the United States, and one by the association, under such regulations as the secretary of the treasury may prescribe. A certificate of [*such burning*], signed by the parties so appointed, shall be made in the books of the comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled.

Act June 3, 1864, c. 106, sec. 24; 13 Stat. L., 106. Act June 23, 1874, provides for maceration in place of burning.

91. Maceration of national bank notes. Act June 23, 1874. **** For the maceration of national bank notes * * * *; and that all such issues hereafter destroyed may be destroyed by maceration instead of burning to ashes, as now provided by law; and that so much of sections twenty-four and forty-three of the national currency act as requires national bank notes to be burned to ashes is hereby repealed; that the pulp from such macerated issue shall be disposed of only under the direction of the secretary of the treasury.

Provision in sundry civil appropriation Act, June 23, 1874; 18 Stat. L., 206.

92. Sec. 5185 [as amended 1875]. **Organization of associations to issue gold notes.** Associations may be organized in the manner prescribed by this title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the comptroller of the currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable.

Act July 12, 1870, c. 282, sec. 3; 16 Stat. L., 252. Act Jan. 19, 1875, c. 19; 18 Stat. L., 302.

93. Sec. 5186. Reserve requirements for gold banks. Every association organized under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this title: Provided, that, in applying the same to associations organized for issuing gold notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such association shall not be within the limitation of circulation mentioned in this title.

Act July 12, 1870, c. 282, secs. 3—5; 16 Stat. L., 252, 253.

94. Conversion of national gold banks into currency banks. Act February 14, 1830. That any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the revised statutes of the United States, for the conversion of banks incorporated under the laws of any state, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: Provided, that all

certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

Act Feb. 14, 1880, c. 25; 21 Stat. L., 66.

95. Sec. 5187. Penalty for issuing circulating notes to unauthorized associations.

No officer acting under the provisions of this title shall countersign or deliver to any association or to any other company or person, any circulating notes contemplated by this title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

Act June 3, 1864, c. 106, sec. 27; 13 Stat. L., 107.

96. Sec. 5188. Penalty for imitating bank circulation. Use of same for advertising purposes. It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, handbill, or advertisement, in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under this title, or any act of congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice, or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one-half to the use of the informer.

Act Feb. 5, 1867, c. 26, sec. 2; 14 Stat. L., 383.

97. Sec. 5189. Penalty for mutilating circulation. Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

Act June 3, 1864, c. 106, sec. 58; 13 Stat. L., 117.

98. Formation of national currency associations — what banks eligible — manner of forming — association to be body corporate and exercise powers as such — but one association in any city — members of association to be taken as nearly as convenient from state, part of state, or contiguous parts of one or more states — officers, how selected — powers of officers and executive committee — by - laws to be approved by the secretary of the treasury. Act May 30, 1908, authorizing national currency associations, the issue of additional national-bank circulation, and creating a national monetary commission. That national banking associations, each having an unimpaired capital and a surplus of not less than twenty per centum, not less than ten in number, having an aggregate capital and surplus of at least five millions of dollars, may form voluntary associations to be designated as national currency associations. The banks uniting to form such association shall, by their presidents or vice-presidents, acting under authority from the board of directors, make and file with the secretary of the treasury a certificate setting forth the names of the banks composing the association, the principal place of business of the association, and the name of the association, which name shall be subject to the approval of the secretary of the treasury. Upon the filing of such certificate the associated banks therein named shall become a body corporate, and by the name so designated and approved may sue and be sued and exercise the powers of a body corporate for the purposes hereinafter mentioned: Provided, that not more than one such national currency association shall be formed in any city: Provided further, that the several members of such national currency association shall be taken, as nearly as conveniently may be, from a territory composed of a state or part of a state, or contiguous parts of one or more states: And provided further, that any national bank in such city or territory, having the qualifications herein prescribed for membership in such national currency association, shall, upon its application to and upon the approval of the secretary of the treasury, be admitted to membership in a national currency association for that city or territory, and upon such admission shall be deemed and held a part of the body corporate, and as such entitled to all the rights and privileges and subject to all the liabilities of an original member: And provided further, that each national currency association shall be composed exclusively of banks not members.

of any other national currency association. The dissolution, voluntary or otherwise, of any bank in such association shall not affect the corporate existence of the association unless there shall then remain less than the minimum number of ten banks: Provided, however, that the reduction of the number of said banks below the minimum of ten shall not affect the existence of the corporation with respect to the assertion of all rights in favor of or against such association. The affairs of the association shall be managed by a board consisting of one representative from each bank. By-laws for the government of the association shall be made by the board, subject to the approval of the secretary of the treasury: A president, vice-president, secretary, treasurer, and an executive committee of not less than five members, shall be elected by the board. The powers of such board, except in the election of officers and making of by-laws, may be exercised through its executive committee.

Act May 30, 1908, sec. 1.

99. Conditions under which banks belonging to national currency associations may take out additional circulation — amount limited to seventy-five per cent. of the cash value of the securities and commercial paper deposited — issue of additional circulation on deposit of state, city, town, county, or municipal bonds authorized to extent of ninety per cent. of their market value — the banks and assets of all banks members of said association jointly and severally liable to the United States for the redemption of such additional circulation — lien of United States under section 5230, revised statutes, extended to cover assets of all banks belonging to the association — requirement of additional securities — when association may sell securities deposited with it. The national currency association herein provided for shall have and exercise any and all powers necessary to carry out the purposes of this section, namely, to render available, under the direction and control of the secretary of the treasury, as a basis for additional circulation any securities, including commercial paper, held by a national banking association. For the purpose of obtaining such additional circulation, any bank belonging to any national currency association, having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of its capital stock, and which has its capital unimpaired and a surplus of not less than twenty per centum, may deposit with and transfer to the association, in trust for the United States, for the purpose hereinafter provided, such of the securities above mentioned as may be satisfactory to the board of the association. The officers of the association may thereupon, in behalf of such bank make application to the comptroller of the currency for an issue of additional circulating notes to an amount not exceeding seventy-five per centum of the cash value of the securities or commercial paper so deposited. The comptroller of the currency shall immediately transmit such application to the secretary of the treasury with such recommendation as he thinks proper, and if, in the judgment of the secretary of the treasury, business conditions in the locality demand additional circulation, and if he be satisfied with the character and value of the securities proposed and that a lien in favor of the United States on the securities so deposited and on the assets of the banks composing the association will be amply sufficient for the protection of the United States, he may direct an issue of additional circulating notes to the association, on behalf of such bank, to an amount in his discretion, not, however, exceeding seventy-five per centum of the cash value of the securities so deposited: Provided, that upon the deposit of any of the state, city, town, county, or other municipal bonds, of a character described in section three of this act, circulating notes may be issued to the extent of not exceeding ninety per centum of the market value of such bonds so deposited: And provided further, that no national banking association shall be authorized in any event to issue circulating notes based on commercial paper in excess of thirty per centum of its unimpaired capital and surplus. The term "commercial paper" shall be held to include only notes representing actual commercial transactions, which when accepted by the association shall bear the names of at least two reponsible parties and have not exceeding four months to run. The banks and the assets of all banks belonging to the association shall be jointly and severally liable to the United States for the redemption of such additional circulation; and to secure such liability the lien created by section fifty-two hundred and thirty of the revised statutes shall extend to and cover the assets of all banks belonging to the association, and to the securities deposited by the banks with the association pursuant to the provisions of this act; but as between the several banks composing such association each

bank shall be liable only in the proportion that its capital and surplus bears to the aggregate capital and surplus of all such banks. The association may, at any time, require of its constituent banks a deposit of additional securities or commercial paper, or an exchange of the securities already on deposit, to secure such additional circulation, and in case of the failure of such bank to make such deposit or exchange the association may, after ten days' notice to the bank sell the securities and paper already in its hands at public sale, and deposit the proceeds with the treasurer of the United States as a fund for the redemption of such additional circulation. If such fund be insufficient for that purpose the association may recover from the bank the amount of the deficiency by suit in the circuit court of the United States, and shall have the benefit of the lien hereinbefore provided for in favor of the United States upon the assets of such bank. The association or the secretary of the treasury may permit or require the withdrawal of any such securities or commercial paper and the substitution of other securities or commercial paper of equal value therefor.

Act May 30, 1908, sec. 1.

100. Sec. 2. Redemption fund below requirement. Duty of treasurer of United States. That whenever any bank belonging to a national currency association shall fail to preserve or make good its redemption fund in the treasury of the United States, required by section three of the act of June twentieth, eighteen hundred and seventy-four, chapter three hundred and forty-three, and the provisions of this act, the treasurer of the United States shall notify such national currency association to make good such redemption fund, and upon the failure of such national currency association to make good such fund, the treasurer of the United States may, in his discretion, apply so much of the redemption fund belonging to the other banks composing such national currency association as may be necessary for that purpose; and such national currency association may, after five days' notice to such bank, proceed to sell at public sale the securities deposited by such bank with the association pursuant to the provisions of section one of this act, and deposit the proceeds with the treasurer of the United States as a fund for the redemption of the additional circulation taken out by such bank under this act.

Act May 30, 1908, sec. 2.

101. Sec. 3. What national banks may apply for authority to issue additional circulation on bonds other than United States bonds. What bonds will be accepted for such additional circulation. That any national banking association which has circulating notes outstanding, secured by the deposit of United States bonds to an amount of not less than forty per centum of its capital stock, and which has a surplus of not less than twenty per centum, may make application to the comptroller of the currency for authority to issue additional circulating notes to be secured by the deposit of bonds other than bonds of the United States. The comptroller of the currency shall transmit immediately the application, with his recommendation, to the secretary of the treasury, who shall, if in his judgment business conditions in the locality demand additional circulation, approve the same, and shall determine the time of issue and fix the amount, within the limitations herein imposed, of the additional circulating notes to be issued. Whenever after receiving notice of such approval any such association shall deposit with the treasurer or any assistant treasurer of the United States such of the bonds described in this section as shall be approved in character and amount by the treasurer of the United States and the secretary of the treasury, it shall be entitled to receive, upon the order of the comptroller of the currency, circulating notes in blank, registered and countersigned as provided by law, not exceeding in amount ninety per centum of the market, value, but not in excess of the par value of any bonds so deposited, such market value to be ascertained and determined under the direction of the secretary of the treasury.

The treasurer of the United States, with the approval of the secretary of the treasury, shall accept as security for the additional circulating notes provided for in this section, bonds or other interest-bearing obligations of any state of the United States, or any legally authorized bonds issued by any city, town, county, or other legally constituted municipality or district in the United States which has been in existence for a period of ten years, and which for a period of ten years previous to such deposit has not defaulted in the payment of any part of either principal or interest of any funded debt authorized to be contracted by it, and whose net funded indebtedness does not exceed ten per centum of the valuation of its taxable prop-

erty, to be ascertained by the last preceding valuation of property for the assessment of taxes. The treasurer of the United States, with the approval of the secretary of the treasury, shall accept, for the purposes of this section, securities herein enumerated in such proportions as he may from time to time determine, and he may with such approval at any time require the deposit of additional securities, or require any association to change the character of the securities already on deposit.

Act May 30, 1908, sec. 3.

102. Sec. 4. Legal title of bonds deposited to secure additional circulation. Assignment of bonds by treasurer to be countersigned by the comptroller of the currency. That the legal title of all bonds, whether coupon or registered, deposited to secure circulating notes issued in accordance with the terms of section three of this act shall be transferred to the treasurer of the United States in trust for the association depositing them, under regulations to be prescribed by the secretary of the treasury. A receipt shall be given to the association by the treasurer or any assistant treasurer of the United States, stating that such bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the treasurer shall be deemed valid unless countersigned by the comptroller of the currency. The provisions of sections fifty-one hundred and sixty-three, fifty-one hundred and sixty-four, fifty-one hundred and sixty-five, fifty-one hundred and sixty-six, and fifty-one hundred and sixty-seven and sections fifty-two hundred and twenty-four to fifty-two hundred and thirty-four, inclusive, of the revised statutes respecting United States bonds deposited to secure circulating notes shall, except as herein modified, be applicable to all bonds deposited under the terms of section three of this act.

Act May 30, 1908, sec. 4.

103. Sec. 5. Additional circulation, how treated. Limit to amount of circulation issued to each bank. Limit to total amount outstanding under this act. That the additional circulating notes issued under this act shall be used, held, and treated in the same way as circulating notes of national banking associations heretofore issued and secured by a deposit of United States bonds, and shall be subject to all the provisions of law affecting such notes except as herein expressly modified: Provided, that the total amount of circulating notes outstanding of any national banking association, including notes secured by United States bonds as now provided by law, and notes secured otherwise than by deposit of such bonds, shall not at any time exceed the amount of its unimpaired capital and surplus: And provided further, that there shall not be outstanding at any time circulating notes issued under the provisions of this act to an amount of more than five hundred millions of dollars.

Act May 30, 1908, sec. 5.

104. Sec. 6. Amount of redemption fund. That whenever and so long as any national banking association has outstanding any of the additional circulating notes authorized to be issued by the provisions of this act it shall keep on deposit in the treasury of the United States, in addition to the redemption fund required by section three of the act of June twentieth, eighteen hundred and seventy-four, an additional sum equal to five per centum of such additional circulation at any time outstanding, such additional five per centum to be treated, held, and used in all respects in the same manner as the original redemption fund provided for by said section three of the act of June twentieth, eighteen hundred and seventy-four.

Act May 30, 1908, sec. 6.

105. Sec. 7. Equitable distribution of notes. In order that the distribution of notes to be issued under the provisions of this act shall be made as equitable as practicable between the various sections of the country, the secretary of the treasury shall not approve applications from associations in any state in excess of the amount to which such state would be entitled of the additional notes herein authorized on the basis of the proportion which the unimpaired capital and surplus of the national banking associations in such state bears to the total amount of unimpaired capital and surplus of the national banking associations of the United States: Provided, however, that in case the applications from associations in any state shall not be equal to the amount which the associations of such state would be entitled to under this method of distribution, the secretary of the treasury may, in his discretion, to meet an

emergency, assign the amount not thus applied for to any applying association or associations in states in the same section of the country.

Act May 30, 1908, sec. 7.

106. Sec. 8. Secretary of the treasury to furnish information as to the value and character of securities. That it shall be the duty of the secretary of the treasury to obtain information with reference to the value and character of the securities authorized to be accepted under the provisions of this act, and he shall from time to time furnish information to national banking associations as to such securities as would be acceptable under the provisions of this act.

Act May 30, 1908, sec. 8.

107. Sec. 9.

[Amends section 5214, Revised Statutes.]

108. Sec. 10.

[Amends section 9 of act approved July 12, 1882, as amended by act approved March 4, 1907, inserted after section 5167, ante.]

109. Sec. 11.

[Amends section 5172, Revised Statutes.]

110. Sec. 12. Circulating notes to be redeemed in lawful money of the United States. That circulating notes of national banking associations, when presented to the treasury for redemption, as provided in section three of the act approved June twentieth, eighteen hundred and seventy-four, shall be redeemed in lawful money of the United States.

Act May 30, 1908, sec. 12.

111. Sec. 13. All acts of the comptroller of the currency and treasurer of the United States under this act to be approved by the secretary of the treasury. That all acts and orders of the comptroller of the currency and the treasurer of the United States authorized by this act shall have the approval of the secretary of the treasury who shall have power, also, to make any such rules and regulations and exercise such control over the organization and management of national currency associations as may be necessary to carry out the purposes of this act.

Act May 30, 1908, sec. 13.

112. Sec. 14.

[Is amendatory of section 5191, Revised Statutes, and is inserted, post.]

113. Sec. 15.

[Relates to deposits of public money and interest thereon and is inserted after section 5153, Revised Statutes.]

114. Sec. 16. Expenses of act. That a sum sufficient to carry out the purposes of the preceding sections of this act is hereby appropriated out of any money in the treasury not otherwise appropriated.

Act May 30, 1908, sec. 16.

115. Sec. 17. Appointment of monetary commission. That a commission is hereby created, to be called the "National Monetary Commission," to be composed of nine members of the Senate, to be appointed by the presiding officer thereof, and nine members of the house of representatives, to be appointed by the speaker thereof; and any vacancy on the commission shall be filled in the same manner as the original appointment.

Act May 30, 1908, sec. 17.

116. Sec. 18. Powers of commission. Commission to report to congress. That it shall be the duty of this commission to inquire into and report to congress at the earliest date practicable, what changes are necessary or desirable in the monetary system of the United States or in the laws relating to banking and currency, and for this purpose they are authorized to sit during the sessions or recess of congress, at such times and places as they may deem desirable, to send for persons and papers, to administer oaths, to summons and compel the attendance of witnesses, and to employ a disbursing officer and such secretaries, experts, stenographers, messengers, and other assistants as shall be necessary to carry out the purposes for which said commission was created. The commission shall have the power, through subcommittee or otherwise, to examine witnesses and to make such investigations and examinations, in this or other countries, of the subjects committed to their charge as they shall deem necessary.

Act May 30, 1908, sec. 18.

117. Sec. 19. Expenses of commission. That a sum sufficient to carry out the purposes of sections seventeen and eighteen of this act, and to pay the necessary ex-

penses of the commission and its members, is hereby appropriated, out of any money in the treasury not otherwise appropriated. Said appropriation shall be immediately available and shall be paid out on the audit and order of the chairman or acting chairman of said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of such commission.

Act May 30, 1908, sec. 19.

118. Sec. 20. When act expires by limitation. That this act shall expire by limitation on the thirtieth day of June, nineteen hundred and fourteen.

Act May 30, 1908, sec. 20.

Chapter IV. Regulation of the banking business.

119. Sec. 5190. Place of business. The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.

Act June 3, 1864, c. 106, sec. 8; 13 Stat. L., 101. See act May 1, 1886, following Revised Statutes, 5136, in reference to change in place of business.

120. Sec. 5191. Reserve cities and reserve requirements. Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburg, St. Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of [*its notes in circulation and*] its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount [*of its notes in circulation and*] of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its [*circulation and*] deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its [*circulation and*] deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting on purchasing bills of exchange payable at sight, nor make any dividends of its profits until the required proportion, between the aggregate amount of its [*outstanding notes of circulation and*] deposits and its lawful money of the United States, has been restored. And the comptroller of the currency may notify any association, whose lawful reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the comptroller may, with the concurrence of the secretary of the treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, sec. 31; 13 Stat. L., 108. Act Mar. 1, 1872, c. 22; 17 Stat. L., 32. This section is amended by the act of June 20, 1874, section 2, which provides that no reserve need be held against circulation. Said act follows section 5192. Act of March 3, 1903, amending act of March 3, 1887, providing for additional reserve cities, follows section 5192. Provisions relating to redemption of circulating notes, acts June 20, 1874, March 3, 1875, and July 14, 1890, follow Revised Statutes, 5192. Provisions relating to redemption of old notes of banks extending their corporate existence, act July 12, 1882, follows Revised Statutes, 5136. Leavenworth, Kansas, was included as a reserve city in the original act, but was struck out March 1, 1872. Words "lawful money" construed by Attorney-General as including all that is legal tender. 17 Op. Atty. Gen'l. 123.

121. Sec. 5192. What may be counted as reserve. Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the comptroller of the currency, organized under the act of June three, eighteen hundred and sixty-four, or under this title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburg, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

Act June 3, 1864, c. 106, sec. 31; 13 Stat. L., 108. Act Mar. 1, 1872, c. 22; 17 Stat. L., 32. Leavenworth, Kansas, was included as a reserve city in the original act, but was struck out

March 1, 1872. Charleston and Richmond not being included in the list of reserve cities enumerated in section 5191, the banks of which are required to hold a reserve of twenty-five per centum of their net deposits, the comptroller of the currency has never approved any banks in said cities as reserve agents.

122. Sec. 2. Lawful money reserve to be determined by deposits. Act June 20, 1874. That section thirty-one of "the national-bank act" be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section.

Act June 20, 1874, c. 343, sec. 2; 18 Stat. L., 123. Section 31 of "the National Bank Act" is incorporated in sections 5191, 5192, Revised Statutes. Section 1 of act June 20, 1874, precedes section 5133, Revised Statutes.

123. Sec. 14. No reserve need be held against deposits of public money. Act May 30, 1908. That the provisions of section fifty-one hundred and ninety-one of the revised statutes, with reference to the reserves of national banking associations, shall not apply to deposits of public moneys by the United States in designated depositories.

Act May 30, 1908, sec. 14.

124. Sec. 3. Provisions for redeeming circulation. Five per cent redemption fund. Act June 20, 1874. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars, or any multiple thereof, to the treasurer of the United States, the same shall be redeemed in [*United States notes*]. All notes so redeemed shall be charged by the treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any assistant treasurer, or at any designated depository of the United States, be forwarded to the treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the comptroller of the currency and destroyed and replaced as now provided by law: Provided, that each of said associations shall reimburse to the treasury the charges for transportation and the costs for assorting such notes; and the associations hereafter organized shall also severally reimburse to the treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the treasurer. And provided further, that so much of section thirty-two of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

Act June 20, 1874, c. 343, sec. 3; 18 Stat. L., 123. Section 12 of act of May 30, 1908, provides that notes of national banking associations shall be redeemed in lawful money of the United States. Section 32 of National Bank Act is section 5195, Revised Statutes.

125. Clerical force for redemption of circulating notes. Act March 3, 1875. That to carry into effect the provisions of section three of the act entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes, approved June twentieth, eighteen hundred and seventy-four, the secretary of the treasury is authorized to appoint the following force, to be employed under his direction, namely: In the office of the treasurer: * * * In the office of the comptroller of the currency * * * And at the end of each month, the secretary of the treasury shall reimburse the treasury to the full

amount paid out under the provisions of this section by transfer of said amount from the deposit of the national banking association with the treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which have been incurred in carrying into effect the provisions of the said section of the above-named act.

Act Mar. 3, 1875, 18 Stat. L., 399; part of the sundry civil appropriation Act.

126. Sec. 1. Additional reserve cities. Act of March 3, 1903, Amending act of March 3, 1887. That whenever three-fourths in number of the national banks located in any city of the United States having a population of twenty-five thousand people shall make application to the comptroller of the currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the revised statutes, the comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the revised statutes.

Act Mar. 3, 1887, sec. 1; 24 Stat. L., 559. Act Mar. 3, 1903, sec. 1; 32 Stat. L., 1223.

127. Sec. 6. Disposition of redemption account. Act July 14, 1890. That upon the passage of this act the balances standing with the treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the treasury as a miscellaneous receipt, and the treasurer of the United States shall redeem from the general cash in the treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate of the comptroller of the currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the treasurer, under such regulations as the secretary of the treasury may prescribe, from an appropriation hereby created, to be known as "national-bank notes, redemption account;" but the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every national bank to keep in lawful money with the treasurer of the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest.

Act July 14, 1890, c. 708, sec. 6; 26 Stat. L., 289. The other sections of this Act relate to the purchase of silver bullion and issue of treasury notes.

128. Redemption of lost or stolen notes, and of notes not properly signed. Act July 23, 1892. That the provisions of the revised statutes of the United States, providing for the redemption of national-bank notes, shall apply to all national-bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier.

Act July 23, 1892, c. 217; 27 Stat. L., 322.

129. Sec. 5193.

[Repealed, March 14, 1900.] This section as enacted June 8, 1872 (17 Stat. L., 337), authorized the secretary of the treasury to receive on deposit from national banking associations United States notes in sums of not less than ten thousand dollars and to issue certificates therefor payable on demand in denominations of not less than five thousand dollars. This was repealed by Act March 14, 1900, section 6, which provides for issue of gold certificates payable to order in denominations of ten thousand dollars.

130. Sec. 5194.

[Dependent on 5193 and superseded by its repeal.]

131. Sec. 5195. Place for redemption of circulating notes to be designated. Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the comptroller of the currency, an association in the city of New York, [at which it will redeem its circulating notes at par;] and may keep one-half of its lawful money reserve in cash deposits in the

city of New York. [*But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named shall select, subject to the approval of the comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par*]. The comptroller shall give public notice of the names of the associations selected [*at which redemptions are to be made by the respective associations*], and of any change that may be made of the association [*at which to notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the comptroller of the currency may upon receiving satisfactory evidence thereof appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs.*] But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

Act June 3, 1864, c. 106, sec. 32; 13 Stat. L., 109. *Italicized words repealed by Act June 20, 1874.*

132. Sec. 3. National banks not required or permitted to redeem their circulating notes elsewhere than at their own counters. Act June 20, 1874. * * * And provided further, that so much of section thirty-two (section 5195, revised statutes) of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

Act June 20, 1874, c. 343, sec. 3; 18 Stat. L., 123. Section 3, of Act June 20, 1874, is set forth in full after Revised Statutes, 5192.

133. Sec. 2. Additional central reserve cities. Act March 3, 1887. That whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the comptroller of the currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the revised statutes, the comptroller shall have authority, with the approval of the secretary of the treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the revised statutes.

Act Mar. 3, 1887, c. 378, sec. 2; 24 Stat. L., 560. Other sections of Act March 3, 1887: Section 1, relating to additional reserve cities as amended by Act of March 3, 1903, follows Revised Statutes, section 5192. Section 3 of this Act relates to redemption of legal-tender notes.

134. Sec. 5196. National banks to take notes of other national banks at par. Every national banking association formed or existing under this title, shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

Act June 3, 1864, c. 106, sec. 32; 13 Stat. L., 109. Act July 12, 1870, c. 282, sec. 5; 16 Stat. L., 253.

135. Sec. 5197. Limitation upon rate of interest which may be taken. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any state under this title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Act June 3, 1864, c. 106, sec. 30; 13 Stat. L., 108.

136. Sec. 5198 [as amended 1875]. Penalty for taking unlawful interest. Jurisdiction of suits by or against national banks. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill,

or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Act June 3, 1864, c. 106, sec. 30; 13 Stat. L., 108. Act Feb. 18, 1875, c. 80; 18 Stat. L., 320. Additional provisions relating to jurisdiction of actions by and against national banks are contained in act July 12, 1882, which is inserted after Revised Statutes, section 5136. See sections 629 and 736, Revised Statutes of United States, as to jurisdiction of circuit courts to enjoin comptroller under section 5237, Revised Statutes.

137. Sec. 5199. Dividends. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Act June 3, 1864, c. 106, sec. 33; 13 Stat. L., 109.

138. Sec. 5200 [as amended 1906]. Limitation of liabilities which may be incurred by any one person, company, etc. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association, actually paid in and unimpaired, and one-tenth part of its unimpaired surplus fund: Provided, however, that the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed.

Act June 3, 1864, c. 106, sec. 29; 13 Stat. L., 108. Act June 22, 1906; 34 Stat. L., 451.

139. Sec. 5201. Associations must not loan on or purchase their own stock. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

Act June 3, 1864, c. 106, sec. 35; 13 Stat. L., 110.

140. Sec. 5202. Restriction on bank's indebtedness. No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following: First. Notes of circulation. Second. Moneys deposited with or collected by the association. Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto. Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Act June 3, 1864, c. 106, sec. 36; 13 Stat. L., 110.

141. Sec. 5203. Restriction upon use of circulating notes. No association shall, either directly or indirectly, pledge or hypothecate any of its notes of circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

Act June 3, 1864, c. 106, sec. 37; 13 Stat. L., 110.

142. Sec. 5204. Prohibition upon withdrawal of capital. Unearned dividends prohibited. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits

then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Act June 3, 1864, c. 106, sec. 38; 13 Stat. L., 110.

143. Sec. 5205 [as amended 1876]. Assessment for failure to pay up capital stock or for impairment of capital. Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the comptroller of the currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four: And provided, that if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

Act Mar. 3, 1873, c. 269, sec. 1; 17 Stat. L., 603. Act June 30, 1876, c. 156, sec. 4; 19 Stat. L., 64.

144. Sec. 5206. Prohibition against uncurrent notes. No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

Act June 3, 1864, c. 106, sec. 39; 13 Stat. L., 111.

145. Sec. 5207. United States noted to be held as collateral. No association shall hereafter offer or receive United States notes or national-bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

Act Feb. 19, 1869, c. 32; 15 Stat. L., 270.

146. Sec. 12. Issue of gold certificates. Act July 12, 1882. That the secretary of the treasury is authorized and directed to receive deposits of gold coin * * * and issue certificates therefor * * *. Said certificates * * * when held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing house in which such certificates shall not be receivable in the settlement of clearing-house balances: * * * And the provisions of section fifty-two hundred and seven of the revised

statutes shall be applicable to the certificates herein authorized and directed to be issued.

Act July 12, 1882, sec. 12; 22 Stat. L., 165. See also Currency Act of March 4, 1900, as amended March 4, 1907, relating to gold certificates, and making ten dollars lowest denomination. Other sections of this Act referred to, ante.

147. Sec. 5208. Penalty for falsely certifying checks. It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty-two hundred and thirty-four.

Act Mar. 3, 1869, c. 135; 15 Stat. L., 335.

148. Sec. 13. Punishment for falsely certifying checks. Act July 12, 1882. That any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the revised statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

Act July 12, 1882, c. 290, sec. 13; 22 Stat. L., 166.

149. Sec. 5209. Penalty for embezzlement, abstraction, willful misapplication, false entries, etc. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Act June 3, 1864, c. 106, sec. 55; 13 Stat. L., 116. Act Apr. 6, 1869, c. 11; 16 Stat. L., 7. Act July 8, 1870, c. 226; 16 Stat. L., 195.

150. National banks not permitted to make contributions in connection with election to political office. Act January 26, 1907. That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which presidential and vice-presidential electors or a representative in congress is to be voted for, or any election by any state legislature of a United States senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be subject to a fine not exceeding five thousand dollars, and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall upon conviction be punished by a fine of not exceeding one thousand and not less than two hundred and fifty dollars, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court.

Act Jan. 26, 1907; 34 Stat. L., 864.

151. Sec. 5210. List of shareholders. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number

of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency.

Act June 3, 1864, c. 106, sec. 40; 13 Stat. L., 111.

152. Sec. 5211 [as amended 1877]. Reports to comptroller of the currency. Every association shall make to the comptroller of the currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the comptroller. The comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

Act June 3, 1864, c. 106, sec. 34; 13 Stat. L., 109. Act Mar. 3, 1869, c. 130, sec. 1; 15 Stat. L., 326. Act Feb. 27, 1877, c. 69; 19 Stat. L., 252.

153. Verification of reports. Act February 26, 1881. That the oath or affirmation required by section fifty-two hundred and eleven of the revised statutes, verifying the returns made by national banks to the comptroller of the currency, when taken before a notary public properly authorized and commissioned by the state in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such state to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: Provided, that the officer administering the oath is not an officer of the bank.

Act Feb. 26, 1881, c. 82; 21 Stat. L., 352.

154. Sec. 5212. Report of dividends. In addition to the reports required by the preceding section, each association shall report to the comptroller of the currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

Act Mar. 3, 1869, c. 130, sec. 2; 15 Stat. L., 327.

155. Sec. 5213. Penalty for failure to make reports. Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the comptroller of the currency, the amount thereof may be retained by the treasurer of the United States, upon the order of the comptroller of the currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the treasury of the United States.

Act Mar. 3, 1869, c. 130, secs. 1, 2; 15 Stat. L., 326.

156. Sec. 5214 [as amended May 30, 1908]. Taxes payable to the United States. National banking associations having on deposit bonds of the United States, bearing interest at the rate of two per centum per annum, including the bonds issued for the construction of the Panama Canal, under the provisions of section eight of "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds; and such associations having on deposit bonds of the United States bearing interest at a rate higher than two per centum per annum

shall pay a tax of one-half of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds. National banking associations having circulating notes secured otherwise than by bonds of the United States shall pay for the first month a tax at the rate of five per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and thereafter such tax of ten per centum per annum, upon the average amount of such notes. Every national banking association having outstanding circulating notes secured by a deposit of other securities than United States bonds shall make monthly returns, under oath of its president or cashier, to the treasurer of the United States, in such form as the treasurer may prescribe, of the average monthly amount of its notes so secured in circulation; and it shall be the duty of the comptroller of the currency to cause such reports of notes in circulation to be verified by examination of the banks' records. The taxes received on circulating notes secured otherwise than by bonds of the United States shall be paid into the division of redemption of the treasury and credited and added to the reserve fund held for the redemption of United States and other notes.

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111. Act Mar. 3, 1883, sec. 1; 18 Stat. L., 488. Act Mar. 14, 1900, c. 41, sec. 13; 31 Stat. L., 49. Act May 30, 1908, sec. 9.

157. Sec. 5215. Half-yearly return of circulation. In order to enable the treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the treasurer of the United States, in such form as the treasurer may prescribe, of the average amount of its notes in circulation [*and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds*] for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the treasurer, or, at his option in the manner in which penalties are to be collected of other corporations under the laws of the United States.

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111. The taxes on the average amount of deposits and capital stock having been repealed by the Act of March 3, 1883, and the original provision therefor struck out of section 5214 as amended by Act of May 30, 1908, there is no longer any obligation to make the return of those two items.

158. Sec. 5216. Penalty for failure to make return. Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the comptroller of the currency [*and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the treasurer may deem best*].

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111. See note under section 5215 stating that tax on deposits and capital stock had been repealed.

159. Sec. 5217. Enforcing tax on circulation. Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations: or the treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111.

160. Sec. 5218. Refunding excess tax. In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the treasurer of the United States, the association may state an account therefor, which, on being certified by the treasurer of the United States, and found correct by the first comptroller of the treasury, shall be refunded in the ordinary manner by warrant on the treasury.

Resolution Mar. 2, 1867, No. 49; 14 Stat. L., 572.

161. Sec. 22. No tax to be paid by insolvent banks. Act March 1, 1879. That whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated

from such national banks as are found by the comptroller of the currency to be insolvent.

Internal Revenue Act Mar. 1, 1879, sec. 22; 20 Stat. L., 351.

162. Sec. 5219. State taxation. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Act June 3, 1864, c. 106, sec. 41; 13 Stat. L., 111. Act Feb. 10, 1868, c. 7; 15 Stat. L., 34.

Chapter V. Dissolution and receivership.

163. Sec. 5220. Two-thirds vote required for liquidation. Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

Act June 3, 1864, c. 106, sec. 42; 13 Stat. L., 112. For enforcement of shareholders' liability when bank is in liquidation see Act of June 20, 1876, following Revised Statutes, 5238.

164. Sec. 5221. Notice of voluntary liquidation. Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the comptroller of the currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

Act June 3, 1864, c. 106, sec. 42; 13 Stat. L., 112.

165. Sec. 5222. Deposit of lawful money to redeem circulation. Within six months from the date of the vote to go into liquidation, the association shall deposit with the treasurer of the United States, lawful money of the United States sufficient to redeem all its outstanding circulation. The treasurer shall execute duplicate receipts for money thus deposited and deliver one to the association and the other to the comptroller of the currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the treasury of the United States, and placed to the credit of such association upon redemption account.

Act June 3, 1864, c. 106, secs. 42, 43; 13 Stat. L., 112. Act July 14, 1870, c. 257, 16 Stat. L., 274.

166. Sec. 5223. No deposit required for consolidation. An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

Act July 14, 1870, c. 257, 16 Stat. L., 274.

167. Sec. 5224 [as amended 1875]. Reassignment of bonds and redemption of notes of liquidating banks. Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be reassigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds thirty days after the expiration of the time specified, the comptroller of the currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the re-

demption and cancellation of said circulation, and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representatives.

Act June 3, 1864, c. 106, sec. 42; 13 Stat. L., 112. Act Feb. 18, 1875, c. 80; 18 Stat. L., 320.

168. Sec. 8. Duty of treasurer, assistant treasurers, etc., to return notes of failed or liquidating banks to treasury for redemption. Act June 20, 1874. And it shall be the duty of the treasurer, assistant treasurers, designated depositaries, and national bank depositaries of the United States to assort and return to the treasury for redemption the notes of such national banks as have failed, or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation.

Act June 20, 1874, c. 343, sec. 8; 18 Stat. L., 125.

169. Sec. 5225 [as amended 1877]. Destruction of redeemed notes. Whenever the treasurer has redeemed any of the notes of an association which has commenced to close its affairs, under the five preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the treasurer shall, every three months, be certified to and [*burned*] in the manner prescribed in section fifty-one hundred and eighty-four.

Act June 3, 1864, c. 106, sec. 43; 13 Stat. L., 112. Act Feb. 27, 1877, c. 69; 19 Stat. L., 252. See Act of June 23, 1874, following Revised Statutes, section 5184, directing that bank notes be macerated and not burned.

170. Sec. 5226. Protest of bank circulation. Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment [*or the president or cashier of the association at the place at which they are redeemable*] offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the comptroller of the currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

Act June 3, 1864, c. 106, sec. 46; 13 Stat. L., 113. Circulation redeemable only at treasury or over own counter. Designated places of redemption have not existed since Act June 20, 1874. (See said Act following Revised Statutes, 5192.)

171. Sec. 5227. Bonds forfeited if circulation is dishonored. Examination by special agent. On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the comptroller the fact so ascertained. If, from such protest, and the report so made, the comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

Act June 3, 1864, c. 106, sec. 47; 13 Stat. L., 114.

172. Sec. 5228 [as amended 1875]. Suspension of business after default. After a default on the part of an association to pay any of its circulating notes has been ascertained by the comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

Act June 3, 1864, c. 106, sec. 46; 13 Stat. L., 113. Act Feb. 18, 1875, c. 80; 18 Stat. L., 320.

173. Sec. 5229. Notice to present circulation for redemption. Cancellation of bonds. Immediately upon declaring the bonds of an association forfeited for nonpayment

of its notes, the comptroller shall give notice, in such manner as the secretary of the treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

Act June 3, 1864, c. 106, sec. 47; 13 Stat. L., 114.

174. Sec. 5230. Sale of bonds at auction. First lien for redeeming circulation. Whenever the comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

Act June 3, 1864, c. 106, sec. 47, 48; 13 Stat. L., 114.

175. Sec. 5231. Bonds may be sold at private sale. The comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

Act June 3, 1864, c. 106, sec. 49; 13 Stat. L., 114.

176. Sec. 5232. Disposal of redeemed notes; regulations for redemption records. The secretary of the treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

Act June 3, 1864, c. 106, sec. 47; 13 Stat. L., 114.

177. Sec. 5233. Redeemed notes to be canceled. All notes of national banking associations presented at the treasury of the United States for payment shall, on being paid, be canceled.

Act June 3, 1864, c. 106, sec. 47; 13 Stat. L., 114.

178. Sec. 5234. Appointment and duties of receivers. On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Act June 3, 1864, c. 106, sec. 50; 13 Stat. L., 114. Other provisions authorizing the appointment of receivers of national banks and relating to powers and duties of receivers and agents will be found in the Act of June 30, 1876, as amended August 3, 1892, and March 2, 1897, and the Act of March 29, 1886. Both these Acts are set forth following section 5238, Revised Statutes. A receiver may also be appointed, under the provisions of section fifty-two hundred and thirty-four of the Revised Statutes of the United States, for the following violations of law: Where the capital stock of a national bank has not been fully paid in and it is thus reduced below the

legal minimum and remains so for thirty days. (Sec. 5141, R. S.) For failure to make good the lawful money reserve within thirty days after notice. (Sec. 5191, R. S.) Where a bank purchases or acquires its own stock, to prevent loss upon a debt previously contracted in good faith, and the same is not sold or disposed of within six months from the time of its purchase. (Sec. 5201, R. S.) For failure to make good any impairment in its capital stock and refusing to go into liquidation within three months after receiving notice. (Sec. 5205, R. S.) For false certification of checks by any officer, clerk, or agent. (Sec. 5208, R. S.)

179. Sec. 5235. Notice to creditors of insolvent banks to present claims. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Act June 3, 1864, c. 106, sec. 50; 13 Stat. L., 114.

180. Sec. 5236. Dividends; distribution of assets of insolvent banks. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Act June 3, 1864, c. 106, sec. 50; 13 Stat. L., 114.

181. Sec. 5237. When bank may enjoin further proceedings. Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the comptroller of the currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of the jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act June 3, 1864, c. 106, sec. 50; 13 Stat. L., 114.

182. Sec. 5238. Fees and expenses. All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Act June 3, 1864, c. 106, sec. 51; 13 Stat. L., 115.

183. Sec. 1. When receiver may be appointed. Act June 30, 1876. That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the revised statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

Act June 30, 1876, c. 156, sec. 1; 19 Stat. L., 63.

184. Sec. 2. Creditor's bill against shareholders. Act June 30, 1876. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by

bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

Act June 30, 1876, c. 156, sec. 2; 19 Stat. L., 63.

185. Sec. 3. Appointment, qualification, and duties of shareholders' agent. Act June 30, 1876, as amended 1892, 1897. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the revised statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the comptroller of the currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the treasurer of the United States, the comptroller of the currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the comptroller of the currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said comptroller and said receiver, or either of them; and for this purpose said comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said comptroller and the said receiver shall be virtue of this act be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may, in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district, or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such account and dis-

charge said agent and the sureties upon said bond. And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows: First. To pay the expenses of the execution of the trust to the date of such payment. Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the comptroller of the currency in accordance with the provisions of the statutes of the United States; and Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent.

Act June 30, 1876, c. 156, sec. 3; 19 Stat. L., 63, as amended Aug. 3, 1892, 27 Stat. L., 345, and Mar. 2, 1897, 29 Stat. L., 600. Other sections of Act June 30, 1876: Section 4 amends Revised Statutes, 5205. Section 5 relates to counterfeit notes. Section 6 relates to savings banks and trust companies, organized under Act of Congress.

186. Sec. 1. Receiver may purchase property to protect his trust. Act March 29, 1886. That whenever the receiver of any national bank duly appointed by the comptroller of the currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the comptroller of the currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

Act Mar. 29, 1886, c. 28, sec. 1; 24 Stat. L., 8.

187. Sec. 2. Approval of request. Act March 29, 1886. That such request, if approved by the comptroller of the currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the secretary of the treasury, and if the same shall likewise be approved by him, the request shall be by the comptroller of the currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the treasurer of the United States.

Act Mar. 29, 1886, c. 28, sec. 2; 24 Stat. L., 8.

188. Sec. 3. Payment. Act March 29, 1886. That whenever any such request shall be allowed as hereinbefore provided, the said comptroller of the currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, that all payments to be

made for or on account of the purchase of any such property and under any such allowance shall be made by the comptroller of the currency direct, with the approval of the secretary of the treasury, for such purpose only and in such manner as he may determine and order.

Act Mar. 29, 1886, c. 28, sec. 3; 24 Stat. L., 8.

189. Sec. 5239. Penalty for violation of this title; forfeiture of charter; individual liability of directors. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.

Act June 3, 1864, c. 106, sec. 53; 13 Stat. L., 116.

190. Sec. 5240 [as amended 1875]. Appointment of examiners, compensation. The comptroller of the currency, with the approval of the secretary of the treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the comptroller. That all persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the revised statutes of the United States, or in any one of the states of Oregon, California, and Nevada, or in the territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amount shall be assessed by the comptroller of the currency upon, and paid by, the respective association so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examinations of national banks in the cities named in section five thousand one hundred and ninety-two of the revised statutes of the United States, or in any one of the states of Oregon, California, and Nevada, or in the territories, shall receive such compensation as may be fixed by the secretary of the treasury upon the recommendation of the comptroller of the currency; and the same shall be assessed and paid in the manner hereinbefore provided. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer.

Act June 3, 1864, c. 106, sec. 54; 13 Stat. L., 116. Act Feb. 19, 1875, c. 89; 18 Stat. L., 329.

191. Sec. 5241. Limitation of visitatorial powers. No association shall be subject to any visitatorial powers other than such as are authorized by this title, or are vested in the courts of justice.

Act June 3, 1864, c. 106, sec. 54; 13 Stat. L., 116.

192. Sec. 5242. Transfers when void; illegal preference of creditors. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view

to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court.

Act June 3, 1864, c. 106, sec. 52; 13 Stat. L., 115.

193. Sec. 5243. Use of the title "National." All banks not organized and transacting business under the national currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is permitted or repeated.

Act Mar. 3, 1873, c. 269, sec. 3; 17 Stat. L., 603.

Chapter VII. Special acts relating to national banks.

260. Sec. 14. National banking laws applicable to Porto Rico. Act April 12, 1900.

That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section 3, shall not have force and effect in Porto Rico.

Act Apr. 12, 1900, sec. 14; 31 Stat. L., 80. The attorney-general of the United States in an opinion rendered June 2, 1900, held "There seems to be in the structure of the national banking laws no general provisions which cannot be carried into force and effect in Porto Rico equally with all of the various states and territories to which the laws were originally applied. I can find no reason to hold that the statutes relative to the organization and powers of national banks have not, by section 14 of the Porto Rican Act, above referred to, been extended to that island. The language of that section is broad enough, and in my opinion does, authorize the organization and carrying on of national banks in Porto Rico."

261. Sec. 5. National banking laws applicable to Hawaii. Act April 30, 1900. That the constitution, and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States: Provided, that sections eighteen hundred and fifty and eighteen hundred and ninety of the revised statutes of the United States shall not apply to the territory of Hawaii.

Act Apr. 30, 1900, sec. 5, 31 Stat. L., 141. The attorney-general of the United States in an opinion rendered June 23, 1900, held "That the Act of April 30, 1900, *** extended the national banking Acts to the territory of Hawaii, and would authorize the comptroller to grant permission for the organization of national banks therein. (See my opinion of June 2, 1900, relative to the same question as applied to Porto Rico.) But I do not think that the provisions of section 5154 apply to banks existing in Hawaii prior to the passage of the Act of April 30, 1900. Sections 5154 and 5155 seem, by their especial terms, to refer only to banking institutions organized under special or general laws of a state, and do not seem to apply at all to banks organized under the laws of any territory. I think the object of these two sections was to enable the banks that were previously strictly state institutions to become national corporations, and the operation of the Act in that respect is to be so restricted."

VI.

THE LAW OF COMMERCIAL PAPERS

The Law of Commercial Papers.

(By Donald J. Kiser, Counsellor at Law, and Reviewing Editor of the *Cyclopedia of Law and Procedure*.)

Analysis.

I. SCOPE OF ARTICLE, 178

II. HISTORY AND SOURCES OF THE LAW, 179

III. DEFINITIONS

- A. Negotiable Instrument, 179*
- B. Promissory Note, 180*
- C. Bill of Exchange, 180*
- D. Check, 180*
- E. Certified Check, 180*
- F. Memorandum Check, 180*
- G. Certificate of Deposit, 180*
- H. Maker, 181*
- I. Payee, 181*
- J. Indorser, 181*
- K. Indorsee, 181*

IV. NEGOTIABLE AND NON-NEGOTIABLE INSTRUMENTS DISTINGUISHED, 181

V. ESSENTIALS OF A NEGOTIABLE INSTRUMENT

- A. Writing and Signature, 181*
- B. Promise or Order, 182*
- C. How Payable, 182*
 - 1. In General, 182*
 - 2. Medium of Payment, 182*
 - 3. Collateral and Additional Agreements, 182*
- D. Time for Payment, 183*
 - 1. In General, 183*
 - 2. When Payable on Demand, 183*
- E. Certainty as to Amount, 183*
 - 1. In General, 183*
 - 2. Provision for Attorney's Fees and Costs of Collection, 183*
- F. Designation of Drawee, 184*
- G. Expression of Consideration, 184*
- H. Date, 184*
- I. Place of Payment, 184*
- J. Seal, 184*

VI. CONSIDERATION

- A. In General, 184*
- B. Existing Indebtedness as Consideration, 185*

VII. CONSTRUCTION OF INSTRUMENT — AMBIGUITIES AND OMISSIONS, 185

VIII. DELIVERY, 185

IX. NEGOTIATION, TRANSFER AND INDORSEMENT

- A. What Constitutes Negotiation, 186*
- B. Indorsement, 186*
- C. Necessity That Entire Instrument be Indorsed, 186*
- D. Kinds of Indorsements, 186*
 - 1. In General, 186*
 - 2. Indorsement in Blank, 186*
 - 3. Special Indorsements, 186*
 - 4. Restrictive Indorsements, 186*
 - 5. Qualified Indorsements, 186*
 - 6. Conditional Indorsements, 187*
- E. Special Indorsement of Instrument Payable to Bearer, 187*
- F. Indorsement of Instrument Payable to More than One Person, 187*

- G. *Instrument Drawn or Indorsed to Person as Cashier, 187*
- H. *Indorsement by Infant or Corporation, 187*
- I. *Where Name is Erroneously Spelled or Stated, 187*
- J. *Indorsements in Representative Capacity, 187*
- K. *Presumptions as to Indorsements, 187*
- L. *Continuation of Negotiable Character, 187*
- M. *Striking out Indorsements, 187*
- N. *Effect of Transfer without Indorsement, 187*
- O. *Negotiation by Prior Party, 187*

X. PAYMENT AND DISCHARGE

- A. *In General, 187*
- B. *Time of Maturity, 188*
- C. *Days of Grace, 188*
- D. *Where the Instrument is Payable at Bank, 188*
- E. *Payment in Due Course, 188*
- F. *Rights of Party Discharging Instrument, 188*

XI. ACCEPTANCE

- A. *What Constitutes, 188*
- B. *Kinds of Acceptance, 188*
- C. *Who may Accept, 189*
- D. *Form and Requisites, 189*
- E. *Time for Acceptance, 189*
- F. *Effect of Retention or Destruction of Bill, 189*
- G. *Acceptance of Incomplete or Dishonored Bill, 189*
- H. *Rights of Parties as to Qualified Acceptances, 189*
- I. *Acceptance for Honor, 190*

XII. PRESENTMENT FOR ACCEPTANCE

- A. *Necessity, 190*
- B. *By and to Whom Made, 190*
- C. *Time, 190*
- D. *Place, 191*
- E. *Effect of Non-Acceptance, 191*
- F. *Necessity that Bill be Treated as Dishonored, 191*
- G. *Rights of Holder upon Non-Acceptance, 191*

XIII. PRESENTMENT FOR PAYMENT

- A. *Necessity, 191*
- B. *Sufficiency, 191*
- C. *Place, 192*
- D. *Time, 192*
- E. *Exhibit and Delivery of Instrument, 192*
- F. *Delay in Presentment, 192*
- G. *Effect of Non-Payment, 192*
- H. *Effect of Dishonor for Non-Payment, 192*
- I. *Presentment after Acceptance for Honor, 192*

XIV. NOTICE OF DISHONOR

- A. *Definition, 192*
- B. *Necessity, 193*
- C. *Sufficiency of Notice, 193*
- D. *Who may give Notice, 193*
- E. *To Whom Notice should be Given, 193*
- F. *Persons Entitled to Benefit of Notice, 194*
- G. *Time within which Notice must be Given, 194*
- H. *Place of Giving Notice, 194*
- I. *Waiver, 195*
- J. *Omission to give Notice of Non-Acceptance, 195*

XV. PROTEST OF BILLS OF EXCHANGE

- A. *Necessity, 195*
- B. *Protest for Better Security, 195*
- C. *Excuses for Failure to Protest, 195*
- D. *Who may Make, 195*

- E. Time, 195*
- F. Place, 195*
- G. Form and Requisites, 195*
- H. Lost or Withheld Bill, 195*
- I. Protest both for Non-Payment and Non-Acceptance, 195*
- J. Bill Accepted for Honor, Etc., 195*
- K. Payment supra Protest, 196*

XVI. THE LIABILITY OF PARTIES

- A. In General, 196*
- B. Primary Liability, 196*
- C. Secondary Liability, 196*
- D. The Maker's Undertaking, 196*
- E. The Drawer's Undertaking, 196*
- F. The Liability of the Acceptor, 196*
 - 1. In General, 196*
 - 2. Acceptors for Honor, 197*
- G. Indorsers, 197*
 - 1. Persons Regarded as Indorsers in General, 197*
 - 2. Signature by Person in Blank before Delivery, 197*
 - 3. Liabilities of Regular Indorsers, 197*
 - 4. Negotiation by Delivery or Qualified Indorsements, 197*
 - 5. Indorser of Instrument Negotiable by Delivery, 197*
 - 6. Liability as between Indorsers, 197*
- H. Accommodation Parties, 198*
- I. Discharge of Persons Secondarily Liable, 198*

XVII. RIGHTS OF HOLDER

- A. In General, 198*
- B. Holders in Due Course, 198*

XVIII. ACTIONS, 199

XIX. DEFENSES

- A. In General, 199*
- B. Classes of Defenses, 199*
- C. Defenses Good as to Bonâ Fide Holders, 199*
 - 1. Incapacity to Contract, 199*
 - a) Insanity, 199*
 - b) Drunkenness, 199*
 - c) Infancy, 200*
 - d) Coverture, 200*
 - 2. Illegality, 200*
 - 3. Usury, 200*
 - 4. Alteration, 200*
 - 5. Forgery, 200*
- D. Defenses Not Available against Bonâ Fide Holders, 200*
 - 1. In General, 200*
 - 2. Fraud, 200*
 - 3. Total or Partial Failure of Consideration, 200*
 - 4. Illegality of Consideration, 200*
 - 5. Payment or Cancellation before Maturity, 200*

I. SCOPE OF ARTICLE. — It is intended in this article to treat generally the law of commercial paper, or more strictly the law relating to bills of exchange, promissory notes, bank checks and drafts and other instruments in writing, either negotiable or non-negotiable, whereby the maker requests, orders or promises the payment of money. The form, nature and essentials of such instruments will be considered; together with the law relating to their negotiable or non-negotiable character, the rights and liabilities of the parties thereto; acceptance, indorsement and transfer; rights and liabilities of acceptors, indorsers and transferees; demand of acceptance and payment; protest and notice of protest for non-acceptance or non-payment; and payment and renewal. Instruments relating to the sale or conveyance of land or chattels; or to the pledge, mortgage or incumbrance of land

or chattels will not be considered. Where the uniform Negotiable Instrument Law is considered it is with special reference to the New York Act. The citations are to this Act.

II. HISTORY AND SOURCES OF THE LAW. — The law of commercial paper in the United States is based upon the law merchant, as the law was adopted by England from the trade cities of the continent and incorporated in the English common law. In many of the states, however, alterations have been made in the common law by statutes, and in all of the states there has been a wealth of judicial interpretation. It has resulted from this that the law in the various jurisdictions has not been entirely harmonious. For the purpose of securing harmony in the commercial law of the several states, there has of late years been a determined effort to secure the general adoption of a uniform law upon the subject; and this effort has met with large success, so much as to indicate that in a few years at the most the same law will probably stand upon the statute books of all of the states and territories. This law, for convenience termed the Negotiable Instruments Law, was first adopted in 1897 by New York, Colorado, Connecticut and Florida. It is now in force in the following states and by the following statutes: Alabama, Laws of 1907, Chap. 722; — Arizona, Revised Statutes, 1901, Title 49; — Colorado, Laws of 1897, Chap. 64; — Connecticut, Laws of 1897, Chap. 74; — Delaware, Act of April 4, 1911; — District of Columbia, Laws U. S. 1899, Chap. 47; — Florida, Laws of 1897, Chap. 4524; — Hawaii, Laws of 1907, No. 89; — Idaho, Laws of 1903, p. 380; — Illinois, Laws of 1907, p. 403; — Iowa, Laws of 1902, Chap. 130; — Kansas, Laws of 1905, Chap. 310; — Kentucky, Laws of 1904, Chap. 102; — Louisiana, Laws of 1904, Chap. 64; — Maryland, Laws of 1898, Chap. 119; — Massachusetts, Laws of 1898, Chap. 533, Laws of 1899, Chap. 130; — Michigan, Laws of 1905, Chap. 265; — Missouri, Laws of 1905, p. 243; — Montana, Laws of 1903, Chap. 121; — Nebraska, Laws of 1905, Chap. 83; — Nevada, Laws of 1907, Chap. 62; — New Hampshire, Laws of 1909, Chap. 128; — New Jersey, Laws of 1902, Chap. 184; — New Mexico, Laws of 1907, Chap. 83; — New York, Laws of 1897, Chap. 612; Laws of 1898, Chap. 336; — North Carolina, Laws of 1899, Chap. 733; — North Dakota, Laws of 1899, Chap. 113; — Ohio, Laws of 1902, p. 162; — Oklahoma, Laws of 1909, Chap. 24; — Oregon, Laws of 1899, p. 18; — Pennsylvania, Laws of 1901, Chap. 162; — Philippines, Acts of 1911, No. 2031; — Rhode Island, Laws of 1899, Chap. 674; — Tennessee, Laws of 1899, Chap. 94; — Utah, Laws of 1899, Chap. 83; — Virginia, Laws of 1898, Chap. 866; — Washington, Laws of 1899, Chap. 149; — West Virginia, Laws of 1907, Chap. 81; — Wisconsin, Laws of 1899, Chap. 356; — Wyoming, Laws of 1905, Chap. 43.

In those states and territories in which the uniform Negotiable Instruments Law has been enacted all questions concerning which provision has been made in the law are of course governed by its terms, unless the negotiable instrument affected was made and delivered prior to the adoption of the law¹); in which case to give the law operation would be to confer upon it a retroactive effect, in contravention of the constitution of the United States and of the several states. All cases for which provision has not been made in the Negotiable Instruments Law are left to be governed by the common law, which is, as already stated, a development of the law merchant²).

III. DEFINITIONS. — **A. Negotiable Instruments.** — The term "negotiable instruments" is a general name for bills, notes, checks, transferable bonds or coupons, letters of credit and other negotiable written securities³). The term "negotiable" in its enlarged signification, is used to describe any written security which may be transferred by indorsement and delivery, or by delivery merely so as to vest in the indorsee the legal title, and thus enable him to bring suit thereon in his own name. But in a strictly commercial classification, and as the term is technically used, it applies only to those instruments which, like bills of exchange, not only carry the legal title with them by indorsement or delivery, but carry as well, when transferred before maturity, the right of the transferee to demand the full amounts which their faces call for. "Assignable" is the more appropriate term to describe bonds, and ordinary notes, or notes of hand as they are most commonly called; as "negotiable" is the more fitting term to describe the peculiar instruments of commerce⁴).

¹) Neg. Inst. Law, § 6. — ²) Neg. Inst. Law § 7. — ³) Black's Law Dictionary. — ⁴) Daniel Neg. Inst. (5th ed.), § 1a.

B. Promissory Note. — A promissory note has been tersely defined as: A written promise made by a certain person to pay a certain sum of money to a certain person, at a certain time¹).

C. Bill of Exchange. — A bill of exchange is an open letter by one person to a second, directing him in effect to pay, absolutely and at all events, a certain sum of money therein named, to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself²). Bills of exchange are of two kinds, — foreign and inland. Foreign bills are those which are drawn upon a person residing in another state or out of the United States and made payable out of the state when drawn. Inland bills are those which are drawn upon a person within the state and made payable within the state. A bill of exchange does not operate as an assignment of funds in the hands of the drawee, and he is not liable thereon unless and until he accepts it. A bill cannot be addressed to two or more drawees in the alternative or in succession, although it may be addressed to two or more drawees jointly, and although they may not be partners. In case the bill is drawn upon the drawer, or the drawee is a fictitious or incapacitated person, the instrument may be treated either as a bill of exchange or a promissory note at the option of the holder³).

D. Check. — A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand⁴). While a check is not an inland bill of exchange it has many of the properties of such commercial paper, and many of the rules of the law merchant are applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance no action can be maintained upon either by the holder against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill have funds in the hands of the drawee. A check in such case would be a fraud⁵).

E. Certified Check. — A check is certified when it is marked or certified to be good by the bank on which its drawn. The usual method of certification is for the cashier or teller of the bank to write his name across the face of the check together with the word "Good" or other expression indicating that the bank has funds for its payment. The certificate of a bank that a check is good is equivalent to an acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its payment and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and its object is to enable the holder to use it as money⁶). In case the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon⁷).

F. Memorandum Check. — A memorandum check is in the ordinary form of a bank check, with the word "Memorandum" written across its face, and is not intended for immediate presentation, but simply as evidence of an indebtedness by the drawer to the holder⁸).

G. Certificate of Deposit. — The term "certificate of deposit" is usually employed to indicate a writing by which a bank acknowledges a deposit with it of a specified sum of money. It is in effect a receipt⁹).

¹) *Brown v. Indianapolis First Natl. Bank*, 115 Ind. 572, 18 N. E. 56. — ²) *Daniel Neg. Instr.*, § 27; 7 Cyc. 525. — ³) *Neg. Inst. Law*, § 214. — ⁴) *Rogers v. Durant*, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481 [quoting 2 *Daniel Neg. Instr.* 583]; 7 Cyc. 529. — ⁵) *Mr. Justice Swayne in Merchants' Nat. Bank v. State Nat.*

Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008. — ⁶) *Merchants' Natl. Bank v. State Natl. Bank*, 10 Wall. (U. S.) 604, 19 L. ed. 1008. — ⁷) *Neg. Inst. Law*, § 324. — ⁸) *United States v. Isham*, 17 Wall. (U. S.) 496, 21 L. ed. 7281. — ⁹) *Hotchkiss v. Mosher*, 48 N. Y. 478.

H. Maker. — The maker of a negotiable instrument is the person who originally executes and is bound by it.

I. Payee. — The payee of a negotiable instrument is the person to whom it is originally made payable.

J. Indorser. — The indorser of a negotiable instrument is one who passes the title thereto by indorsement.

K. Indorsee. — The indorsee of a negotiable instrument is one to whom the instrument has been passed by indorsement.

IV. NEGOTIABLE AND NON-NEGOTIABLE INSTRUMENTS DISTINGUISHED.

— At the beginning of a consideration of the law of commercial paper it is necessary to divide all writings incidental to business transactions into two great classes: Negotiable and Non-negotiable. The sharp distinction between the two classes lies in the fact that the instruments of the latter class may be transferred only by assignment, as in the case of ordinary choses in action. This distinction is important because of the difference between the legal effects of assignment and negotiation. The first and most important difference may be briefly stated to be that an assignee takes subject to existing equities between the prior parties, while the person who takes a negotiable instrument by negotiation takes, in case of bona fides, free from all of such existing equities and defenses¹). The question of what constitutes bona fides and of the defenses available against a bona fide holder will be considered at length in a later chapter²). A second distinction is that in the case of assignment the debtor may discharge himself from liability by performance toward the person to whom he is originally bound, unless notice of the assignment has been brought home to him³). In the case of negotiable instruments however, payment to the original creditor will not discharge the debtor toward one who holds the instrument by a valid transfer, although the debtor has had no notice of the transfer⁴). Another distinctive feature of a valid assignment is the necessity for a consideration except when the chose in action is the subject of a gift⁵). With regard to the right to sue to enforce the instrument the holder of a negotiable instrument may bring an action in his own name⁶), while, unless the action is brought in the Code states or in equity, an assignee cannot sue in his own name, but the action must be in the name of the assignor for the benefit of the assignee⁷).

V. ESSENTIALS OF A NEGOTIABLE INSTRUMENT. — A. Writing and signature. — A negotiable instrument must be in writing and signed by the maker or drawer⁸). Handwriting is not essential, but the instrument may be engraved, lithographed or printed, and it may be in lead pencil writing as well as in ink⁹). When the instrument is executed by a partnership it should be signed with the firm name. When the instrument is that of a corporation it should be signed with the corporate name by the proper officers, the proper officers, in the absence of other provision in the charter or by laws of the concern, being the president and secretary. The corporate seal need not be affixed, but if it is affixed it does not deprive the instrument of its negotiability. The signature of any party may be made by agent. The authority of the agent to sign may be established as in other cases of agency, and his power need not be derived from any particular form of authorization¹⁰). Where an agent executes a note or other instrument he should sign it as agent; otherwise he may be personally liable to one who has no knowledge of the fact of his agency. The mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, is not sufficient to exempt him from personal liability¹¹). The proper form is for the agent to sign the name of the principal and follow it with his signature, prefixed by some word or expression such as "by" indicating the agency. Where a party signs by "procuration", the principal is bound only in case the agent acted within the actual limits of his authority, since the signature is notice that the agent has but a limited authority¹²). The executor or administrator of the estate of a deceased person who executes a note for the estate which he represents must provide that he shall not be personally liable, otherwise he will be bound individually, although he signs as executor or administrator and the name of the estate is mentioned in

¹) 7 Cyc. 521. — ²) See *infra*, XVII, B; XIX. — ³) 4 Cyc. 88. — ⁴) 7 Cyc. 1036. — ⁵) 4 Cyc. 30. — ⁶) 8 Cyc. 66, *et seq.* — ⁷) 4 Cyc. 92. — ⁸) Neg. Inst. Law, § 20, cl. 1. — ⁹) 7 Cyc. 542. — ¹⁰) Neg. Inst. Law, § 39. — ¹¹) Neg. Inst. Law, § 39. — ¹²) Neg. Inst. Law, § 40.

the body of the instrument, or although the promise is made as executor or administrator¹). A forged signature is wholly inoperative, as is one made without authority of the person whose signature it purports to be, unless the person against whom a right is asserted is estopped or precluded from setting up the forgery or lack of authority²).

B. Promise or Order. — A negotiable instrument must contain an unconditional promise or order to pay a sum certain in money³). The kind of current money in which the instrument is to be paid may, however, be expressed. The promise must be unconditional, that is, the money must be made payable in any event. But the condition which will render the instrument non-negotiable must appear on the face of the instrument. An unqualified promise or order to pay may be unconditional although coupled with: 1. An indication of a particular fund out of which re-imbursement is to be made, or a particular account to be debited with the amount⁴); 2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional⁵). A note for example is conditional and non-negotiable where it promises to pay if the amount is realized from certain sales⁶), or if the maker is in funds⁷).

C. How Payable. — 1. **IN GENERAL.** — A negotiable instrument must be payable to order or to bearer⁸). An instrument is payable to bearer: 1. When it is expressed to be so payable; or 2. When it is payable to a person named therein or bearer; or 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or 4. When the name of the payee does not purport to be the name of any person; or 5. When the only or the last indorsement is an indorsement in blank. An instrument is regarded as payable to order when it is drawn payable to a specified person or to him or to his order. It may be drawn payable to the order of: 1. A payee who is not maker, drawer or drawee; or 2. The drawer or maker; or 3. The drawer; or 4. Two or more payees jointly; or 5. One or some of several payees; or 6. The holder of an office for the time being. — Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

2. **MEDIUM OF PAYMENT.** — An instrument to be negotiable must be payable in money only, unless by express provision of the statutes negotiable character is extended to instruments payable in property⁹). Under the Negotiable Instruments Law the instrument must be for the payment of money only¹⁰). A negotiable instrument may be made payable in foreign currency¹¹).

3. **COLLATERAL AND ADDITIONAL AGREEMENTS.** — A collateral agreement which is not essential to the execution of the promise or order to pay may be embodied in the instrument without rendering it non-negotiable¹²). But the order or promise must, as we have seen, be for the payment of money only. Hence if the instrument contains an order or promise to do any act in addition to the payment of money it is not negotiable. There are however certain provisions which are frequently incorporated in commercial paper which do not go to the substance or validity of the promise or order, but which merely relate to the manner and means of its enforcement, and which do not render it non-negotiable. An ordinary provision of this nature is found in the incorporation of a reference to collateral security with provision for the sale of such security in case the instrument is not paid at maturity, or for the surrender of such security when the instrument is paid¹³). Another common example of collateral agreement is that by which the holder, in case the instrument is not paid at maturity, is authorized to confess judgment for the maker¹⁴). In connection with this is usually an agreement by which the maker waives the benefit of any law intended for his protection, such as laws which exempt his property from liability to be taken in satisfaction of his debts¹⁵). Still another form of collateral agreement confers upon the holder the right to require some other act to be done instead of the payment of money¹⁶). So the instrument may be made payable in money in the alternative, if the holder

¹) 7 Cyc. 546. — ²) Neg. Inst. Law, § 42. — ³) Neg. Inst. Law, § 20, cl. 2. — ⁴) Neg. Inst. Law, § 22, cl. 1; 7 Cyc. 580. — ⁵) Neg. Inst. Law, § 22; 7 Cyc. 578. — ⁶) Cochran v. Nebeker, 48 Ind. 459. — ⁷) Kemble v. Sull, 3 McLean 272, 14 Fed. Cas. No. 7, 683. — ⁸) Neg. Inst. Law, § 20, cl. 4. — ⁹) See 7 Cyc. 582.

— ¹⁰) Neg. Inst. Law, § 20, cl. 2. — ¹¹) Norton Bills and Notes (3d ed.) 46. Thompson v. Aloa, 23 Wend (N. Y.) 71. — ¹²) Norton, Bills and Notes (3d Ed.) 48. — ¹³) 7 Cyc. 587. — ¹⁴) Tolman v. Jansen, 106 Iowa 455, 76 N. W. 732; 7 Cyc. 589. — ¹⁵) Zimmerman v. Anderson, 67 Pa. St. 421, 5 Am. Rep. 447. — ¹⁶) 7 Cyc. 589.

is not denied the option of demanding money¹). It must of course be remembered that any collateral agreement of this kind must be one which is not in itself unlawful.

D. Time for Payment. — 1. IN GENERAL. — A negotiable bill or note must be payable at a time certain²). Under the Negotiable Instruments Law it must be payable on demand, or at a fixed or determinable future time³). In order that the instrument shall be regarded as certain as to the time of payment it should be made payable upon an expressed date or in a specified time after date or sight, or on or before a date which is either specified or determinable. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect⁴). The principal may be made payable in instalments, and there may also be added a provision that in event of default in the payment of any instalment or of interest the entire amount shall become due⁵). Or it may be made to mature at an earlier date than that expressed in the case of default of the maker, as in payment of interest⁶).

2. WHEN PAYABLE ON DEMAND. — The sum is payable on demand when it is expressly so stated in the instrument itself or when the instrument is payable at sight or on presentation⁷). An instrument is also regarded as payable on demand when no time for payment is expressed⁸). When an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand⁹).

E. Certainty as to Amount. — 1. IN GENERAL. — A negotiable instrument is not rendered uncertain as to amount by the fact that it is made payable with interest after date or after maturity, or by the fact that a higher rate of interest is provided for in event the instrument is not paid at maturity¹⁰), or by the fact that the instrument is made payable with exchange either at a fixed rate or at the current rate¹¹).

2. PROVISION FOR ATTORNEYS' FEES AND COSTS OF COLLECTION. — The addition of a provision for the payment of attorneys' fees in case of the collection of the instrument by suit is in the greater number of the states held not to affect the negotiability of the instrument¹²). And this is the rule under the Negotiable Instruments Law¹³). But in some states it is held that the insertion of such a provision is fatal to negotiability¹⁴).

¹) *Owen v. Barnum*, 2 Gilm. (Ill.) 461. — ²) 7 Cyc. 597. — ³) Neg. Inst. Law, § 20, cl. 3. — ⁴) 7 Cyc. 597. — ⁵) *De Haas v. Roberts*, 59 Fed. 853. — ⁶) *De Haas v. Roberts*, 59 Fed. 853. — ⁷) 7 Cyc. 845. — ⁸) *Converse v. Johnson*, 146 Mass. 20, 14 N. E. 925. — ⁹) Neg. Inst. Law, § 26. — ¹⁰) 7 Cyc. 595. — ¹¹) *Hastings v. Thompson*, 54 Minn. 184, 55 N. W. 968, 40 Am. St. Rep. 315, 21 L. R. A. 178. — ¹²) *Alabama*. *Montgomery First Nat. Bank v. Slaughter*, 98 Ala. 602, 14 So. 545. — *Arkansas*. *Trader v. Chidester*, 41 Ark. 242, 48 Am. Rep. 38. — *Colorado*. *Cowing v. Cloud*, 65 Pac. 417 (Colo. App. 1901). — *Georgia*. *Jones v. Crawford*, 107 Ga. 318, 33 S. E. 51, 41 L. R. A. 105. — *Illinois*. *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617. — *Indiana*. *Witty v. Michigan Mutual Life Ins. Co.* 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, 8 L. R. A. 365. — *Iowa*. *Shenandoah Natl. Bank v. Marsh*, 89 Iowa 273, 56 N. W. 458, 48 Am. St. Rep. 381. — *Kansas*. *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 603. — *Kentucky*. *Goar v. Louisville Banking Co.*, 11 Bush. (Ky.) 180, 21 Am. Rep. 209. — *Louisiana*. *Dietrich v. Bayhi*, 23 La. Ann. 767. — *Michigan*. *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708. — *Mississippi*. *Clifton v. Bank of Aberdeen* 75 Miss. 929, 23 So. 394. — *Nebraska*. *Stark v. Olsen*, 44 Nebraska 646, 63 N. W. 37. — *Benn v. Kutzschan*, 24 Oregon 28, 32 Pac. 763. — *Tennessee*. *Oppenheimer v. Farmers etc. Bank*, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778,

33 L. R. A. 767. — *Texas*. *Hamilton Gin Co. v. Sinker*, 74 Tex. 51, 11 S. W. 1056. — *Washington*. *Colfax Second Natl. Bank v. Auglin*, 6 Wash. 403, 33 Pac. 1056. — *United States*. *Adams v. Addington*, 4 Woods 389, 16 Fed. 89. — ¹³) Neg. Inst. Law, § 21, cl. 5. — ¹⁴) *California*. *Findley v. Pott*, 131 Cal. 385, 63 Pac. 694. The law has now been amended, and such instruments are negotiable. — *Maryland*. *Maryland Fertilizing etc. Co. v. Newman*, 60 Maryland. 584, 45 Am. Rep. 750. — *Minnesota*. *Deering v. Thom*, 29 Minn. 120. — *Missouri*. *McCoy v. Green*, 83 Mo. 626. — *Montana*. *Stadler v. Helena*, First Natl. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582. — *North Carolina*. *New Windsor First Natl. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604. — *North Dakota*. *Decorah First Natl. Bank v. Langhlin*, 4 N. D. 391, 61 N. W. 473. — *Pennsylvania*. *Johnston v. Speer*, 92 Pa. St. 227, 37 Am. Rep. 675. — *South Carolina*. *Sylvester etc. Co. v. Alewine*, 48 S. C. 308, 26 S. E. 609, 37 L. R. A. 86. — *South Dakota*. *Johnson v. Sehar*, 9 S. D. 936, 70 N. W. 838. — *Utah*. *Leppincott v. Rich*, 22 Utah 196, 61 Pac. 626. — *Wisconsin*. *Petersen v. Stoughton State Bank*, 78 Wis. 113, 47 N. W. 368. In all of these states, except California, Minnesota, South Carolina, and South Dakota, the Negotiable Instruments Law has been adopted, and has rendered these cases obsolete.

F. Designation of Drawee. — When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty¹).

G. Expression of Consideration. — Unless particularly required by statute it is not essential that the instrument express that it is for a consideration²). Under the Negotiable Instruments Law an instrument is negotiable although it does not express the value given or state that any value has been given therefor. Under some statutes it is essential to the validity of notes given for the purchase of patent rights or for a speculative consideration that they shall express such consideration.

H. Date. — While it is customary to date a negotiable instrument and also to express the place of making it in the date, this is not essential to the validity nor negotiability of the instrument³). If there is no date it will be considered as dated as of the time when it was made. A date is merely *primâ facie* and not conclusive evidence of the time of execution⁴). A date however when incorporated becomes a material part of the instrument, and any alteration therein is material⁵). The position of the date is immaterial. It may be either at the beginning or at the end of the instrument⁶). When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *primâ facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be. In case a date is expressed which is variant from the actual date of delivery the instrument will in general be construed according to its expressed date⁷). A negotiable instrument is not invalid for the reason only that it is ante-dated or post-dated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery⁸).

I. Place of Payment. — Save in a few states, the designation of an express place of payment is not essential to negotiability. Under the Negotiable Instruments Law such designation is not required.

J. Seal. — A negotiable instrument even when executed by a corporation should not be under seal. But the fact that a seal is unnecessarily placed upon an instrument will not in most of the states destroy its negotiability⁹).

VI. CONSIDERATION. — **A. In General.** — With regard to the rights and liabilities of the immediate parties a negotiable instrument is governed by the ordinary principles of contract law; hence as between the immediate parties a consideration is necessary to its validity¹⁰). The effect upon the rights of other than immediate parties of a total or partial failure of consideration will be treated in other parts of this article, viz, those bearing upon the rights and liabilities of indorsers and indorseees and of *bona fides*¹¹). In general it may be stated that as between the parties the same consideration is necessary to support a negotiable instrument as is necessary to support an ordinary contract¹²). The instrument carries with it a presumption that it is based upon a consideration¹³). An instrument which is based upon an illegal consideration is invalid as between the parties¹⁴), and this is true whether the consideration is illegal in whole or in part. A consideration may be illegal because in contravention of public policy, as where it tends to restrain trade or obstruct the administration of public justice or service; or it may be illegal because in contravention of some provision of the statutory or common law. An illustration of illegality arising from statute is that attaching in some of the states to notes given for the purchase price of intoxicating liquors¹⁵). An illustration of common law illegality would be a note given in consideration of the commission of a crime. Owing to the frequent perpetration of swindles through the securing and negotiation of notes as incident to fraudulent sales of particular commodities, statutes in many of the states require that where the instrument is given in payment for the purchase of patent rights, or for farm products in large excess of their market value, or for lightning rods, or for such other purposes as the legislatures may have seen fit to take cognizance of as common means of cheating, it shall state such fact upon its face. Absence or failure of considera-

¹) Neg. Inst. Law, § 20, cl. 5. — ²) Townsend v. Derby, 3 Metc. (Mass.) 363. — ³) See Neg. Inst. Law, § 25, cl. 1. — ⁴) Col-
lens v. Driscoll, 69 Cal. 550, 11 Pac. 244. —
⁵) Crawford v. West Side Bank, 100 N. Y. 50,
2 N. E. 881, 53 Am. Rep. 152. — ⁶) Sheppard
v. Graves, 14 How. (U. S.) 505, 14 L. Ed. 518.
— ⁷) 7 Cyc. 544, text and note 92. — ⁸) Neg.
Inst. Law, § 31. — ⁹) 7 Cyc. 615, *et seq.* — ¹⁰) 7
Cyc. 690. — ¹¹) See *infra*, XIX, D. 3. — ¹²) See
Neg. Inst. Law, § 51. — ¹³) Carnwright v. Gray,
127 N. Y. 92, 27 N. E. 835; Neg. Inst. Law,
§ 50. — ¹⁴) 7 Cyc. 740. — ¹⁵) Carlton v. Bailey,
27 N. H. 230.

tion is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is for an ascertained and liquidated amount or otherwise¹).

B. Existing Indebtedness as Consideration. — A sufficient consideration to support a negotiable instrument may rest in an antecedent or pre-existing debt, and this is true whether the instrument is payable on demand or at a future time²).

VII. CONSTRUCTION OF INSTRUMENT. — AMBIGUITIES AND OMISSIONS.

— A negotiable instrument being but a special form of contract, the rules of interpretation applicable to contracts generally are in the main applicable to it. For example, where the instrument is partially in printing and partially in writing, any conflict between the written and printed portions will be governed by the writing. Similarly, numbers or dates written out at length control those written in figures. So where the sum payable is written out and is also expressed in figures the sum denoted by the words will be taken to be the true amount. But the figures may be referred to, to fix the amount in case the words are uncertain or ambiguous. So where no date is placed upon the instrument it will in the manner of other contracts be taken to be dated as of the time of its execution and delivery. There are certain other rules of construction which are peculiar to the character of the instrument. One of the most important of these is that where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. Another is that where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either at his election. In case interest is provided for but no date is specified from which it is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

VIII. DELIVERY. — Delivery of the instrument is essential to its validity, or in other words before the instrument becomes operative as against the maker or drawer he must have parted with its possession with the intention to transfer the title³). Delivery may be actual, as by the placing of the instrument in the hands of the payee or a person having authority to receive it for him; or it may constructive, as where the instrument is in the actual possession of a third person who is directed to deliver it to the payee or to hold it for him⁴), or in case the instrument is delivered to a third person to hold for a designated length of time or until the fulfillment of a specified condition before actual delivery to the person ultimately entitled. Delivery of a negotiable instrument in escrow differs from other deliveries in escrow in that in case the instrument is wrongfully freed from escrow it is valid in the hands of an innocent holder for value and without notice. As between the parties, delivery may also be conditional; that is that while the actual possession is transferred, it is with the understanding that the instrument is not to become operative until some specified event shall have happened or condition shall have been fulfilled⁵). As in the case of delivery in escrow an innocent holder for value is not affected by the conditions imposed. Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person where signature was placed thereon before delivery⁶).

The language of the Negotiable Instruments Law upon the subject of delivery is: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course the delivery in order to be effectual must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved"⁷).

¹) Neg. Inst. Law, § 54. — ²) Neg. Inst. — ⁵) 7 Cyc. 688. — ⁶) Neg. Inst. Law, § 34. Law, § 51. — ³) Norton, Bills and Notes, 67; — ⁷) Neg. Inst. Law § 35. 7 Cyc. 683. — ⁴) Norton, Bills and Notes, 67.

IX. NEGOTIATION, TRANSFER AND INDORSEMENT. — A. What Constitutes Negotiation. — Commercial paper is said to be negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If the instrument is one which is payable to bearer it may be negotiated by a simple delivery or a transfer of possession. If the instrument is payable to order it is negotiated by the indorsement of the holder, completed by a delivery¹).

B. Indorsement. — While the word "indorsement" in its primary meaning would indicate something written upon the back of the paper, the location of the indorsement upon the instrument is not of material importance. While it is usually placed upon the back it may appear upon the face of the instrument, or in case the frequency of indorsements has left no space upon the instrument an indorsement may be written upon a slip of paper pasted to the original instrument. In the words of the Negotiable Instruments Law the indorsement "may be written on the instrument itself or upon a paper attached thereto"²). No particular form of words is essential to constitute an indorsement: the signature of the indorser is sufficient³). The questions which usually arise concerning the sufficiency of indorsement grow out of words in addition to the signature of the party which it is contended reduce his liability from that of indorser to assignor. The presumption is that the writing is intended as an indorsement, and a contrary intention must clearly appear to prevent its operating as such. And where from the position of the signature upon the instrument it is not clear in what capacity the person making such signature intended to sign, he is to be deemed an indorser.

C. Necessity That Entire Instrument Be Indorsed. — The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue⁴).

D. Kinds of Indorsements. — 1. IN GENERAL. — Indorsements may be either in blank or special. A special indorsement may also be restrictive, qualified or conditional.

2. INDORSEMENTS IN BLANK. — An indorsement in blank is one which specifies no indorsee⁵). An instrument indorsed in blank may be negotiated by delivery and is payable to bearer. A blank indorsement may be converted by the holder into a special indorsement by writing, over the signature of the indorser in blank, any contract consistent with the character of the indorsement⁶).

3. SPECIAL INDORSEMENTS — A special indorsement is one which specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. The ordinary form of special indorsement is as follows, the indorsee's name being assumed to be Richard Roe and that of the indorser John Doe: "Pay to Richard Roe, John Doe;" or "Pay to order of Richard Roe, John Doe;" or "Pay to Richard Roe or order, John Doe."

4. RESTRICTIVE INDORSEMENTS. — An indorsement is restrictive, which either: 1. Prohibits the further negotiation of the instrument; or 2. Constitutes the indorsee the agent of the indorser; or 3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

A restrictive indorsement confers upon the indorsee the right: 1. To receive payment of the instrument; 2. To bring any action thereon that the indorser could bring; 3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsee acquire only the title of the first indorsee under the restrictive indorsement.

5. QUALIFIED INDORSEMENTS. — A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument⁷).

¹) Neg. Inst. Law, § 60. — ²) Neg. Inst. Law, § 61; 7 Cyc. 793. — ³) 7 Cyc. 794; Neg. Inst. Law, § 61. — ⁴) Neg. Inst. Law, § 62. — ⁵) 7 Cyc. 799. — ⁶) Evans v. Gee, 11 Pet. (U. S.) 80; 7 Cyc. 802; Neg. Inst. Law, § 65. — ⁷) 7 Cyc. 809. Neg. Inst. Law, § 68.

6. CONDITIONAL INDORSEMENTS. — Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally¹).

E. Special Indorsement of Instrument Payable to Bearer. — A special indorsement of an instrument payable to bearer does not prevent its further negotiation by delivery, but the liability of the special indorser as indorser extends only to such holders as make title through his indorsement²).

F. Indorsement of Instrument Payable to More Than One Person. — Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others³).

G. Instrument Drawn or Indorsed to Person as Cashier. — Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *primâ facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer⁴).

H. Indorsement by Infant or Corporation. — The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein notwithstanding that from want of capacity the corporation or infant may incur no liability thereon⁵).

I. When Name is Erroneously Spelled or Stated. — When the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature⁶).

J. Indorsements in Representative Capacity. — Any person who is under obligation to indorse in a representative capacity may indorse in such terms as to negative personal liability⁷).

K. Presumptions as to Indorsements. — Every negotiation is deemed *primâ facie* to have been effected before the instrument was overdue, except where the indorsement bears date after the maturity of the instrument⁸).

And unless the contrary appears every indorsement is presumed *primâ facie* to have been made at the place where the instrument is dated⁹).

L. Continuation of Negotiable Character. — Until there has been a restrictive indorsement of the instrument or it has been discharged by payment or otherwise an instrument negotiable in its origin continues to be negotiable¹⁰).

M. Striking Out Indorsements. — The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument¹¹).

N. Effect of Transfer Without Indorsement. — A transfer for value without indorsement, by the holder of an instrument payable to his order, vests in the transferee such title as the transferor had, and the transferee has in addition the right to have the indorsement of his transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made¹²).

O. Negotiation by Prior Party. — Where an instrument is negotiated back to a prior party such party may reissue and further negotiate it. But he is not entitled to enforce payment against any intervening party to whom he was personally liable¹³).

Where his prior indorsement was without recourse or if other circumstances prevent liability on his part toward his indorsee he may recover under the indorsement back¹⁴).

X. PAYMENT AND DISCHARGE. — **A. In General.** — A negotiable instrument may be discharged: 1. By payment in due course by the principal debtor or by some one in his behalf; — 2. By payment in due course by the party accommodated when the instrument is made or accepted for accommodation; — 3. By can-

¹) 7 Cyc. 807; Neg. Inst. Law, § 69. — § 75. — ⁹) Neg. Inst. Law, § 76. — ¹⁰) Neg. Inst. Law, § 77. — ¹¹) 7 Cyc. 797; Neg. Inst. Law, § 78. — ¹²) Neg. Inst. Law, § 79. — ¹³) Neg. Inst. Law, § 80. — ¹⁴) Norton, Bills and Notes, 135.

²) Neg. Inst. Law, § 70. — ³) Neg. Inst. Law, § 71. — ⁴) Neg. Inst. Law, § 72. — ⁵) Neg. Inst. Law, § 41. — ⁶) Neg. Inst. Law, § 73. — ⁷) Neg. Inst. Law, § 74. — ⁸) Neg. Inst. Law,

cellation by the holder with intent to effect its discharge; — 4. By the fact that the principal debtor becomes the holder of the instrument at or after maturity in his own right; — 5. Or generally by any act which would effect the discharge of an ordinary contract having for its object the payment of money. — In case the holder absolutely and unconditionally renounces his rights against the original debtor at or after the maturity of the instrument, and evidences such renunciation in writing, or delivers the instrument to the person primarily liable thereon, it is discharged. But a renunciation does not affect the rights of a holder in due course without notice¹).

B. Time of Maturity. — When a negotiable instrument contains a promise or order to pay upon a stated day, it of course falls due upon such day, with the exception that when such day is a Sunday or a holiday, the day of payment is regarded as the next succeeding secular or business day. It must be borne in mind that in those jurisdictions where days of grace are recognized, this exception does not operate when the last day of grace falls upon a Sunday or a holiday, but in such a case the instrument must be paid upon the preceding business day. In computing time generally, when an instrument is expressed payable a certain number of days after date or demand or sight, the time is calculated by excluding the day of date, demand or sight and including the day of payment²). Where the time is expressed in months, calendar months are taken to be meant, without regard to the number of days included in the particular months embraced within the period.

C. Days of Grace. — By the custom of the law merchant the acceptor was allowed, in the case of foreign bills of exchange, certain days (generally three in number) after the bill was due according to its tenor, within which to provide funds for its payment. These days were computed by excluding the date of maturity according to the tenor of the bill and including the last day of grace or day of payment; and until the expiration of such time the bill was not dishonored by non-payment. From foreign bills of exchange the custom extended under the common law to allow days of grace upon inland bills of exchange and all negotiable instruments save those in which days of grace were expressly waived or which were payable on demand or which were impliedly payable on demand owing to the fact that no time for payment was specified. Under the Negotiable Instruments Law, as adopted in most of the states, days of grace are abolished and the instrument is payable at the time fixed therein³).

D. Where the Instrument is Payable at Bank. — Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon⁴).

E. Payment in Due Course. — Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective⁵).

F. Rights of Party Discharging Instrument. — In case a party secondarily liable upon a negotiable instrument pays it, he may keep it alive as against all prior parties, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, with the exception of cases where the instrument is payable to the order of a third person and has been paid by the drawer, or where the instrument was made or accepted for accommodation and has been paid by the party accommodated.

XI. ACCEPTANCE. — **A. What Constitutes.** — The acceptance of a bill of exchange is the signification by the drawee of his assent to the order of the drawer⁶), or in other words it evidences the agreement of the drawee to pay the amount of the bill when due. Under the Negotiable Instruments Law the acceptance must be in writing and signed by the drawee⁷). But unless prohibited by statute there may be a valid parol acceptance of an existing bill⁸). Under the Negotiable Instruments Law the acceptance must not express that the drawee will perform his promise by any other means than the payment of money⁹).

B. Kinds of Acceptance. — Acceptances are either general or qualified, having distinct effects upon the rights of the parties, which will be considered later¹⁰). A

¹) Neg. Inst. Law, § 203. — ²) Neg. Inst. Law, § 146. — ³) Neg. Inst. Law, § 145. See table of days of grace appended to this article. — ⁴) Neg. Inst. Law, § 147. — ⁵) Neg.

Inst. Law, § 148. — ⁶) Neg. Inst. Law, § 220. — ⁷) Neg. Inst. Law, § 220. — ⁸) Sturges v. Bank, 75 Ill. 595. — ⁹) Neg. Inst. Law, § 220. — ¹⁰) See *infra*, XVI, F.

general acceptance is that which results when the drawee assents to the order of the drawee without condition or qualification. A qualified acceptance is one which in express terms changes the effect of the bill as drawn¹⁾. A general acceptance is a promise to pay according to the tenor of the bill, or in other words to pay the money at the time and place and in the manner specified in it²⁾. An acceptance may be general although it is an agreement to pay at a particular place, unless it expressly stipulates that the bill is to be paid at such place only and not elsewhere³⁾. Where the acceptance varies from the tenor of the bill it is qualified, or, as the same idea is expressed in the Negotiable Instruments Law, it is qualified where it is: 1. Conditional, that is to say where it makes payment by the acceptor dependent upon a condition therein stated; 2. Partial, that is to say where it is an acceptance to pay a part only of the amount for which the bill is drawn; 3. Local, that is to say where it is an acceptance to pay only at a particular place; 4. Qualified as to time; 5. The acceptance of some one or more of the drawees but not of all⁴⁾.

C. Who May Accept. — Acceptance must be by the drawee of the bill⁵⁾ except in the case of an acceptance for honor, which will be hereafter explained⁶⁾.

D. Form and Requisites. — In the absence of statute the acceptance may be in a writing separate from the bill itself; and such an acceptance is permitted by the Negotiable Instruments Law, which differs in this respect from the English Bills of Exchange Act. Such a separate acceptance may be either of an existing bill or of a bill or bills to be drawn in the future. A distinction is to be drawn between the two classes of acceptance, for where an acceptance of an existing bill is written upon a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it was shown and who on the faith thereof received the bill for value⁷⁾. But an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, on the faith thereof, receives the bill for value⁸⁾. Under the Negotiable Instruments Law the holder of a bill upon presentation of such bill for acceptance may require the acceptance to be written upon the bill, and if the request is refused he may treat the bill as dishonored⁹⁾.

E. Time for Acceptance. — After presentation for acceptance the drawee has a reasonable time within which to accept or refuse to accept. Twenty four hours is usually held to constitute a reasonable time¹⁰⁾, and this is the length of time awarded the drawee by the Negotiable Instruments Law¹¹⁾, which, however, provides that although the drawee is entitled to twenty-four hours in which to decide whether he will accept, the acceptance if given dates as of the day of presentation¹²⁾.

F. Effect of Retention or Destruction of Bill. — In case the drawee, after a bill has been delivered to him for acceptance, destroys it or refuses to return it to the holder within twenty-four hours as accepted or non-accepted, he may be held to have accepted the bill¹³⁾. This however would seem not to be the rule in the absence of statute¹⁴⁾.

G. Acceptance of Incomplete or Dishonored Bill. — A bill may be accepted while it is as yet incomplete, as where it is accepted before it is signed by the drawer. It may also be accepted after it is due or after dishonor, whether such dishonor has resulted from a previous refusal to accept or from non-payment. In case however a bill payable after sight is dishonored by non-acceptance and the drawer subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment¹⁵⁾.

H. Rights of Parties as to Qualified Acceptances. — In case the holder is offered only a qualified acceptance he may refuse it and treat the bill as dishonored for non-acceptance, since he has a right to a general acceptance. The effect of taking a qualified acceptance is to discharge the drawer and indorsers unless they have expressly or impliedly authorized the holder to take such an acceptance or unless they subsequently assent thereto. A drawer or indorser must however express to the holder his dissent to a qualified acceptance within a reasonable time after he has received notice of it, or he will be deemed to have assented to it¹⁶⁾.

1) Neg. Inst. Law, § 227. — 2) Norton, Bills and Notes, § 82. — 3) Neg. Inst. Law, § 228. — 4) Neg. Inst. Law, § 229. — 5) Neg. Inst. Law, § 220; Norton, Bills and Notes, 86. — 6) See *infra*, XI, J. — 7) Neg. Inst. Law, § 222. — 8) Neg. Inst. Law, § 223. — 9) Neg. Inst.

Law, § 221. — 10) Norton, Bills and Notes, 103. — 11) Neg. Inst. Law, § 224. — 12) Neg. Inst. Law, § 224. — 13) Neg. Inst. Law, § 225. — 14) See Norton, Bills and Notes, 93. — 15) Neg. Inst. Law, § 226. — 16) Neg. Inst. Law, § 230.

I. Acceptance for Honor. — Acceptance for honor or acceptance *supra* protest may be made only after the bill has been protested¹⁾, and must be with the consent of the holder. It consists on the part of the acceptor for honor of a promise to pay the bill in case the drawer refuses upon due presentment and notice. Any person not already liable upon the bill may accept *supra* protest, and the acceptance may be for the honor of any party already liable thereon or for the honor of the person for whose account the bill is drawn. After one acceptance for honor there may be a further acceptance by a different person for the honor of another party. The acceptance for honor may be for a part only of the sum for which the bill is drawn²⁾. An acceptance *supra* protest must be in writing and indicate that it is an acceptance for honor and be signed by the person who so accepts³⁾. In case it is not expressly stated for whose honor the acceptance is made it is deemed to be an acceptance for the honor of the drawer⁴⁾. In case the bill is payable after sight its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor⁵⁾.

XII. PRESENTMENT FOR ACCEPTANCE. — **A. Necessity.** — Presentment for acceptance is necessary to fix the rights of parties to a bill of exchange only where the bill itself expressly stipulates that it shall be presented for acceptance, or where the bill is payable after sight, or presentment is for some other reason necessary in order to fix the time of its maturity, or unless the bill is drawn payable elsewhere than at the residence or place of business of the drawee⁶⁾. An instrument payable on demand need not be presented for acceptance, but must be presented for payment within a reasonable time. In case of instruments payable after demand the demand must be made within a reasonable time⁷⁾. The holder of an instrument as to which presentment for acceptance is required must either negotiate it or present it for acceptance within a reasonable time. In case he fails to do so the drawer and all indorsers are discharged⁸⁾. A bill may be treated as dishonored for non-acceptance although there has been no actual presentment, presentment for acceptance being deemed to be excused in the following cases: 1. Where the drawer is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; 2. Where after the exercise of reasonable diligence presentment cannot be made; 3. Where, although presentment has been irregular, acceptance has been refused on some other ground⁹⁾.

B. By and to Whom Made. — Presentment for acceptance should be made by or on behalf of the holder of the bill¹⁰⁾. Presentment must be made to the drawee or some person authorized to accept or refuse acceptance on his behalf¹¹⁾. In case the drawees are two or more in number and are not partners, presentment must be made to them all unless there is one of the drawees who has authority to accept or refuse to accept for all, in which case it is sufficient to present the bill to him only¹²⁾. In case the drawee is dead, presentment must be made to his executor or administrator. In case no personal representative has been appointed, presentment may be at the drawee's former place of residence. Where the drawee has been declared a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, presentment may be made to him or to his trustee in bankruptcy or insolvency or to the assignee for creditors.

C. Time. — Presentment must be made before the bill is overdue. But where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers¹³⁾.

Presentment must be upon a business day¹⁴⁾. When Saturday is not otherwise a holiday presentment may be made before twelve o'clock, noon. The Negotiable Instruments Law provides that presentment for acceptance must be at a reasonable hour¹⁵⁾. The question of what is a reasonable hour, not being expressly solved by statute, depends largely upon business custom; but the general principle is that presentment

¹⁾ 7 Cyc. 1062. — ²⁾ Neg. Inst. Law, § 280. — ³⁾ Neg. Inst. Law, § 281. — ⁴⁾ 7 Cyc. 1062; Neg. Inst. Law, § 282. — ⁵⁾ Neg. Inst. Law, § 285. — ⁶⁾ Neg. Inst. Law, § 240. — ⁷⁾ Norton, Bills and Notes, 343. — ⁸⁾ Neg. Inst. Law, § 241. — ⁹⁾ Neg. Inst. Law, § 245. — ¹⁰⁾ 7 Cyc.

753. — ¹¹⁾ 7 Cyc. 753; Neg. Inst. Law, § 242.

— ¹²⁾ Union Bank v. Willis, 8 Metc. (Mass) 504, 41 Am. Dec. 541. — Neg. Inst. Law § 242. — ¹³⁾ Neg. Inst. Law, § 244. — ¹⁴⁾ 7 Cyc. 756. — ¹⁵⁾ 7 Cyc. 755; Neg. Inst. Law, § 242.

must be made at such a time as a person in the exercise of ordinary business prudence would anticipate¹⁾. Presentment at a bank or place of business should ordinarily be during the usual banking or business hours, while presentment at a residence should not be before or after the usual hours for rising and retiring²⁾.

D. Place. — Presentment for acceptance should be at the place stipulated in the bill. In case no place is stipulated in the bill it should be made to the drawee personally, or, in case this cannot be done, first at his place of business and then at his place of residence if that is known³⁾.

E. Effect of Non-Acceptance. — A bill is dishonored where it is properly presented for acceptance and acceptance is refused or cannot be obtained. The same result follows when presentment for acceptance is excused and the bill is not accepted.

F. Necessity That Bill be Treated as Dishonored. — Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers⁴⁾.

G. Rights of Holder Upon Non-Acceptance. — Upon dishonor of a bill by non-acceptance the holder is vested with an immediate right of recourse against the drawers and indorsers, and no presentment for payment is thereafter necessary⁵⁾.

XIII. PRESENTMENT FOR PAYMENT. — **A. Necessity.** — Presentment of a bill or note for payment is important only with regard to the liabilities of the parties secondarily liable thereon, that is to say the drawer and indorsers. The maker of a note and the acceptor of a bill being primarily liable thereon, a failure to present the instrument for payment at any particular time or place will not discharge them from liability to pay the amount thereof⁶⁾. There is however this fact to be noted with respect to failure to present a bill or note to the acceptor or maker for payment at the time and place at which it is payable: that the presence of the acceptor or maker at the time and place of payment with funds for payment has the effect of a tender⁷⁾ and stops the running of interest and removes the liability for costs in the case of suit⁸⁾. But the tender must be kept good, for a demand made at a date later than that specified in the instrument will cause interest again to run from the time of demand, and the maker or acceptor will again be liable for costs in case of suit⁹⁾. With regard to the persons secondarily liable however, — that is to say the drawer and indorsers, — presentment for payment is of extreme importance. Presentment for payment is necessary to charge them¹⁰⁾, there being but two well-recognized exceptions to this rule: the one being in the case of the drawer of a bill who has no right to expect or require that the drawee or acceptor will pay the instrument¹¹⁾; and the other being that presentment for payment is not required to charge an indorsee where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented¹²⁾. Presentment is also dispensed with when after the exercise of reasonable diligence it cannot be made¹³⁾, or where the drawee is a fictitious person¹⁴⁾, or where there has been an express or implied waiver of presentment¹⁵⁾.

B. Sufficiency. — Presentment for payment must be made: 1. By the holder or by some person authorized to receive payment on his behalf¹⁶⁾; 2. At a reasonable hour on a business day; 3. At a proper place; 4. To the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made¹⁷⁾. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient¹⁸⁾. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be

¹⁾ Norton, Bills and Notes, 352. — ²⁾ Dana v. Sawyer, 22 Maine 244, 39 Am. Dec. 574. — ³⁾ Norton, Bills and Notes, 354; — ⁷ Cyc. 756. — ⁴⁾ Neg. Inst. Law, § 247. — ⁵⁾ Neg. Inst. Law, § 248. — ⁶⁾ Neg. Inst. Law, § 130. — ⁷⁾ Neg. Inst. Law, § 130. — ⁸⁾ Norton, Bills and Notes, 366. — ⁹⁾ Norton, Bills and Notes, 367. — ¹⁰⁾ Neg. Inst. Law, § 130. —

¹¹⁾ Neg. Inst. Law, § 139; Norton, Bills and Notes, 394. — ¹²⁾ Neg. Inst. Law, § 140; Norton, Bills and Notes, 395. — ¹³⁾ Neg. Inst. Law, § 142. — ¹⁴⁾ Neg. Inst. Law, § 142. — ¹⁵⁾ Neg. Inst. Law, § 142. — ¹⁶⁾ Mt. Pleasant Branch State Bank v. McSeran, 26 Iowa 306. — ¹⁷⁾ Neg. Inst. Law, § 132. — ¹⁸⁾ Neg. Inst. Law, § 135.

found¹⁾. Where there are several persons, not partners, primarily liable upon the instrument, and no place of payment is specified, presentment must be made to them all²⁾. Where the persons primarily liable upon the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm³⁾.

C. Place. — Presentment for payment should be made: 1. At the place of payment specified in the instrument in case any place is so specified; 2. At the address of the person to make payment given in the instrument in case such address is given and no place of payment is specified; 3. At the usual place of business or residence of the person to make payment in case no place of payment is specified and no address is given; 4. In any other case presentment should be made to the person to make payment wherever he can be found, or at his last-known place of business or residence⁴⁾.

D. Time. Where the instrument is payable on a specific date presentment must be made on the day it falls due⁵⁾. Where the instrument is payable on or after demand or sight it must be presented for payment within a reasonable time after its issue, or in the case of a bill of exchange within a reasonable time after the last negotiation thereof⁶⁾.

E. Exhibit and Delivery of Instrument. — The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it⁷⁾.

F. Delay in Presentment. — As correlative to the rule that presentment for payment may be excused when after the exercise of reasonable diligence it cannot be made, delay in presentment may be excused when it is occasioned by circumstances over which the holder has no control and which cannot be attributed to his default, misconduct or negligence. It must however be noted that in case presentment becomes again possible, or in other words in case the cause of delay ceases to operate, presentment must then be made with reasonable diligence⁸⁾.

G. Effect of Non-Payment. — When a negotiable instrument has been duly presented for payment and the person charged with the duty of making payment refuses to make such payment, or where, although there is no express refusal, payment is evaded and cannot be obtained, the instrument must be regarded as dishonored. In case presentment for payment has been excused as hereinbefore noted and the instrument becomes overdue and unpaid, it is dishonored.

H. Effect of Dishonor for Non-Payment. — In case of dishonor for non-payment of a negotiable instrument the holder has a right of immediate recourse to the parties secondarily liable thereon⁹⁾, provided of course that such rights are preserved by the due observance of the formalities of giving notice, which will be hereinafter considered.

I. Presentment After Acceptance For Honor. — Where a bill has been accepted for honor¹⁰⁾ it must be presented for payment to the acceptor for honor not later than the day following its maturity in case it is to be presented in the place where the protest was made; in case it is to be presented in some other place then it must be forwarded by deposit in the post office in time to go by mail the day following its maturity, or, in case there be no mail at a convenient hour on that day, by the next mail thereafter¹¹⁾. In case the instrument is not forwarded by mail it must be so forwarded that it will be received in the same time as it would have been received in the due course of the mail had it been forwarded thereby as just noted¹²⁾. Delay in presentment to an acceptor for honor or referee in case of need is excused where not imputable to the default, misconduct, or negligence of the holder, and caused by circumstances beyond his control¹³⁾. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him¹⁴⁾.

XIV. NOTICE OF DISHONOR. — **A. Definition.** — Notice of dishonor consists in informing the drawer or indorser of a negotiable instrument that such instrument upon proper proceedings taken has not been accepted or has not been paid and that the party notified is expected to pay it¹⁵⁾.

¹⁾ Neg. Inst. Law, § 136. — ²⁾ 7 Cyc. 1001; Neg. Inst. Law, § 138. — ³⁾ 7 Cyc. 1002; Neg. Inst. Law, § 137. — ⁴⁾ Neg. Inst. Law, § 133. — ⁵⁾ Neg. Inst. Law, § 131. — ⁶⁾ Neg. Inst. Law, § 131. — ⁷⁾ 7 Cyc. 797; Neg. Inst. Law, § 134. — ⁸⁾ Neg. Inst. Law, § 141. —

⁹⁾ Neg. Inst. Law, § 144. — ¹⁰⁾ See *supra*, XI, J. — ¹¹⁾ Neg. Inst. Law, §§ 287, 175. — ¹²⁾ Neg. Inst. Law, §§ 287, 175. — ¹³⁾ Neg. Inst. Law, §§ 288, 141. — ¹⁴⁾ Neg. Inst. Law, § 289. — ¹⁵⁾ Norton, Bills and Notes, 372.

B. Necessity. — Notice of dishonor is necessary in all cases to charge an indorser or drawer except that in the case of a drawer, notice need not be given: 1. Where the drawer and drawee are the same person; 2. Where the drawee is a fictitious person or a person not having capacity to contract; 3. Where the drawer is the person to whom the instrument is presented for payment; 4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; 5. Where the drawer has countermanded payment¹). And in the case of an indorser, notice of dishonor need not be given: 1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of that fact at the time he executed the indorsement; 2. Where the indorser is the person to whom the instrument is presented for payment; 3. Where the instrument was made or accepted for his accommodation²). With these exceptions, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of non-payment must be given to the drawer and to each indorser; and any drawer or indorser to whom such notice is not given is discharged³). Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. After non-acceptance of a bill and the giving of due notice thereof, further notice of a dishonor by non-payment need not be given unless in the interim there has been an acceptance of the instrument.

C. Sufficiency of Notice. — No particular form of words is required for a notice of dishonor. All that is necessary is that the words employed be such as will identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. The further element that the notice must be such as to inform the person to whom it is given of the fact that payment is expected of him is supplied, where not directly expressed in the notice, from the fact that the notice must be given by one entitled to such payment⁴). The notice need not be in writing⁵) and may be given in person or by sending it through the mails. While it is usual to describe the instrument by date, amount and parties, and state where it is held for payment, all that is necessary is that the notice does not mislead the party and that it informs him what instrument is to be paid. From this it results that the sufficiency of a particular notice is a fact question⁶). A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom notice is given is in fact misled thereby⁷).

D. Who may give Notice. — Notice of dishonor may be given by, or at the instance of, any person who is a party to, or lawfully in possession of, the dishonored bill or note, and who would be a competent witness to prove such demand and notice⁸). Or as the same idea is expressed in the Negotiable Instruments Law, the notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given⁹). Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon¹⁰) or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder¹¹). Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not¹²).

E. To Whom Notice should be Given. — In general it is advisable that notice of dishonor of a bill or note should be given to all parties whom one may afterwards desire to hold liable on such paper¹³). It should be given either to the party himself or to his agent in that behalf¹⁴). When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of

¹) Neg. Inst. Law, § 185. — ²) Neg. Inst. Law, § 186. — ³) Neg. Inst. Law, § 160. — ⁴) See *infra*, XIV, D. — ⁵) Neg. Inst. Law, § 167. — ⁶) Norton, Bills and Notes, 374. — ⁷) Neg. Inst. Law, § 166. — ⁸) 7 Cyc. 1078. — ⁹) Neg. Inst. Law, § 161. — ¹⁰) 7 Cyc. 1079. — ¹¹) Neg. Inst. Law, § 165. — ¹²) Neg. Inst. Law, § 162. — ¹³) 7 Cyc. 1066. — ¹⁴) Neg. Inst. Law, § 168.

business of the deceased¹). Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution²). Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others³). Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his assignee⁴).

F. Persons Entitled to Benefit of Notice. — Where the holder gives notice or it is given by some one on his behalf it enures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given⁵). And where notice is given by or on behalf of a party entitled to give notice, it enures to the benefit of the holder and all parties subsequent to the party to whom notice is given⁶).

G. Time within which Notice must be Given. — Notice of the dishonor of a bill or note must in all cases be given within a reasonable time, and due diligence must be used in order to charge persons secondarily liable, not only by the holder but by every party through whom the notice is transmitted, from the holder up to the party charged⁷). Notice may be given as soon as the instrument is dishonored⁸). There has been some conflict in the decisions as to what constitutes reasonable time, although there has been a constant trend toward uniformity; and the rules laid down in the Negotiable Instruments Law as to the time in which notice must be given may be taken as a practical codification of the decisions on the subject. By that law it is provided that where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following; 2. If given at his residence, it must be given before the usual hours of rest on the day following; 3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following⁹). Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: 1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; 2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified for the service of notice by mail¹⁰). A miscarriage of the notice in the mails will not prevent the sender from being deemed to have given due notice in case the notice of dishonor has been duly addressed and deposited in the post office¹¹). Notice is deemed to have been deposited in the post office when deposited in any branch office or in any letter-box under the control of the Post-Office Department¹²). Where a party receives notice of dishonor he has, after receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor¹³). A delay in giving notice of dishonor may be excused when caused by circumstances which are beyond the control of the party charged with the duty of giving notice and not imputable to his default, misconduct or negligence. When the causes of delay cease to operate, notice must be given with reasonable diligence.

H. Place of Giving Notice. — It is as a general rule immaterial where notice is given, provided the person to whom it must be given receives it in due time¹⁴). In case, however, an address has been given by a party, notice of dishonor should be sent to him there¹⁵). In the absence of such an address the Negotiable Instruments Law (which is a practical codification of the prior case law upon the subject) provides that notice must be sent as follows: 1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; 2. If he live in one place and have his place of business in another, notice may be sent to either place; 3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning¹⁶). The Negotiable Instruments Law

¹) Neg. Inst. Law, § 169. — ²) Neg. Inst. Law, § 170; 7 Cyc. 1075. — ³) Neg. Inst. Law, § 171; 7 Cyc. 1075. — ⁴) Neg. Inst. Law, § 172; 7 Cyc. 1078. — ⁵) Neg. Inst. Law, § 163. — ⁶) Neg. Inst. Law, § 164. — ⁷) 7 Cyc. 1081. — ⁸) Neg. Inst. Law, § 173. — ⁹) Neg. Inst.

Law, § 175. — ¹⁰) Neg. Inst. Law, § 175. — ¹¹) Neg. Inst. Law, § 176. — ¹²) Neg. Inst. Law, § 177. — ¹³) 7 Cyc. 1084; Neg. Inst. Law, § 178. — ¹⁴) 7 Cyc. 1089. — ¹⁵) 7 Cyc. 1084. — ¹⁶) Neg. Inst. Law, § 179.

provides further, however, that it shall be sufficient if the notice is actually received within the proper time, though not sent in accordance with the foregoing provisions.

I. Waiver. — A party entitled to notice of dishonor may waive such notice either before or after the time of giving notice has arrived or after the omission to give due notice. Such a waiver may be either express or implied. In case a waiver of notice is set out in the instrument itself it is binding upon all parties. Where, however, it is written above the signature of an indorser it binds him only. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor¹).

J. Omission to give Notice of Non-Acceptance. — An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission²).

XV. PROTEST OF BILLS OF EXCHANGE. — **A. Necessity.** — The drawer and indorsers of a foreign bill which appears on its face to be such are discharged by failure to duly protest for non-acceptance in case the bill is dishonored by non-acceptance, or to protest for non-payment when a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment. But protest is not necessary in case the bill does not appear on its face to be a foreign bill³).

B. Protest for Better Security. — Protest for better security against the drawer and indorsers is specifically authorized by the Negotiable Instruments Law in case the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures⁴).

C. Excuses for Failure to Protest. — As a general rule it may be stated that the conjunction of the same circumstances which, as already seen, will excuse notice of dishonor⁵), will obviate the necessity of notice of protest⁶). Delay in noting or protesting may be excused when the delay is caused by circumstances which are not imputable to the default, misconduct, or negligence of the holder and are beyond his control. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

D. Who may Make. — Protest should ordinarily be made by a notary public in person, or, where such protest cannot be conveniently had, by any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses⁷).

E. Time. — Protest must be made on the day on which the bill is dishonored unless, as has been stated, delay is excused. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

F. Place. — A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary⁸).

G. Form and Requisites. — It is not necessary that a certificate of protest follow any particular form; it must be sufficient however to identify the bill, and must show when and where the bill was presented, that it was presented and how, the cause or reason for protest, the demand made, the answer given if any, or the fact that the drawee or acceptor could not be found⁹). The bill is usually identified by the fact that is annexed to the certificate or a copy set out therein. The protest must be under the hand and seal of the notary.

H. Lost or Withheld Bill. — In case the bill has been lost or is destroyed, or in case it is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof¹⁰).

I. Protest both for Non-Payment and Non-Acceptance. — The fact that a bill has already been protested for non-acceptance will not prevent its subsequent protest for non-payment¹¹).

J. Bill Accepted for Honor, Etc. — In case a dishonored bill has been accepted for honor *supra* protest or contains a provision for reference in case of need, it must

¹) Neg. Inst. Law, § 182. — ²) Neg. Inst. Law, § 188. — ³) Neg. Inst. Law, § 260; 7 Cyc. 1052. — ⁴) Neg. Inst. Law, § 266. — ⁵) See *supra*, XIV, B. — ⁶) Neg. Inst. Law, § 267. —

⁷) 7 Cyc. 1054; Neg. Inst. Law, § 262. — ⁸) Neg. Inst. Law, § 264. — ⁹) 7 Cyc. 1057 *et seq.* — Neg. Inst. Law, § 261. — ¹⁰) Neg. Inst. Law, § 268. — ¹¹) Neg. Inst. Law, § 265.

be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need¹).

K. Payment *supra* Protest. — In case a bill has been protested for non-payment it may be paid by any person for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. But where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given preference. A payment for honor will not act as such unless attested by the notary²), otherwise it is to be regarded as a mere voluntary payment; and the notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. The effect of a payment for honor is to discharge all parties subsequent to the party for whose honor it is paid, but the payer for honor succeeds to all the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. In case the holder of a bill refuses to receive payment *supra* protest he loses his right of recourse against any party who would have been discharged by such payment. The payer for honor is entitled to receive the bill and the protest on paying to the holder the amount of the bill and the notary fees.

XVI. THE LIABILITY OF PARTIES. A. In General. — The parties to negotiable instruments are divisible into two classes: those primarily and those secondarily liable for their payment.

B. Primary Liability. — Parties primarily liable upon negotiable instruments are those who by the terms of the instrument are absolutely required to pay it when it becomes due. All other parties are secondarily liable³). In the case of a promissory note the party primarily liable is the maker. In the case of a bill of exchange the party primarily liable is the acceptor. It should be observed however that the similarity of the liabilities of the maker and the acceptor goes no further than this one element: that is that they both promise to pay the instrument when it becomes due according to its terms.

C. Secondary Liability. — All the parties not primarily liable upon a negotiable instrument are regarded as secondarily liable. Those secondarily liable include indorsers of bills and notes, the drawer of a bill of exchange and acceptors for honor or acceptors *supra* protest.

D. The Maker's Undertaking. — The maker of a note negotiable in its nature by the execution of the note undertakes to pay it according to its tenor. He also admits that the payee is in existence and has, at the time of the execution of the note, capacity to indorse it⁴).

E. The Drawer's Undertaking. — The drawer of a bill of exchange agrees that the instrument on proper presentment will be accepted or paid, or both, according to its tenor. He also admits the existence of the payee and his capacity at the time to indorse the instrument. He further undertakes, unless he limits his agreement by an express stipulation, that in event the instrument is dishonored and the necessary proceedings on dishonor are taken that he will pay the amount of the instrument to the holder or to any subsequent indorser who may be compelled to pay it⁵).

F. The Liability of the Acceptor. — 1. IN GENERAL. — The agreement of the acceptor of a bill of exchange is, as to the matter of payment, similar to that of the maker. He undertakes to pay the instrument according to the tenor of his acceptance. In case the acceptance is unqualified he agrees to pay the instrument according to its tenor⁶). The acceptance is also regarded as evidencing certain admissions by the acceptor. These admissions with regard to the drawer of the instrument are that the drawer is in existence, that he has capacity and authority to draw the instrument and that his signature is genuine⁷). With regard to the payee the acceptor admits the existence of the payee and his then capacity to indorse the instrument⁸). The admission of the genuineness of the bill does not however go farther than the genuineness of the signature; it does not prevent him from asserting a forgery or alteration in the terms of the bill, such as in its amount or in the

¹) Neg. Inst. Law, § 286. — ²) Neg. Inst. Law, § 301. — ³) Neg. Inst. Law, § 3. — ⁴) Neg. Inst. Law, § 110. — ⁵) Neg. Inst. Law, § 111. — ⁶) Neg. Inst. Law, § 112. — ⁷) Neg. Inst. Law, § 112. — ⁸) Neg. Inst. Law, § 112.

date or in the name of the payee¹⁾. The acceptor is regarded as bound to know the genuineness of the drawer's signature, and his acceptance admits such fact; but he is not charged with similar knowledge as to the signatures of the payee or subsequent indorsees, and therefore his acceptance does not admit that indorsements are genuine²⁾.

2. ACCEPTORS FOR HONOR. — An acceptor for honor incurs liability to the holder of the bill and to all parties subsequent to the party for whose honor he has accepted³⁾. His agreement is to pay the bill upon its presentment according to the terms of its acceptance in case it shall not have been paid by the drawee, and in case further, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him⁴⁾.

G. Indorsers. — **1. PERSONS REGARDED AS INDORSERS IN GENERAL.** — Any person who places his signature upon a negotiable instrument other than as maker, drawer, or acceptor is regarded as an indorser unless by the employment of appropriate words he has clearly indicated his intention to be bound in some other capacity⁵⁾.

2. SIGNATURE BY PERSON IN BLANK BEFORE DELIVERY. — Where, before an instrument is delivered, a person who is not otherwise a party to it places his signature upon it in blank and without words indicating his purpose, he becomes liable as an indorser to certain parties under the following rules: 1. He is liable as indorser to the payee and to all subsequent parties to an instrument payable to the order of a third person. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. One who signs for the accommodation of the payee is liable to all parties subsequent to the payee⁶⁾.

3. LIABILITIES OF REGULAR INDORSERS. — Where an indorsement is unqualified the indorser is regarded as making certain warranties to all subsequent holders of the instrument who take it in good faith and for value before it is overdue and without notice of any previous dishonor or of any infirmity in the instrument or defect in the title of the person negotiating it. The first and perhaps the most important of these warranties is that the instrument is genuine and in all respects what it purports to be⁷⁾. Secondly, he warrants that he has a good title to the instrument⁸⁾. Third, he warrants that all prior parties to the instrument had capacity to contract⁹⁾. Finally, he warrants that at the time of his indorsement the instrument is valid and subsisting¹⁰⁾. In addition to these warranties, the indorser agrees that upon due presentment the instrument shall be accepted or paid, or both, according to its tenor, and in case it is dishonored and the necessary proceedings to charge him¹¹⁾ are duly taken, that he will pay the amount of the instrument to the holder or to any subsequent indorser who shall be compelled to pay it¹²⁾.

4. NEGOTIATION BY DELIVERY OR QUALIFIED INDORSEMENTS. — Under the Negotiable Instruments Law, every person negotiating an instrument by delivery or by a qualified indorsement warrants that the instrument is genuine and in all respects what it purports to be; that he has good title to it; that all prior parties had capacity to contract; that he has no knowledge of any fact that would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The warranty as to capacity to contract does not apply to persons negotiating public or corporate securities other than bills and notes¹³⁾. By another section of the same law these liabilities are extended to a broker or agent who negotiates an instrument without indorsement unless he discloses the name of his principal and the fact that he is acting only as agent¹⁴⁾.

5. INDORSER OF INSTRUMENT NEGOTIABLE BY DELIVERY. — A person who places his name as indorser upon an instrument which is negotiable by delivery incurs all the liabilities of an indorser¹⁵⁾.

6. LIABILITY AS BETWEEN INDORSERS. — As to each other, indorsers are liable in the order in which they indorse; but this order is presumptive merely and it may be shown that as between or among themselves they have agreed

1) Norton, Bills and Notes, 151. — 2) Norton, Bills and Notes, 151. — 3) Neg. Inst. Law, § 283. — 4) Neg. Inst. Law, § 284. — 5) Neg. Inst. Law, § 113. — 6) Neg. Inst. Law, § 114. — 7) Neg. Inst. Law, § 116. — 8) Neg. Inst.

Law, § 116. — 9) Neg. Inst. Law, § 116. — 10) Neg. Inst. Law, § 116. — 11) See *supra*, XIII, XIV, XV. — 12) Neg. Inst. Law, § 116. — 13) Neg. Inst. Law, § 115. — 14) Neg. Inst. Law, § 119. — 15) Neg. Inst. Law, § 117.

otherwise. The liability of joint payees or joint indorsers upon their indorsement is regarded as joint and several¹).

H. Accommodation Parties. — An accommodation party is one who has signed a bill or note as acceptor or drawer, maker or indorser without recompense and for the purpose of lending his name to some other person as a means of credit²). An accommodation party incurs no liability towards the person accommodated, but as to a holder for value he is liable upon the instrument although such person at the time of taking the instrument knew him to be only an accommodation party³). The party accommodated is bound to pay the bill or note or repay the accommodation party for all loss occasioned by his default⁴). As between himself and the party accommodated the accommodation party is in effect a surety⁵).

I. Discharge of Persons Secondarily Liable. — A person who is secondarily liable upon a negotiable instrument is discharged by any act which discharges the instrument⁶); or by the intentional cancellation of his signature by the holder; or by the discharge of one liable prior to him; or by a valid tender of payment made by a prior party; or by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; or, lastly, by any agreement, binding upon the holder, to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.

XVII. RIGHTS OF HOLDER. — A. In General. — It is in the rights of holders of negotiable instruments that are to be found some of the most distinctive characteristics of such contracts as compared with others. In considering such rights it is necessary first to divide such holders into two classes: Holders in due course and holders not in due course. The importance of the distinction lies in the fact that a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon⁷). While in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter⁸).

B. Holders in Due Course. — Under the Negotiable Instruments Law a bona fide purchaser is termed a "holder in due course" and is defined as one who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face. 2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it. A person is not deemed a holder in due course where he becomes the holder of an instrument payable on demand by negotiation an unreasonable length of time after its issue. A person may secure the rights of a holder in due course only partially, as in a case where the transferee receives notice of any infirmity in the instrument, or defect in the title of the person negotiating the same, before he has paid the full amount which he has agreed to pay therefor. Under such circumstances he will be deemed a holder in due course only to the amount theretofore paid by him. The title of a person negotiating an instrument will be regarded as defective when the instrument or any signature thereto was obtained by him through fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or where he negotiates it in breach of faith, or under such circumstances as amount to a fraud. To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument

¹) Neg. Inst. Law, § 118. — ²) Norton, Bills and Notes, p. 176. — ³) Neg. Inst. Law, § 55. — ⁴) Norton, Bills and Notes, 176. — ⁵) 7 Cyc. 725. — ⁶) See *supra*, X. — ⁷) Neg. Inst. Law, § 96. — ⁸) Neg. Inst. Law, § 97.

was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title¹). Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time²). Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien³).

XVIII. ACTIONS. — It is not within the scope of this article to give any attempt at stating the rules governing actions upon commercial paper. Such actions are controlled by the ordinary rules of civil procedure, and any attempt to state such peculiarities as exist with reference to them would be misleading unless accompanied by an exposition of such general rules of procedure and at a length which would be impracticable here. Under the Negotiable Instruments Law the holder of a negotiable instrument may sue thereon in his own name⁴). Where the Negotiable Instruments Law is not in effect the rule is perhaps more accurately stated that: "The person to whom a bill or note is negotiated or to whom it is transferred by operation of law acquires the right to sue thereon in his own name"⁵). The code rule requiring all actions to be brought by the real party in interest has been construed merely to require that an action upon a bill or note shall be brought by the person having legal title⁶).

XIX. DEFENSES. — **A. In General.** — Between the original parties a negotiable instrument is subject to all the defenses which would operate to prevent the enforcement of an ordinary contract, in particular an ordinary contract involving the payment of money. These defenses are more appropriately treated in a general article on contracts than in one upon commercial paper. It is with regard to the rights of subsequent holders that the law of commercial paper is peculiar, for in some cases defenses are unavailable against them which would destroy the enforceability of the negotiable instrument were it any other kind of a contract. It is necessary at the outset however to note the distinction between the two classes of subsequent holders, viz.: Those take in good faith for value and without notice of the infirmity before maturity of the instrument, and those who take after maturity or with notice or who do not take in good faith and for value. The latter class stand in the position of the original parties, and as against them the same defenses may be asserted as against the original parties. It will be seen therefore that the peculiarities of the law of negotiable instruments are found only in the rights of the bona fide purchaser for value and without notice, and these only will be considered here. Persons who may be regarded as bona fide purchasers have already been considered⁷).

B. Classes of Defenses. — Defenses to negotiable instruments are of two kinds: First those which strike directly at the existence of the contract and which go to show either that there never has been a contract or that it has ceased to exist. Second those which admit the existence of the contract, but go to show facts which would render its enforcement inequitable or unjust as between the parties, for the reason that it would allow the party attempting to enforce it to take advantage of his own wrong. Defenses of the first class may be asserted even as against bona fide holders, but defenses of the second class cannot.

C. Defenses Good as to Bona Fide Holders. — **1. INCAPACITY TO CONTRACT.** — *a) Insanity.* — Where a person has been adjudged insane a negotiable instrument cannot be enforced against him even by a bona fide holder, but it may be proved against his estate in case it is a just claim. In case the person has not been adjudged insane it would seem that a bona fide holder may enforce the instrument; but he has the burden of proving that he was ignorant of the insanity, and further that the transaction upon which the note is based was a fair one and that in case the note is not enforced he cannot be placed in *statu quo*⁸).

b) Drunkenness. — Where a committee has been appointed for a person as an habitual drunkard his negotiable instruments are subject to the rules governing those of an insane person after inquisition. In case no committee has been appointed

¹) Neg. Inst. Law, § 98. — ²) Neg. Inst. Law, § 52. — ³) Neg. Inst. Law, § 53. — ⁴) Neg. Inst. Law, § 90. — ⁵) Norton, Bills and Notes,

212. — ⁶) See also *supra*, IV. — ⁷) See *supra*, XVII, B. — ⁸) Norton, Bills and Notes.

it would seem that a note executed by person so intoxicated that he had no comprehension of the character of his act is not enforceable even by a bona fide holder¹⁾.

c) *Infancy*. — The note of an infant is regarded as voidable even as against a bona fide holder for value. But the right to assert its voidable character is personal to the infant²⁾.

d) *Coverture*. — As a general rule, in the United States a married woman may contract as if sole; and as a result coverture is no defense to her notes either in the hands of a bona fide holder or otherwise.

2. **ILLEGALITY**. — Where a negotiable instrument is based upon an illegal consideration it is enforceable in the hands of a bona fide purchaser³⁾. Where however it is in contravention of a statute which declares the contract void, or is for a penalized consideration, it is not enforceable even in the hands of a bona fide holder⁴⁾.

3. **USURY**. — When a note is void for usury it cannot be enforced by a bona fide holder. This rule extends to those who take after an indorsement void for usury. However the rights of bona fide holders are frequently protected by the terms of statutes defining usury⁵⁾.

4. **ALTERATION**. — Where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor⁶⁾. Any alteration which changes: 1. The date; 2. The sum payable, either for principal or interest; 3. The time or place of payment; 4. The number or the relations of the parties; 5. The medium or currency in which payment is to be made; or 6. Which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, — is a material alteration⁷⁾.

5. **FORGERY**. — When the signature to an instrument is forged or made without authority it is wholly inoperative, and no rights can be acquired through or under such signature, unless the person against whom it is sought to enforce such right is precluded from setting up such forgery or want of authority⁸⁾.

D. Defenses Not Available against Bona Fide Holders. — 1. **IN GENERAL**. — As a general rule a bona fide holder may enforce a negotiable instrument although there are circumstances which would cause a court to refuse to enforce it as between the original parties because it would be to enable a party to take advantage of his own wrong.

2. **FRAUD**. — Where a person is induced to execute a negotiable instrument by means of fraud or false representations such fact constitutes no defense as against a purchaser without notice, unless the fraud consisted in inducing the person to sign the instrument under the belief that he was signing one of a different character, and the person signing acted without negligence⁹⁾.

3. **TOTAL OR PARTIAL FAILURE OF CONSIDERATION**. — Want of consideration or inadequacy thereof, while a defense *pro tanto* as between the original parties, cannot be urged as a defense as against a bona fide purchaser for value¹⁰⁾.

4. **ILLEGALITY OF CONSIDERATION**. — The fact that a negotiable instrument is given for an illegal consideration, while a defense as between the original parties, will not so operate as against an innocent purchaser, unless by statute it is declared that the fact that the instrument is based upon such a consideration shall render it void, or shall subject the parties to a penalty.

5. **PAYMENT OR CANCELLATION BEFORE MATURITY**. — Payment or cancellation of the instrument before maturity affords no defense as against a bona fide holder who takes it for value before maturity and without notice of the defect¹¹⁾. So where a person paying a note or making a partial payment thereon fails to take up the paper or have the payment indorsed thereon he cannot urge a defense of payment as against a bona fide holder.

¹⁾ Norton, Bills and Notes. — ²⁾ Norton, Bills and Notes. — ³⁾ 8 Cyc. 45. — ⁴⁾ 8 Cyc. 47. — ⁵⁾ Norton, Bills and Notes; 8 Cyc. 48. — ⁶⁾ Neg. Inst. Law, § 205. — ⁷⁾ Neg. Inst. Law, § 206. — ⁸⁾ Neg. Inst. Law, § 42. — ⁹⁾ Norton, Bills and Notes; 8 Cyc. 37. — ¹⁰⁾ 8 Cyc. 31. — ¹¹⁾ 8 Cyc. 58.

Statutes on Commercial Paper.

Uniform Negotiable Instruments Law.¹⁾

A general Act relating to Negotiable Instruments, being an Act to establish a Law uniform with the Laws of other States on that Subject.²⁾

Title I. Negotiable instruments in general.

Article I. Form and interpretation.

Sec. 1. [20] Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements: 1. It must be in writing and signed by the maker or drawer; 2. Must contain an unconditional promise or order to pay a sum certain in money; 3. Must be payable on demand, or at a fixed or determinable future time; 4. Must be payable to order or to bearer; and 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

The Wisconsin act adds: "But no order drawn upon or accepted by the treasurer of any county, town, city, village, or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading, and railroad receipts upon the face of which the words "not negotiable," shall not be plainly written, printed, or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes as the same have been construed by the Supreme Court."

Sec. 2. [21] Certainty as to sum; what constitutes. The sum payable is a sum certain within the meaning of this act, although it is to be paid: 1. With interest; or 2. By stated instalments; or 3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or 4. With exchange, whether at a fixed rate or at the current rate; or 5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

The acts of Idaho, Iowa, and North Carolina omit the words "or of interest" in subsection 3.

The Nebraska act adds: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this state any sum for attorney's fees or other costs not allowable in other cases."

The North Carolina act adds a new section, sec. 197: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof."

Sec. 3. [22] When promise is unconditional. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: 1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or 2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

Sec. 4. [23] Determinable future time; what constitutes. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: 1. At a fixed period after date or sight; or 2. On or before a fixed or determinable future time specified therein; or 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

The Wisconsin act substitutes, for the sentence beginning with "an instrument is payable upon a contingency, etc." the following: "4. At a fixed period after the date or sight, though

¹⁾ For a list of states in which this act is now adopted, see *supra*, p. 179. — ²⁾ The title of the act varies in the several states. The numbering of the sections varies somewhat. The section numbers here given are those of the draft act prepared by the Commissioners for Uniform State Laws. As the references in

the article on Commercial Paper are to the sections of the New York act, the section numbers of this act are given in brackets immediately after the section number of the draft. Essential differences in the phraseology of the sections as adopted in the several states are set forth in the notes.

payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

Sec. 5. [24] Additional provisions not affecting negotiability. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: 1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or 2. Authorizes a confession of judgment if the instrument be not paid at maturity; or 3. Waives the benefit of any law intended for the advantage or protection of the obligor; or 4. Gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.

The Illinois act reads as follows: "An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable under this act. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: 1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or 2. Authorizes a confession of judgment; or 3. Waives the benefit of any law intended for the advantage or protection of the obligor; or 4. Gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal or authorize the waiver of exemptions from execution."

In the Kentucky act subsection 3 is omitted.

In the Wisconsin act the words "or authorize the waiver of exemptions from execution" are added at the end of the section.

Sec. 6. [25] Omissions; seal; particular money. The validity and negotiable character of an instrument are not affected by the fact that: 1. It is not dated; or 2. Does not specify the value given, or that any value has been given therefor; or 3. Does not specify the place where it is drawn or the place where it is payable; or 4. Bears a seal; or 5. Designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

In the Illinois act subsection 5 reads as follows: "Is payable in currency or current funds; or designates a particular kind of current money in which payment is to be made." The last sentence is omitted.

Sec. 7. [26] When payable on demand. An instrument is payable on demand: 1. Where it is expressed to be payable on demand, or at sight, or on presentation; or 2. In which no time for payment is expressed. Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Sec. 8. [27] When payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of: 1. A payee who is not maker, drawer, or drawee; or 2. The drawer or maker; or 3. The drawee; or 4. Two or more payees jointly; or 5. One or some of several payees; or 6. The holder of an office for the time being. Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

The Illinois act inserts after the words "for the time being" the following: "7. An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

Sec. 9. [28] When payable to bearer. The instrument is payable to bearer: 1. When it is expressed to be so payable; or 2. When it is payable to a person named therein or bearer; or 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or 4. When the name of the payee does not purport to be the name of any person; or 5. When the only or last indorsement is an indorsement in blank.

In the Illinois act subsections 3 and 5 read as follows: "3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it." "5. When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

Sec. 10. [29] Terms when sufficient. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

The Wisconsin act adds: "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument and parol evidence is admissible to show the circumstances under which they were made."

Sec. 11. [30] Date, presumption as to. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement, as the case may be.

Sec. 12. [31] Ante-dated and post-dated. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Sec. 13. [32] When date may be inserted. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Sec. 14. [33] Blanks; when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

In the Illinois act the last sentence reads as follows: "But if any such instrument, after completion, is issued or negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

The Wisconsin act reads as follows: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it prior to negotiation by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as an authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Sec. 15. [34] Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Sec. 16. [35] Delivery; when effectual; when presumed. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

The Kansas act omits the sentence reading: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

The North Carolina act reads as follows: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course

the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

Sec. 17. [36] Construction where instrument is ambiguous. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: 1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount; 2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof; 3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued; 4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail; 5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election; 6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser; 7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

In the North Carolina act subsection 2 is omitted.

The Wisconsin act adds a new subsection reading: "8. Where several writings are executed at or about the same time, as parts of the same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

Sec. 18. [37] Liability of person signing in trade or assumed name. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Sec. 19. [38] Signature by agent; authority; how shown. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

The Kentucky act reads as follows: "The signature of any party may be made by an agent duly authorized in writing. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

Sec. 20. [39] Liability of person signing as agent, etc. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

The Virginia act reads as follows: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, without disclosing his principal, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

Sec. 21. [40] Signature by procuration; effect of. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Sec. 22. [41] Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Sec. 23. [42] Forged signature; effect of. Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or

to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

The Illinois act reads as follows: "Where a signature is forged or made without authority it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

Article II. Consideration.

Sec. 24. [50] Presumption of consideration. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Sec. 25. [51] Consideration, what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

The Wisconsin act reads as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt, discharged, extinguished or extended, constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

Sec. 26. [52] What constitutes holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Sec. 27. [53] When lien on instrument constitutes holder for value. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Sec. 28. [54] Effect of want of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Sec. 29. [55] Liability of accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

The Illinois act reads as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party and in case a transfer after maturity was intended be the accommodating party notwithstanding such holder acquired title after maturity."

Article III. Negotiation.

Sec. 30. [60] What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Sec. 31. [61] Indorsement; how made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

The Illinois act reads as follows: "The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement, and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated."

Sec. 32. [62] Indorsement must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Sec. 33. [63] Kinds of indorsement. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

Sec. 34. [64] Special indorsement; indorsement in blank. A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Sec. 35. [65] Blank indorsement; how changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Sec. 36. [66] When indorsement restrictive. An indorsement is restrictive, which either: 1. Prohibits the further negotiation of the instrument; or 2. Constitutes the indorsee the agent of the indorser; or 3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Sec. 37. [67] Effect of restrictive indorsement; rights of indorsee. A restrictive indorsement confers upon the indorsee the right: 1. To receive payment of the instrument; 2. To bring any action thereon that the indorser could bring; 3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

The Illinois act reads as follows: "A restrictive indorsement confers upon the indorsee the right: 1. To receive payment of the instrument. 2. To bring any action thereon that the indorser could bring or except in the case of a restrictive indorsement specified in section 36, subsection 2, any action against the indorser or any prior party that a special indorsee would be entitled to bring. 3. To transfer the instrument where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement specified in section 36, subsection 1, and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsements specified in section 36, subsections 2 and 3 respectively."

Sec. 38. [68] Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

Sec. 39. [69] Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Sec. 40. [70] Indorsement of instrument payable to bearer. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

The Illinois act reads as follows: "Where an instrument originally payable to or indorsed specifically to bearer is subsequently indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

Sec. 41. [71] Indorsement where payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

The Wisconsin act reads as follows: "Where an instrument is payable to the order of two or more payees or joint indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."

Sec. 42. [72] Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Sec. 43. [73] Indorsement where name is misspelled, et cetera. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Sec. 44. [74] Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Sec. 45. [75] Time of indorsement; presumption. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

Sec. 46. [76] Place of indorsement; presumption. Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

Sec. 47. [77] Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Sec. 48. [78] Striking out indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Sec. 49. [79] Transfer without indorsement; effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

The Colorado act adds at the end of the first sentence: "if omitted by mistake, accident, or fraud."

The Illinois and Missouri acts read as follows: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

The Wisconsin act adds: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of transfer."

Sec. 50. [80] When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Article IV. Rights of the holder.

Sec. 51. [90] Right of holder to sue; payment. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Sec. 52. [91] What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The Wisconsin act adds: "5. That he took it in the usual course of business."

Sec. 53. [92] When person not deemed holder in due course. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Sec. 54. [93] Notice before full amount paid. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Sec. 55. [94] When title defective. The title of a person who negotiates an instrument defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

The Wisconsin act adds: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

Sec. 56. [95] What constitutes notice of defect. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Sec. 57. [96] Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

The Illinois act reads as follows: "A holder in due course holds the instrument free from any defect of title or prior parties, and free from defenses available to prior parties among themselves except the defect and defense specified in section 10 of act entitled "An act to revise the law in relation to promissory notes, bonds, due bills, and other instruments in writing," approved March 18, 1874, in force July 1, 1874, and except the defect and defense specified in sections 131 and 136 of an act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, in force July 1, 1874, known as sections 131 and 136 of chapter 38 of the Revised Statutes of Illinois, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

The Wisconsin act adds: "Except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676—25¹) of this act."

Sec. 58. [97] When subject to original defenses. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

The Illinois and Wisconsin acts read as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud, or duress, or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Sec. 59. [98] Who deemed holder in due course. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Article V. Liabilities of parties.

Sec. 60. [110] Liability of maker. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

Sec. 61. [111] Liability of drawer. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

The District of Columbia, New York, and North Dakota acts substitute the words "accepted and paid" for "accepted or paid".

The Colorado and Illinois acts omit the word "subsequent" before "indorser."

¹) Sec. 55 of the uniform law.

Sec. 62. [112] Liability of acceptor. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and 2. The existence of the payee and his then capacity to indorse.

In the Missouri act subsection 2 reads as follows: "The existence of the payee and his capacity to indorse."

Sec. 63. [113] When person deemed indorser. A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Sec. 64. [114] Liability of irregular indorser. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties; 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; 3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

The Illinois act reads as follows: "Where a person, not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: 1. If the instrument is a note or a bill, payable to the order of a third person or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. 2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Sec. 65. [115] Warranty where negotiation by delivery, et cetera. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants: 1. That the instrument is genuine and in all respects what it purports to be; 2. That he has a good title to it; 3. That all prior parties had capacity to contract; 4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

Sec. 66. [116] Liability of general indorser. Every indorser who indorses without qualification, warrants to all subsequent holders in due course: 1. The matter and things mentioned in subdivisions one, two, and three of the next preceding section; and 2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The Illinois act reads as follows: "Every indorser not an accommodating party who indorses without qualification, warrants to all subsequent holders in due course: 1. The matters and things mentioned in subdivision one, two, three and four of the next preceding section; and 2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, every indorser engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Sec. 67. [117] Liability of indorser where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Sec. 68. [118] Order in which indorsers are liable. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

Sec. 69. [119] Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

The Illinois Act adds a new section: "69a. Whenever any bill of exchange drawn or indorsed within this state and payable without this state is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon and on bills payable without the United States with or without suit five per cent. damages in addition."

Article VI. Presentment for payment.

Sec. 70. [130] Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

The Illinois act reads as follows: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument, except in case of bank notes, but if the instrument is, by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

The Kansas, New York, and Ohio acts read as follows: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

The Wisconsin act reads as follows: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. But except as herein otherwise provided, presentment, for payment is necessary in order to charge the drawer and indorsers."

Sec. 71. [131] Presentment where instrument is not payable on demand. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

The Nebraska act omits the words "except that" to "negotiation thereof."

Sec. 72. [132] What constitutes a sufficient presentment. Presentment for payment to be sufficient, must be made: 1. By the holder, or by some person authorized to receive payment on his behalf; 2. At a reasonable hour on a business day; 3. At a proper place as herein defined; 4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Sec. 73. [133] Place of presentment. Presentment for payment is made at the proper place: 1. Where a place of payment is specified in the instrument and it is there presented; 2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented; 3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; 4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Sec. 74. [134] Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Sec. 75. [135] Presentment where instrument payable at bank. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

The Nebraska act reads as follows: "Where the instrument is payable at a bank, presentment for payment must be made during banking hours."

Sec. 76. [136] Presentment where principal debtor is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

Sec. 77. [137] Presentment to persons liable as partners. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sec. 78. [138] Presentment to joint debtors. Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Sec. 79. [139] When presentment not required to charge the drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Sec. 80. [140] When presentment not required to charge the indorser. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Sec. 81. [141] When delay in making presentment is excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Sec. 82. [142] When presentment may be dispensed with. Presentment for payment is dispensed with: 1. Where, after the exercise of reasonable diligence presentment as required by this act cannot be made; 2. Where the drawee is a fictitious person; 3. By waiver of presentment, express or implied.

Sec. 83. [143] When instrument dishonored by non-payment. The instrument is dishonored by non-payment when: 1. It is duly presented for payment and payment is refused or cannot be obtained; or 2. Presentment is excused and the instrument is overdue and unpaid.

Sec. 84. [144] Liability of person secondarily liable, when instrument dishonored. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

Sec. 85. [145] Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

A number of states in which the act is in force still retain days of grace. See table appended to this article, *infra* p. 237. Public holidays differ in the several states.

Sec. 86. [146] Time how computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Sec. 87. [147] Rule where instrument payable at bank. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

There is no corresponding section in the Illinois and Nebraska acts.

Sec. 88. [148] What constitutes payment in due course. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Article VII. Notice of dishonor.

Sec. 89. [160] To whom notice of dishonor must be given. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Sec. 90. [161] By whom given. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

Sec. 91. [162] Notice given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Sec. 92. [163] Effect of notice given on behalf of holder. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Sec. 93. [164] Effect where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Sec. 94. [165] When agent may give notice. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Sec. 95. [166] When notice sufficient. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

The Kentucky act reads as follows: "A written notice need be signed, and an insufficient written notice may be supplemented and validated by written communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby."

Sec. 96. [167] Form of notice. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Sec. 97. [168] To whom notice may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Sec. 98. [169] Notice where party is dead. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Sec. 99. [170] Notice to partners. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

Sec. 100. [171] Notice to persons jointly liable. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Sec. 101. [172] Notice to bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Sec. 102. [173] Time within which notice must be given. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Sec. 103. [174] Where parties reside in same place. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following; 2. If given at his residence, it must be given before the usual hours of rest on the day following; 3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Sec. 104. [175] Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: 1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be

no mail at a convenient hour on that day, by the next mail thereafter; 2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Sec. 105. [176] When sender deemed to have given due notice. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Sec. 106. [177] Deposit in post-office; what constitutes. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department.

Sec. 107. [178] Notice to subsequent party; time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Sec. 108. [179] Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: 1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or 2. If he live in one place, and have his place of business in another, notice may be sent to either place; or 3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Sec. 109. [180] Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

Sec. 110. [181] Who affected by waiver. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Sec. 111. [182] Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Sec. 112. [183] When notice is dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Sec. 113. [184] Delay in giving notice; how excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Sec. 114. [185] When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases: 1. Where the drawer and drawee are the same person; 2. Where the drawee is a fictitious person or a person not having capacity to contract; 3. Where the drawer is the person to whom the instrument is presented for payment; 4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; 5. Where the drawer has countermanded payment.

Sec. 115. [186] When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in either of the following cases: 1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; 2. Where the indorser is the person to whom the instrument is presented for payment; 3. Where the instrument was made or accepted for his accommodation.

Sec. 116. [187] Notice of non-payment where acceptance refused. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 117. [188] Effect of omission to give notice of non-acceptance. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

The Wisconsin act reads as follows: "An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission, but this shall not be construed to revive any liability discharged by such omission."

Sec. 118. [189] When protest need not be made; when must be made. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

Article VIII. Discharge of negotiable instruments.

Sec. 119. [200] Instrument; how discharged. A negotiable instrument is discharged: 1. By payment in due course by or on behalf of the principal debtor; 2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; 3. By the intentional cancellation thereof by the holder; 4. By any other act which will discharge a simple contract for the payment of money; 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

The Illinois act omits subsection 4.

Sec. 120. [201] When persons secondarily liable on, discharged. A person secondarily liable on the instrument is discharged: 1. By any act which discharges the instrument; 2. By the intentional cancellation of his signature by the holder; 3. By the discharge of a prior party; 4. By a valid tender of payment made by a prior party; 5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; 6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

The Illinois act reads as follows: "A person secondarily liable on the instrument is discharged: 1. By an act which discharges the instrument. 2. By the intentional cancellation of his signature by the holder. 3. By a valid tender of payment made by a prior party. 4. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved, or unless the principal debtor be an accommodating party. 5. By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent, prior or subsequent, of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party."

In the Maryland and New York acts subsection 6 reads as follows: "By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

In the Missouri act subsection 3 reads as follows: "By the discharge of a prior party, except when such discharge is had in bankruptcy proceedings."

In the Wisconsin act subsection 6 reads as follows: "6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent prior or subsequent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless he is fully indemnified."

Sec. 121. [202] Right of party who discharges instrument. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except: 1. Where it is payable to the order of a third person, and has been paid by the drawer; and 2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Sec. 122. [203] Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Sec. 123. [204] Cancellation; unintentional; burden of proof. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Sec. 124. [205] Alteration of instrument; effect of. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided,

except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

The Illinois act reads as follows: "Where a negotiable instrument is fraudulently or materially altered by the holder without the assent of all parties liable, thereon it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

The Wisconsin act reads as follows: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented, orally or in writing, to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

Sec. 125. [206] What constitutes a material alteration. Any alteration which changes: 1. The date; 2. The sum payable, either for principal or interest; 3. The time or place of payment; 4. The number or the relations of the parties; 5. The medium or currency in which payment is to be made; Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Title II. Bills of exchange.

Article I. Form and interpretation.

Sec. 126. [210] Bill of exchange defined. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Sec. 127. [211] Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Sec. 128. [212] Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

The Wisconsin act omits the words "or in succession."

Sec. 129. [213] Inland and foreign bills of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Sec. 130. [214] When bill may be treated as promissory note. Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

In the Wisconsin act the words "or a person" are omitted.

Sec. 131. [215] Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

Article II. Acceptance.

Sec. 132. [220] Acceptance how made, et cetera. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Sec. 133. [221] Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

Sec. 134. [222] Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor

of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

The Illinois act reads as follows: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person who, on the faith thereof, receives the bill for value."

Sec. 135. [223] Promise to accept; when equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

The Illinois act reads as follows: "An unconditional promise in writing to accept a bill before or after it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

Sec. 136. [224] Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

Sec. 137. [225] Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

There is no corresponding provision in the Illinois act.

The Wisconsin act adds: "Mere retention of the bill is not an acceptance."

Sec. 138. [226] Acceptance of incomplete bill. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Sec. 139. [227] Kinds of acceptances. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Sec. 140. [228] What constitutes a general acceptance. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

Sec. 141. [229] Qualified acceptance. An acceptance is qualified which is: 1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; 2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; 3. Local, that is to say, an acceptance to pay only at a particular place; 4. Qualified as to time; 5. The acceptance of some one or more of the drawees, but not of all.

Sec. 142. [230] Rights of parties as to qualified acceptance. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

Article III. Presentment for acceptance.

Sec. 143. [240] When presentment for acceptance must be made. Presentment for acceptance must be made: 1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or 2. Where the bill expressly stipulates that it shall be presented for acceptance; or 3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Sec. 144. [241] When failure to present releases drawer and indorser. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

Sec. 145. [242] Presentment; how made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and 1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; 2. Where the drawee is dead, presentment may be made to his personal representative; 3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Sec. 146. [243] On what days presentment may be made. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

In the Colorado act the last sentence reads as follows: "When any day is in part a holiday presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

The last sentence is omitted in the Kentucky and Wisconsin acts.

Sec. 147. [244] Presentment when time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Sec. 148. [245] Where presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases: 1. Where the drawee is dead or has absconded, or is a fictitious person or a person not having capacity to contract by bill; 2. Where after the exercise of reasonable diligence, presentment cannot be made; 3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

Sec. 149. [246] When discharged by non-acceptance. A bill is dishonored by non-acceptance: 1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or 2. When presentment for acceptance is excused and the bill is not accepted.

Sec. 150. [247] Duty of holder where bill not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 151. [248] Rights of holder where bill not accepted. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

Article IV. Protest.

Sec. 152. [260] In what cases protest necessary. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Sec. 153. [261] Protest; how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify: 1. The time and place of presentment; 2. The fact that presentment was made and the manner thereof; 3. The cause or reason for protesting the bill; 4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Sec. 154. [262] Protest; by whom made. Protest may be made by: 1. A notary public; or 2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Sec. 155. [263] Protest; when to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided.

When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Sec. 156. [264] Protest; where made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Sec. 157. [265] Protest both for non-acceptance and non-payment. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 158. [266] Protest before maturity where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Sec. 159. [267] When protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Sec. 160. [268] Protest where bill is lost, et cetera. Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Article V. Acceptance for honor.

Sec. 161. [280] When bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Sec. 162. [281] Acceptance for honor; how made. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Sec. 163. [282] When deemed to be an acceptance for honor of the drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 164. [283] Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 165. [284] Agreement of acceptor for honor. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

Sec. 166. [285] Maturity of bill payable after sight; accepted for honor. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Sec. 167. [286] Protest of bill accepted for honor, et cetera. Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 168. [287] Presentment for payment to acceptor for honor, how made. Presentment for payment to the acceptor for honor must be made as follows: 1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity; 2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

Sec. 169. [288] When delay in making presentment is excused. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 170. [289] Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

Article VI. Payment for honor.

Sec. 171. [300] Who may make payment for honor. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Sec. 172. [301] Payment for honor; how made. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

Sec. 173. [302] Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Sec. 174. [303] Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 175. [304] Effect on subsequent parties where bill is paid for honor. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Sec. 176. [305] Where holder refuses to receive payment supra protest. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Sec. 177. [306] Rights of payer for honor. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Article VII. Bills in a set.

Sec. 178. [310] Bills in sets constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

Sec. 179. [311] Rights of holders where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Sec. 180. [312] Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Sec. 181. [313] Acceptance of bills drawn in sets. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Sec. 182. [314] Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Sec. 183. [315] Effect of discharging one of a set. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

The Wisconsin act here inserts two sections: "Sec. 1682. Whenever any bill of exchange drawn or indorsed within this state and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same as the current rate of exchange at

the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents to be computed from the date of the protest; and said amount of contents, damages, and interest shall be in full of all damages, charges, and expenses. Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this state, but within some state or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest, according to its tenor and five per cent. damages together with costs and charges of protest."

Title III. Promissory notes and checks.

Article I.

Sec. 184. [320] Promissory note defined. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Sec. 185. [321] Check defined. A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Sec. 186. [322] Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

The Illinois act reads as follows: "A check must be presented for payment within a reasonable time after its issue, and notice of dishonor given to the drawer as provided for in the case of bills of exchange, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Sec. 187. [323] Certification of check; effect of. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

Sec. 188. [324] Effect where the holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Sec. 189. [325] When check operates as an assignment. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

Title VI. General Provisions.

Article I.

Sec. 190. [1] Short title. This act shall be known as the Negotiable Instruments Law.

Sec. 191. [2] Definitions and meaning of terms. In this act, unless the context otherwise requires: "Acceptance" means an acceptance completed by delivery or notification. "Action" includes counter-claim and set-off. "Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. "Bearer" means the person in possession of a bill or note which is payable to bearer. "Bill" means bill of exchange, and "note" means negotiable promissory note. "Delivery" means transfer of possession, actual or constructive, from one person to another. "Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. "Indorsement" means an indorsement completed by delivery. "Instrument" means negotiable instrument. "Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder. "Person" includes a body of persons, whether incorporated or not. "Value" means valuable consideration. "Written" includes printed, and "writing" includes print.

Sec. 192. [3] Person primarily liable on instrument. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

The Kansas act omits the words "all other parties are secondarily liable."

Sec. 193. [4] Reasonable time, what constitutes. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature

of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Sec. 194. [5] Time, how computed; when last day falls on holiday. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Sec. 195. [6] Application of chapter. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Sec. 196. [7] Law merchant, when governs. In any case not provided for in this act the rules of the law merchant shall govern.

The phraseology differs. In the Delaware act "the rules of law and equity, including the law merchant," are adopted. According to the Philippine act cases not provided for shall be governed "by the provisions of existing legislation, or in default thereof, by the rules of the law merchant."

[Sec. 197. Repeal.]

[Sec. 198. Commencement.]

Additional provisions.

In a number of states where the uniform act is in force certain additional statutory provisions affecting negotiable instruments exist, which, to a certain extent, qualify the rules of law laid down in the act. In a number of states negotiable instruments given for patent rights or for farm products sold for a price considerably in excess of the market price, must bear on their face certain words indicating the consideration. The New York acts given below are typical of this class of legislation.

New York.

Laws, 1909, c. 43. An Act in relation to Negotiable Instruments, constituting Chapter 38 of the Consolidated Laws.

Sec. 330. Negotiable instruments given for patent rights. A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

Sec. 331. Negotiable instruments for a speculative consideration. If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration", or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

Sec. 332. How negotiable bonds are made non-negotiable. The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond,

obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

Laws, 1909, c. 88. An Act providing for the Punishment of Crime, constituting Chapter 40 of the Consolidated Laws.

Sec. 1520. Notes given for patent rights. A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the right to make, use or sell any patent invention or inventions, or any invention claimed or represented to be patented, without having the words "given for a patent right" written or printed legibly and prominently on the face of such note or instrument above the signature thereto, is guilty of a misdemeanor.

Sec. 1521. Notes given for a speculative consideration. A person who takes, sells or transfers a promissory note or other negotiable instrument, knowing the consideration of such note or instrument to consist in whole or in part of the purchase price of any farm product at a price greater by four or more times than the fair market value of the same product at the time in the locality, or in which the consideration shall be in whole or in part membership of and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at such rate, without having the words "given for a speculative consideration", or other words clearly showing the nature of the consideration prominently and legibly written or printed on the face of such note or instrument above the signature thereof is guilty of a misdemeanor.

California.

Civil Code.

Title XV. Negotiable Instruments.

Chapter I. Negotiable Instruments in General (§§ 3086—3165). Chapter II. Bills of Exchange (§§ 3171—3238). Chapter III. Promissory Notes (§§ 3244—3248). Chapter IV. Checks (§§ 3254, 3255). Chapter V. Bank Notes and Certificates of Deposit (§§ 3261—3262).

Chapter I. Negotiable Instruments in General.

Article I. General definitions.

Sec. 3086. To what instruments this title is applicable. The provisions of this title apply only to negotiable instruments, as defined in this article.

Sec. 3087. Negotiable instrument, what. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article.

Sec. 3088. Must be for unconditional payment of money. A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof.

Sec. 3089. Payee. The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.

Sec. 3090. Instrument may be in alternative. A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act; but as to the latter, the instrument is not within the provisions of this title.

Sec. 3091. Date, etc. A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.

Sec. 3092. May contain a pledge, etc. A negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof.

Sec. 3093. What it must not contain. A negotiable instrument must not contain any other contract than such as is specified in this article.

Sec. 3094. Date. Any date may be inserted by the maker of a negotiable instrument, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.

Sec. 3095. Different classes of negotiable instruments. There are six classes of negotiable instruments, namely: 1. Bills of exchange; 2. Promissory notes; 3. Bank notes; 4. Checks; 5. Bonds; 6. Certificates of deposit.

Article II. Interpretation of negotiable instruments.

Sec. 3099. Time of payment. A negotiable instrument which does not specify the time of payment, is payable immediately.

Sec. 3100. Place of payment not specified. A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found.

Sec. 3101. Instruments payable to a person or his order, how construed. An instrument, otherwise negotiable in form, payable to a person named, but with the words added, "or to his order," or "to bearer," or words equivalent thereto, is in the former case payable to the written order of such person, and in the latter case payable to the bearer.

Sec. 3102. Unindorsed note, when negotiable. A negotiable instrument, made payable to the order of the maker, or of a fictitious person, if issued by the maker for a valid consideration, without indorsement, has the same effect against him and all other persons having notice of the facts as if payable to the bearer.

Sec. 3103. Fictitious payee. A negotiable instrument, made payable to the order of a person obviously fictitious, is payable to the bearer.

Sec. 3104. Presumption of consideration. The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business.

Article III. Indorsement.

Sec. 3108. Indorsement, what. One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement.

Sec. 3109. Agreement to indorse. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

Sec. 3110. When may be made on separate paper. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto.

Sec. 3111. Kinds of indorsement. An indorsement may be general or special.

Sec. 3112. General indorsement, what. A general indorsement is one by which no indorsee is named.

Sec. 3113. Special indorsement, what. A special indorsement specifies the indorsee.

Sec. 3114. General indorsement, how made special. A negotiable instrument bearing a general indorsement cannot be afterwards specially indorsed; but any lawful holder may turn a general indorsement into a special one, by writing above it a direction for payment to a particular person.

Sec. 3115. Destruction of negotiability by indorser. A special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument not negotiable.

Sec. 3116. Implied warranty of indorser. Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him: First. That it is in all respects what it purports to be. Second. That he has a good title to it. Third. That the signatures of all prior parties are binding upon them. Fourth. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay the same with interest, unless exonerated under the provisions of sections thirty-one hundred and eighty-nine, thirty-two hundred and thirteen, thirty-two hundred and forty-eight, or thirty-two hundred and fifty-five.

Sec. 3117. Indorser, when liable to payee. One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon, as an indorser.

Sec. 3118. Indorsement without recourse. An indorser may qualify his indorsement with the words, "without recourse," or equivalent words; and upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement.

Sec. 3119. Same. Except as otherwise prescribed by the last section, an indorsement, without recourse, has the same effect as any other indorsement.

Sec. 3120. Indorsee privy to contract. An indorsee of a negotiable instrument has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance.

[Sec. 3121. Repealed.]

Sec. 3122. Effect of want of consideration. The want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorsee in good faith for a consideration.

Sec. 3123. Indorsee in due course, what. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

Sec. 3124. Rights of indorsee in due course. An indorsee of a negotiable instrument, in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.

Sec. 3125. Instrument left blank. One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.

Article IV. Presentment for payment.

Sec. 3130. Effect of want of demand on principal debtor. It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.

Sec. 3131. Presentment, how made. Presentment of a negotiable instrument for payment, when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable: 1. The instrument must be presented by the holder, or his agent; 2. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person having charge thereof, or employed therein, if one can be found there; 3. An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence, or business, of the principal debtor, if it can be found therein; 4. An instrument which does not specify a place for its payment must be presented at the place of residence, or business, of the principal debtor, or wherever he may be found, at the option of the presenter; 5. The instrument must be presented upon the day of its maturity, or, if it is payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and if it is payable at a banking-house, within the usual banking hours of the vicinity, but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day; 6. If the principal debtor has no place of business, or if his place of business, or residence, cannot, with reasonable diligence, be ascertained, presentment for payment is excused.

Sec. 3132. Apparent maturity, when. The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due, or when that is a holiday, the next business day.

Sec. 3133. Presumptive dishonor of bill, payable after sight. A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after

its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.

Sec. 3134. Apparent maturity of bill, payable at sight. The apparent maturity of a bill of exchange, payable at sight or on demand, is: 1. If it bears interest, one year after its date; or, 2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

Sec. 3135. Apparent maturity of note. The apparent maturity of a promissory note, payable at sight or on demand, is: 1. If it bears interest, one year after its date; or, 2. If it does not bear interest, six months after its date.

Sec. 3136. Same. Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last section.

Sec. 3137. Surrender of instrument, when a condition of payment. A party to a negotiable instrument may require, as a condition concurrent to its payment by him: 1. That the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or, 2. If the holder has a right to retain the instrument and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or, 3. If the instrument is lost or destroyed, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon.

Article V. Dishonor of negotiable instruments.

Sec. 3141. Dishonor, what. A negotiable instrument is dishonored, when it is either not paid, or not accepted, according to its tenor, on presentment for the purpose, or without presentment, where that is excused.

Sec. 3142. Notice, by whom given. Notice of the dishonor of a negotiable instrument may be given: 1. By a holder thereof; or, 2. By any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.

Sec. 3143. Form of notice. A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored.

Sec. 3144. Notice, how served. A notice of dishonor may be given: 1. By delivering it to the party to be charged, personally, at any place; or, 2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or, 3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

Sec. 3145. Notice, how served after indorser's death. In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives; or, if there are none, then to any member of his family who resided with him at his death; or, if there is none, then it must be mailed to his last place of residence, as prescribed by subdivision three of the last section.

Sec. 3146. Notice given in ignorance of death, valid. A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

Sec. 3147. Notice, when to be given. Notice of dishonor, when given by the holder of an instrument or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.

Sec. 3148. Notice of dishonor, when to be mailed. When notice of dishonor is given by mail, it must be deposited in the post-office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place where the instrument was dishonored, for the place to which the notice should be sent.

Sec. 3149. Notice, how given by agent. When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a subagent, it is sufficient for each successive agent or subagent to give notice in like manner to his own principal.

Sec. 3150. Additional time for notice by indorser. Every party to a negotiable instrument, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.

Sec. 3151. Effect of notice of dishonor. A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost.

Article VI. Excuse of presentment and notice.

Sec. 3155. Notice of dishonor, when excused. Notice of dishonor is excused:

1. When the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or, 2. When there is no post-office communication between the town of the party by whom the notice should be given and the town in which the place of residence or business of the party to be charged is situated; or, 3. When the party to be charged is the same person who dishonors the instrument; or, 4. When the notice is waived by the party entitled thereto.

Sec. 3156. Presentment and notice, when excused. Presentment and notice are excused as to any party to a negotiable instrument who informs the holder, within ten days before its maturity, that it will be dishonored.

Sec. 3157. Same. If, before or after the maturity of an instrument, an indorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused.

Sec. 3158. Delay, when excused. Delay in presentment, or in giving notice of dishonor, is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

Sec. 3159. Waiver of presentment and notice. A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

Sec. 3160. Waiver of protest. A waiver of protest on any negotiable instrument other than a foreign bill of exchange waives presentment and notice.

Article VII. Extinction of negotiable instruments.

Sec. 3164. Obligation of party, when extinguished. The obligation of a party to a negotiable instrument is extinguished: 1. In like manner with that of parties to contracts in general; or, 2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the ordinary course of business, to any person having actual possession thereof, and entitled by its terms to payment.

Chapter II. Bills of exchange.

Article I. Form and interpretation of a bill.

Sec. 3171. Bill of exchange, what. A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money.

Sec. 3172. Drawee, in case of need. A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

Sec. 3173. Bill in parts of a set. A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

Sec. 3174. When must be in a set. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.

Sec. 3175. Presentment, etc., of part of set. Presentment, acceptance, or payment, of a single part in a set of a bill of exchange, is sufficient for the whole.

Sec. 3176. Bill, where payable. A bill of exchange is payable: 1. At the place where, by its terms, it is made payable; 2. If it specifies no place of payment, then at the place to which it is addressed; 3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for payment is excused, and the bill may be protested for non-payment.

Sec. 3177. Rights and obligations of drawer. The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument.

Article II. Days of grace.

Sec. 3181. Days of grace. Days of grace are not allowed.

Article III. Presentment for acceptance.

Sec. 3185. When a bill may be presented. At any time before a bill of exchange is payable, the holder may present it to the drawee for acceptance, and if acceptance is refused, the bill is dishonored.

Sec. 3186. Presentment, how made. Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable. First. The bill must be presented by the holder or his agent. Second. It must be presented on a business day, and within reasonable hours. Third. It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof, or employed therein; and, Fourth. The drawee, on such presentment, may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

Sec. 3187. Presentment to joint drawees. Presentment for acceptance to one of several joint drawees, and refusal by him, dispenses with presentment to the others.

Sec. 3188. When presentment to be made to drawee in case of need. A bill of exchange which specifies a drawee in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

Sec. 3189. Presentment, when must be made. When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.

Article IV. Acceptance.

Sec. 3193. Acceptance, how made. An acceptance of a bill must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words.

Sec. 3194. Holder entitled to acceptance on face of bill. The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.

Sec. 3195. What acceptance sufficient with consent of holder. The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance: 1. An acceptance written upon any part of the bill, or upon a separate paper; 2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable; or, 3. A refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately without regard to its terms.

Sec. 3196. Acceptance by separate instrument. The acceptance of a bill of exchange, by a separate instrument, binds the acceptor to one, who, upon the faith thereof, has the bill for value or other good consideration.

Sec. 3197. Promise to accept, when equivalent to acceptance. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value.

Sec. 3198. Cancellation of acceptance. The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.

Sec. 3199. What is admitted by acceptance. The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine.

Article V. Acceptance or payment for honor.

Sec. 3203. When bill may be accepted or paid for honor. On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

Sec. 3204. Holder of bill of exchange bound to accept payment for honor. The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

Sec. 3205. Acceptance for honor, how made. An acceptor or payor for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such parties, and from all parties prior to them.

Sec. 3206. How enforced. A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser; after which the acceptor for honor must pay the bill.

Sec. 3207. Notice of dishonor not excused by acceptance for honor. The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

Article VI. Presentment for payment.

Sec. 3211. Presentment, when bill not accepted, where made. If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment, when presentment for payment is necessary.

Sec. 3212. Presentment of bill, payable at particular place. A bill of exchange, accepted payable at a particular place, must be presented at the place for payment, when presentment for payment is necessary, and need not be presented elsewhere.

Sec. 3213. Effect of delay in presentment, in certain cases. If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused.

Sec. 3214. Effect in other cases. Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto.

Article VII. Excuse of presentment and notice.

Sec. 3218. Presentment, when excused. The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

Sec. 3219. Delay, when excused. Delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control.

Sec. 3220. Presentment and notice, when excused. Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.

Article VIII. Foreign bills.

Sec. 3224. Definitions. An inland bill of exchange is one drawn and payable within this state. All others are foreign.

Sec. 3225. Protest necessary. Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest.

Sec. 3226. Protest, by whom made. Protest must be made by a notary public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses.

Sec. 3227. Protest, how made. Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and, finally, protesting against all the parties to be charged.

Sec. 3228. Protest, where made. A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance, and a protest for non-payment in the city or town in which it is presented for payment.

Sec. 3229. Protest, when to be made. A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter.

Sec. 3230. Protest, when excused. The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment.

Sec. 3231. Notice of protest, how given. Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the notary who makes the protest.

Sec. 3232. Waiver of protest. If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as of an inland bill; except that if any indorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice thereof given to him and to all subsequent indorsers.

Sec. 3233. Declaration before payment for honor. One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.

Sec. 3234. Damages allowed on dishonor of foreign bill. Damages are allowed as hereinafter prescribed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this state, and protested for non-acceptance or non-payment.

Sec. 3235. Rate of damages. Damages are allowed under the last section upon bills drawn upon any person: 1. If drawn upon a person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill; 2. If drawn upon a person out of this state, five dollars upon each one hundred dollars of the principal sum specified in the bill; 3. If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars of the principal sum specified in the bill.

Sec. 3236. Interest on amount of protested bill. From the time of notice of dishonor and demand of payment, lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding section.

Sec. 3237. Damages, how estimated. If the amount of a protested bill of exchange is expressed in money of the United States damages are estimated upon such amount without regard to the rate of exchange.

Sec. 3238. Same. If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

Chapter III. Promissory notes.

Sec. 3244. Promissory note, what. A promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money.

Sec. 3245. Certain instruments promissory notes. An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note.

Sec. 3246. Bill of exchange, when converted into a note. A bill of exchange, if accepted, with the consent of the owner, by a person other than the drawee, or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.

Sec. 3247. Certain sections applicable to notes. Chapter one of this title, and sections three thousand one hundred and eighty-one and three thousand two hundred and fourteen of this code, apply to promissory notes.

Sec. 3248. Effect of delay in presentment. If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.

Chapter IV. Checks.

Sec. 3254. Check, what. A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest.

Sec. 3255. Rules applicable to checks. A check is subject to all the provisions of this code concerning bills of exchange, except that: 1. The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby; 2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

Georgia.

Code, 1911.

Sec. 1774. Commercial value only, collectable. If any commercial fertilizer or fertilizer material offered for sale in this state shall, upon official analysis, prove deficient in any of its ingredients as guaranteed and branded upon the sacks or packages, and if by reason of such deficiency the commercial value thereof shall fall three per cent. below the guaranteed total commercial value of such fertilizer or fertilizer material, then any note or obligation given in payment therefor shall be collectable by law only for the amount of actual total commercial value as ascertained by said official analysis, and the person or corporation selling the same shall be liable to consumer by reason of such deficiency for such damages, if any, as may be proved and obtained by him on trial before a jury in any court of competent jurisdiction in this state.

Sec. 1792. When seller refuses to take a sample. Should the seller refuse to take the sample when so requested by the purchaser, then upon proof of this fact the purchaser shall be entitled to his plea of failure of consideration, and to support the same by proof of the want of effect and benefit of said fertilizer upon his crops, which proof shall be sufficient to authorize the jury to sustain defendant's plea in whole or in part, whether the suit is brought by an innocent holder or not.

Sec. 3185. Indorsements, etc. A guaranty or an accommodation indorsement is not within the legitimate business of ordinary partnership.

Sec. 3222. Obligations which must be in writing. To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz.: . . . 8. An acceptance of a bill of exchange.

Sec. 3434. Interest on liquidated demands. All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party is liable and bound to pay them; if payable on demand, from the time of the demand. In case of promissory notes payable on demand, the law presumes a demand instantly, and gives interest from date.

Sec. 3541. Form immaterial. The form of the contract is immaterial, provided the fact of suretyship exists; hence, an accommodation indorser is considered merely as a surety.

Sec. 3654. Assignment of fund. A fund may be assigned in writing; the written acceptance of a draft will be treated as an assignment pro tanto of funds of the drawer in the hands of the acceptor.

Sec. 4118. Title conveyed. The seller can convey no greater title than he has himself. The bona fide purchaser of a negotiable paper not dishonored, or of money, or bank-bills, or other recognized currency, will be protected in his title, though the seller had none. There is no "market overt" in Georgia.

Sec. 4134. Bill of lading with draft attached. When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be.

Sec. 4241. Nudum pactum. A consideration is essential to a contract which the law will enforce. An executory contract, without such consideration, is called nudum pactum, or a naked promise. In some cases a consideration is presumed, and an

avermment to the contrary will not be received. Such are generally contracts under seal, and negotiable instruments alleging a consideration upon their face, in the hands of innocent holders without notice, who have received the same before dishonored.

Sec. 4256. Gaming contracts. Gaming contracts are void, and all evidences of debt or incumbrances or liens on property, executed upon a gaming consideration, are void in the hands of any person. Money paid or property delivered up, upon such consideration, may be recovered back from the winner by the loser, if he shall sue for the same in six months after the loss, and after the expiration of that time it may be sued for by any person, at any time within four years, for the joint use of himself and the educational fund of the county.

Sec. 4269. Bill of exchange, parties. A bill of exchange is an order by one person, called the drawer or maker, to another called the drawee or acceptor, to pay money to another (who may be the drawer himself) called the payee, or his order, or to the bearer. If the payee, or a bearer, transfers the bill by indorsement, he then becomes the indorser. If the drawer or drawee resides out of this state, it is then called a foreign bill of exchange.

Sec. 4270. Promissory note. A promissory note is a written promise made by one or more to pay to another, or order, or bearer, at a specified time, a specific amount of money, or other articles of value. If made by more than one, it may be a joint promise, or joint and several; in which case each is bound for the whole separately, at the option of the holder. If the payment is in articles other than money, and is not punctually made, the holder may recover the value of such articles at the time the note was due, at the place where it was payable, if a specific place is mentioned; otherwise, at the place where it was made, with lawful interest thereon.

Sec. 4271. Payment in specifics. All agreements to pay in specifics are presumed to be made in favor of the debtor, who may pay in the specifics, or in lieu thereof he may pay the amount of debt in money determined by the values to be fixed as in the preceding section.

Sec. 4272. "Days of grace" abolished. The "days of grace" recognized by custom as applicable to promissory notes are abolished; and all promissory notes, drafts, bills, or other evidences of debt, dated on and after the first day of October, 1903, shall become due and payable on the date named in the contract.

Sec. 4273. Negotiable notes. A promissory note is negotiable by indorsement of the payee or holder, or, if payable to bearer, by transfer and delivery only. The maker may restrain the negotiability thereof by expressing such intention in the body of the instrument.

Sec. 4274. Bonds, etc., negotiable. All bonds, specialties, or other contract in writing for the payment of money or any article of property, and all judgments and executions from any court in this state, are negotiable by indorsement, or written assignment, in the same manner as bills of exchange and promissory notes. No indorsement or assignment need be under seal.

Sec. 4275. Limited indorsement. Any person indorsing or transferring a negotiable instrument may limit his own liability upon such indorsement or transfer, by express restrictions therein; and the assignor of a judgment shall not be held liable as indorser, unless in such assignment he expressly contracts so to be.

Sec. 4276. Transfer of secured note carries security. The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security. If more than one note is secured and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee if the security is insufficient to pay all the notes.

Sec. 4277. Implied warranty. Every transferor of a negotiable instrument, whether by indorsement or delivery, warrants (unless otherwise agreed by the parties) that he is the lawful holder and has a right to sell, that the instrument is genuine, and that he has no knowledge of any fact which proves the instrument to be worthless, either by insolvency of the maker, payment, or otherwise.

Sec. 4278. Bill, etc., payable out of fund. An acceptance of a bill or order may be conditioned or payable out of a certain fund; and in all cases the acceptor shall have a lien on the funds or property of the drawer in his hands for the payment of the acceptance in his behalf.

Sec. 4279. Contract of indorser. In ordinary indorsements the contract of the indorser is to pay the money if the parties to the instrument primarily liable thereon

fail to pay according to the terms thereof; hence, if there are several indorsers, each is liable to subsequent ones in the order of their indorsements.

Sec. 4280. Protest and notice. When bills of exchange and promissory notes are made for the purpose of negotiation, or intended to be negotiated at any chartered bank, and the same are not paid at maturity, notice of the non-payment thereof, and of the protest of the same for non-payment or non-acceptance, must be given to the indorsers thereon within a reasonable time, either personally or by post (if the residence of the indorser be known), or the indorser will not be held liable thereon; but it shall not be necessary to protest in order to bind indorsers, except in the following cases, to-wit: 1. When a paper is made payable on its face at a bank or banker's office. 2. When it is discounted at a bank or banker's office. 3. When it is left at a bank or banker's office for collection.

Sec. 4281. Damages on foreign bills. If any bill of exchange, draft, or order is made payable at any place out of this state, and within the United States, and the same is returned under protest for non-acceptance or non-payment, the holder thereof shall be entitled to recover of the drawer and indorsers in the first case, and the acceptor also in the latter case, in addition to the principal, interest, and protest fees, five per cent. on the principal, as damages for non-acceptance or non-payment.

Sec. 4282. If out of the United States. If such bill, draft, or order is payable at a place without the limits of the United States, the holder may recover ten per cent. damages, as above, for non-acceptance or non-payment.

Sec. 4283. Indorser sued with maker. In all cases the indorser may be sued in the same action, and in the same county, with the maker, or drawer, or acceptor.

Sec. 4284. Public holidays. The first of January, commonly called New-year's Day; the nineteenth day of January, known as Lee's Birthday; the twenty-second day of February, known as Washington's Birthday; the twenty-sixth day of April, known as Memorial Day; the third day of June, known as the birthday of Jefferson Davis; the fourth day of July, called Independence Day; the first Monday in September, to be known as Labor Day; the twenty-fifth day of December, known as Christmas Day; and any day appointed or recommended by the governor of the state, or the president of the United States, or any municipal authority, as a day of thanksgiving, or fasting and prayer, or other religious observances; and any other day declared by the law of Georgia to be a public holiday, shall for all purposes whatsoever, as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor, of bills of exchange, bank-checks, and promissory notes, be treated and considered as the first day of the week, commonly called Sunday, and as public holidays; and all such bills, checks, and notes, otherwise presentable for acceptance or payment on said days, shall be deemed to be presentable for acceptance or payment on the next business day thereafter.

Sec. 4285. Papers due on Sunday or a holiday. All bills, checks, notes, and other evidences of debt maturing on Sunday or a public holiday shall be payable on the next business day thereafter; and all bills, checks, notes, and other evidences of debt presentable, by their terms, for acceptance or payment on Sundays or on a public holiday shall be presentable for acceptance or payment on the next business day thereafter. By business day is meant a day other than Sunday or a public holiday.

Sec. 4286. Right of bona fide holder. The bona fide holder for value of a bill, draft, or promissory note, or other negotiable instrument, who receives the same before it is due, and without notice of any defect or defense, shall be protected from any defenses set up by the maker, acceptor, or indorser, except the following: 1. Non est factum. 2. Gambling, or immoral and illegal consideration. 3. Fraud in its procurement.

Sec. 4287. Overdue notice. If the holder receives it after it is due, its non-payment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto; and if there be several notes constituting one transaction, but due at different times, the fact that one is overdue and unpaid shall be notice to the purchaser of all, to put him on his guard as to each.

Sec. 4288. Presumption of good faith. The holder of a note is presumed to be such bona fide, and for value; if either fact is negatived by proof, the defendants are let into all their defenses; such presumption is negatived by proof of any fraud in the procurement of the note.

Sec. 4289. Holder of collaterals. The holder of a note as collateral security for a debt stands upon the same footing as the purchaser.

Sec. 4290. Title not to be inquired into. The title of the holder of a note can not be inquired into, unless it is necessary for the protection of the defendant, or to let in the defense which he seeks to make.

Sec. 4291. What is notice. Any circumstances which would place a prudent man upon his guard, in purchasing a negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due.

Sec. 4292. Bills payable on demand, etc. Bills, notes, or other paper, payable on demand, are due immediately. When no time is specified for the payment of a bill or order, it is due as soon as presented and accepted.

Sec. 4293. Notes or contracts for patent, copy, or proprietary rights. All promissory notes, contracts, or other evidences of debt, taken by any person, agent, company, or corporation, for the purchase-price of any patent, copy, or proprietary right, or territory for the sale of any such right, or for the sale of any patented article or thing, or copyrighted article or thing, or where there is a proprietary ownership or right, and sold by such person, agent, company, or corporation, through or by any peddler, agent, or traveling salesman, traveling for the purpose of making such sales, shall have expressed on the face of such note, contract, or other evidence of debt the consideration of the same, stating the thing or articles for which the same was given: Provided, this section shall not apply to merchants or manufacturers selling and delivering such goods directly from their stores or warehouses in the regular course of business.

Sec. 4294. Purchaser takes note or contract subject to equities. Any person, firm, or company or corporation, who may purchase any note, contract, or other evidence of debt given for any of the articles or things set forth in the preceding section, when the consideration of said note is expressed in the face thereof as is provided in said section, whether before due and without notice or otherwise, where the consideration is so expressed, shall take the same with all the equities existing between the original parties; and the maker of such note, contract, or other evidence of debt shall have the right to make any defense to the payment of same as against such purchasers that could have been made against the original payee.

Sec. 4299. Indorsement, etc., not to be proved. An indorsement or assignment of any bill, bond, or note, when the same is sued on by the indorsee, need not be proved unless denied on oath.

Sec. 5314. How other papers are established. The owner of a paper (other than an office paper, and which cannot be sued on and collected in a justice's court) lost or destroyed, desiring to establish the same, shall present to the clerk of the superior court of the county where the maker of the paper resides, if a resident of this state, a petition in writing, together with a copy, in substance, of the paper lost or destroyed, as nearly as he can recollect, which copy shall be sworn to by the petitioner, his agent, or attorney; whereupon the clerk shall issue a rule nisi in the name of the judge of the superior court, calling upon the opposite party to show cause, if any he has, why the copy sworn to should not be established in lieu of the lost or destroyed original; which rule shall be served by the sheriff, his deputy, or any constable of this state, personally upon the party, if to be found in this state, twenty days before the sitting of the court to which the rule nisi is made returnable; and if the party cannot be found in this state, then the rule shall be published in some public gazette of this state twice a month for two months before the final hearing of the rule.

Sec. 5315. Continuance, when granted. In a proceeding to establish lost papers under the provisions of the preceding section, no continuance shall be granted, unless it appear reasonable and just to the court; nor shall a continuance be allowed to the same party more than once, except for providential cause.

Sec. 5316. Rule absolute. When the rule nisi has been duly served as hereinbefore provided, the court shall grant a rule absolute establishing the copy of the lost or destroyed paper sworn to, unless good and sufficient cause be shown why such rule absolute should not be granted.

Sec. 5317. Certified indorsement of copy. When the copy is established, the clerk of the court in which it is done shall furnish the copy to the party who had it established, with a certified indorsement thereon of the day and term of the court when the rule absolute was granted: Provided, all costs of the proceedings are paid.

Sec. 5318. Lost note sued on. A lost instrument may be sued on; and if a plea of non est factum is filed, the same may be met by proof that the lost note was genuine, and that the copy attached to the declaration is correct.

Sec. 5319. Suit on lost paper. If the paper lost or destroyed be a note, bill, bond, or other instrument upon which suit may be brought, the owner thereof may institute suit thereon so soon as the rule nisi has been issued as hereinbefore provided for, and it shall be set forth in the declaration that the paper sued on is lost or destroyed; and in no case shall there be a judgment had in such suit until it shall be determined whether the application to establish the paper be granted or not; and if granted, then judgment shall be had as in other cases.

Sec. 5320. Oyer of lost paper shall not be demanded. In a suit such as provided for in the preceding section, oyer of the paper sued on shall not be demanded until at the time of the rendition of judgment in such suit; and then if the plaintiff produce a copy of the paper, with a certified indorsement thereon by the clerk of the court in which it was established, as hereinbefore directed, it shall be taken and considered as the original.

Sec. 5321. When execution is lost, alias may issue. When any execution which shall have been regularly issued from the superior courts of this state shall be lost or destroyed, the judge of the court from which the same issued may at any time, either in open court or vacation, upon proper application being made and the facts proved by the affidavit of the applicant, his agent, or his attorney, or by any other satisfactory proof, grant an order for the issuing of an alias execution in lieu of the lost original execution.

Sec. 5322. Papers belonging to suits may be established. When any bond, bill, note, or other evidence of debt, or any summons, execution, or any other paper belonging or appertaining to any suit or other proceeding in any justice's court of this state, shall be lost, destroyed, or mislaid from the hands of the justice of the peace, such justice may, by reason and virtue of his office, establish instantan a copy in substance of such paper in lieu of the original so lost; and if any such paper be lost, destroyed, or mislaid from the hands of any person other than the justice of the peace, the party plaintiff or defendant, or any one interested, wishing to use such lost paper, shall be permitted to establish and use in lieu of the original a substantial copy of the same, by making affidavit of the loss of the original, and that the copy proposed to be used is a copy in substance of the lost original.

Sec. 5323. Other papers, how established. The owner of a lost paper which may, according to law, be sued on and collected in a justice's court, who wishes to establish the same, may present to one of the justices of the peace of the district in which the maker resides, if a resident of this state, a copy in substance of the paper lost, as nearly as he can recollect, which copy shall be sworn to by the applicant, his agent, or attorney, or be proved by other evidence; whereupon such justice of the peace shall issue a rule nisi, calling upon the opposite party to show cause, if any he has, why the copy should not be established in lieu of the original so lost or destroyed; which rule shall be served upon the party personally, if to be found, ten days before the sitting of the court to which he is called upon to show cause, by a constable of the state; and if the party is not to be found, then the rule may be published in a public gazette of this state for one month before the final hearing of the rule; and if no sufficient cause be shown, the justice shall give judgment establishing the copy in lieu of the original so lost or destroyed, and the copy so established shall be certified to by the justice of the court in which it was established, and shall have all the force and effect of the original.

Sec. 5324. Alias executions from justices' courts. Executions issued from the justices' courts of this state, when lost or destroyed, may be supplied by an alias execution, to be issued by the justice of the peace under the same rules and regulations as those which prevail in the superior court on the subject of issuing alias executions.

Sec. 5325. Who may be party. In all cases for the purpose of establishing any lost or destroyed paper (other than an office paper), any person whose interest is to be affected by the establishment of such lost papers shall upon motion, by order of the court, be made a party defendant to such proceeding, and be allowed all the rights of defense against the same as fully as if he were the maker of said lost paper.

Sec. 5326. Summary establishment, how made. The owner, or agent of said owner, or legal representative of the owner of any bond, bill, note, draft, check, or other

evidence of indebtedness, which has been lost or destroyed, may establish a copy of the same in the following summary manner: Said owner, agent, or representative shall file a petition with the ordinary of the county of the residence of the alleged debtor, or maker, if he is a resident of this state (said ordinary being hereby created judicial officer for the purpose herein), which petition must be sworn to by the party applying, and shall contain as full and accurate description as possible of said lost paper, and of the loss and mode of loss, and of the inability to find the same, and wherefore, and a prayer for the establishment of a copy, setting forth the copy desired to be established. Thereupon said ordinary shall issue a citation, or notice, to said alleged debtor or maker, requiring him to appear at a day not more than ten days distant, and show cause, if any he has and can show, why said copy should not be established in lieu of the lost original. This citation or notice must be personally served by an officer, either sheriff or bailiff, or person specially appointed by said ordinary for the purpose, at least five days before the time of hearing. If no successful defense is made at the time and place appointed, the ordinary shall proceed to establish, by an order entered on the petition, the copy so prayed to be established, which shall have all the effect of said original. Said petition, notice, and order shall be entered in a book of record specially prepared for the purpose. If the debtor or maker so served shall file a defense under oath to the effect that such original never existed as claimed, then said ordinary shall decide, after giving the parties time for preparation and hearing (said time not to exceed twenty days) upon the case so made; and if in favor of the applicant, and no appeal is entered as herein-after provided, said decree shall be entered on the petition, and then the copy so established shall have the same effect as an original. If the ordinary's decision is in favor of the alleged debtor or maker, then the ordinary shall also enter his decision on said petition. In all cases all the proceedings shall be recorded as above provided. If either party to the aforesaid proceedings shall be dissatisfied, and claim an appeal, the ordinary shall grant the same upon the applicant's giving the usual bond and security for costs, as in cases of appeal from the court of ordinary to the superior court. Said appeal shall be tried in the superior court and returned to the next term after such decision, with all the pleadings and proceedings had before the ordinary. In the superior court said case shall be tried and determined as provided in section 5314, and the following sections of the code.

Sec. 5327. Non-residents, how served. When the person alleged to be a debtor or maker of the lost or destroyed paper set forth in the preceding section shall not reside in this state, then such alleged debtor or maker may be made a party to the proceedings above mentioned, by publication, in a gazette to be designated by said ordinary, twice a week for two months; and when so made a party (which shall be according to the form in cases in chancery), then all the provisions of this chapter shall apply in this case, and all the provisions thereof shall apply throughout, except as herein excepted.

Sec. 5328. Compensation of ordinary. The compensation of the ordinary for all services in such cases shall be the sum of five dollars.

Sec. 5796. Blank endorsements. Blank endorsements of negotiable paper may always be explained between the parties themselves, or those taking with notice of dishonor or of the actual facts of such indorsements.

Texas.

Rev. St., 1895.

Art. 304. Liability of drawer, etc., how fixed by suit in district or county court. The holder of any bill of exchange or promissory note assignable or negotiable by law, may secure and fix the liability of any drawer or indorser of such bill of exchange, and every indorser of such promissory note, without protest or notice, by instituting suit against the acceptor of such bill of exchange, or against the maker of such promissory note, before the first term of the district or county court to which suit can be brought, after the right of action shall accrue; or by instituting suit before the second term of said court, after the right of action shall accrue, and showing good cause why suit was not instituted before the first term next after the right of action accrued.

Art. 305. How fixed by suit in justice's court. Whenever the amount of such bill of exchange or promissory note shall be within the jurisdiction of a justice of the peace, the holder thereof may secure and fix the liability of any drawer or indorser, by instituting suit against the acceptor or maker within sixty days next after the right of action shall accrue.

Art. 306. Drawer of bill liable on non-acceptance. The drawer of any bill of exchange which shall not be accepted when presented for acceptance shall be immediately liable for the payment thereof; and the holder of such bill may secure and fix the liability of any indorser thereof, by instituting suit against such drawer, within the time and in the manner prescribed by this title.

Art. 307. Assignee may sue in his own name. Any person to whom any of the said negotiable instruments may have been assigned, may maintain any action in his own name which the original obligee or payee might have brought; but he shall not only allow all just discounts against himself, but, if he obtained the same after it became due, he shall also allow all just discounts against the assignor before notice of the assignment was given to the defendant; but should he obtain such instrument before its maturity, by giving for it a valuable consideration, and without notice of any discount or defense against it, then he shall be compelled to allow only the just discounts against himself.

Art. 308. Non-negotiable instruments may be assigned. The obligee, or assignee, of any written instrument not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same.

Art. 309. Assignee of non-negotiable instrument may sue in his own name. The assignee of any instrument mentioned in the preceding article may maintain an action thereon in his own name, but he shall allow every discount and defense against the same which it would have been subject to in the hands of any previous owner before notice of the assignment was given to the defendant; and in order to hold the assignor as surety for the payment of the instrument, the assignee shall use due diligence to collect the same.

Art. 310. Waiver of diligence not to be shown by parol. Parol testimony shall be inadmissible to prove that the assignor, drawer, or indorser of any of the aforesaid instruments has released the holder thereof from his obligation to use due diligence to collect the same.

Art. 311. Assignor liable to assignee. The assignee of any instrument not negotiable by the law merchant shall be entitled to recover from any previous assignor thereof; but in any suit brought against a remote assignor of such instrument, he shall be subject only to such recovery, and shall have the benefit of all defenses which he would have been entitled to had the suit been instituted by any intermediate assignee.

Art. 312. Assignor, indorser, etc., may be sued alone, when. Assignors, indorsers, and other parties not primarily liable upon any of the instruments named in this title, may be jointly sued with their principal obligors, or may be sued alone in the cases provided for in articles 1203 and 1204.

Art. 313. Assignment, how put in issue. When a suit shall be instituted by an assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be regarded as fully proved, unless the defendant shall deny in his plea that the same is genuine, and moreover shall file, with the papers in the cause, an affidavit stating that he has good cause to believe, and verily does believe, that such assignment or indorsement is forged.

Art. 314. Consideration, failure of, when it constitutes a defense. The defendant in any action that may be instituted upon any written instrument may plead a want or failure, or partial failure of consideration, where such written instrument shall remain in the possession of the original payee or obligee; or when it shall have been transferred or assigned after the maturity thereof; or when the defendant may prove a knowledge of such want or failure of consideration on the part of the holder prior to such transfer.

Art. 315. Liability of drawer, etc., fixed by protest. The holder of any bill of exchange or promissory note assignable or negotiable by the law merchant, may also secure and fix the liability of any drawer or indorser of such bill of exchange or promissory note, for the payment thereof, without suit against the acceptor, drawer, or maker, by procuring such bill or note to be regularly protested by a notary public for non-acceptance or non-payment, and giving notice of such

protest to such drawer or indorser, according to the usage and custom of merchants.

Art. 316. Protest, how made, and evidence of. It shall be the duty of any notary public who shall protest any bill of exchange or promissory note, for non-acceptance or non-payment, to set forth in his protest and in his notarial record a full and true statement of what shall have been done by him in relation thereto, according to the facts, by specifying therein whether demand was made of the sum of money in such bill or note specified, of whom, and when and where such demand was made. It shall also be his duty to make the requisite notices of protest for the drawers and indorsers who are sought to be made liable, and when any such notice shall be served by him, he shall note in his protest and notarial record on whom and when such notice was served; and when such notice shall be deposited in the postoffice by him, he shall specify when and where mailed, and to whom and where directed; and such protest, or a copy of such notarial record, certified under the hand and seal of such notary public, shall be admitted in all the courts of this state as evidence of the facts therein set forth.

Art. 317. Damages on protested bill recoverable, when. The holder of any protested draft or bill of exchange, drawn by a merchant within the limits of this state upon his agent or factor living beyond the limits of this state, shall, after having fixed the liability of the drawer or indorser of any such draft or bill of exchange, be entitled to recover and receive ten per cent. on the amount of such draft or bill as damages, together with interest and costs of suit thereon accruing.

Art. 318. Days of grace allowed on all bills and notes. Three days of grace shall be allowed on all bills of exchange and promissory notes assignable or negotiable by law.

Table.

Laws relating to Days of Grace, Interest, and Limitation of Actions.

States and Territories	Days of Grace			Interest		Limitation of Actions on Negotiable Instruments (in years)
	Sight Paper	Demand Paper	Time Paper	Legal Rate	Rate allowed by Contract	
*Alabama	No	No	No	8	8	6 ¹)
Alaska	Yes	Yes	Yes	8	12	8
*Arizona	No	No	No	6	12	4
Arkansas	Yes	Yes	Yes	6	10	5
California	No	No	No	7	No limit	4
*Colorado	No	No	No	8	No limit	6
*Connecticut	No	No	No	6	15	6—17
*Delaware	No	No	No	6	6	6
*District of Columbia	No	No	No	6	6	3
*Florida	No	No	No	8	10	5 ¹)
Georgia	No	No	No	7	8	6 ¹)
*Hawaii	No	No	No			
*Idaho	No	No	No	7	12	5
*Illinois	No	No	No	5	7	10
Indiana	No	No	No	6	8	10
*Iowa	No	No	No	6	8	10
*Kansas	No	No	No	6	10	5
*Kentucky	No	No	No	6	6	5—15
*Louisiana	No	No	No	5	8	5 ¹)
Maine	Yes	No	No	6	15	6—20
*Maryland	No	No	No	6	6	3 ¹)
*Massachusetts	Yes	No	No	6	No limit	6—20
*Michigan	No	No	No	5	7	6 ¹)
Minnesota	No	No	No	6	10	6
Mississippi	Yes	Yes	Yes	6	10	6
*Missouri	No	No	No	6	8	10
*Montana	No	No	No	8	No limit	8

*) In the States and Territories marked with an asterisk, the Uniform Negotiable Instruments Law has been adopted. This act, as framed by the Commissioners for Uniform State Laws, and as generally adopted, does

away with the distinction between sight and demand instruments, and abolishes days of grace.

¹) The time is extended if instrument is under seal.

States and Territories	Days of Grace			Interest		Limitation of Actions on Negotiable Instruments (in years)
	Sight Paper	Demand Paper	Time Paper	Legal Rate	Rate allowed by Contract	
*Nebraska	No	No	No	7	10	5
*Nevada	No	No	No	7	No limit	6
*New Hampshire	No	No	No	6	6	6
*New Jersey	No	No	No	6	6	6
*New Mexico	Yes	Yes	Yes	6	12	6
*New York	No	No	No	6	6	6
*North Carolina	Yes	No	No	6	6	3 ¹⁾
*North Dakota	No	No	No	7	12	6 ¹⁾
*Ohio	No	No	No	6	8	15
*Oklahoma	Yes	Yes	Yes	6	10	5
*Oregon	No	No	No	6	10	6
*Pennsylvania	No	No	No	6	6	6
*Philippines	No	No	No			
Porto Rico	No	No	No			
*Rhode Island	Yes	No	No	6	30 ²⁾	6
South Carolina	Yes	No	Yes	7	8	6
South Dakota	Yes	Yes	Yes	7	12	6
*Tennessee	No	No	No	6	6	6
Texas	Yes	No	Yes	6	10	4
*Utah	No	No	No	8	12	6
Vermont	No	No	No	6	6	6 ³⁾
*Virginia	No	No	No	6	6	5 ¹⁾
*Washington	No	No	No	6	12	6
*West Virginia	No	No	No	8	6	10
*Wisconsin	No	No	No	6	10	6
*Wyoming	No	No	No	8	12	5

*) In the States and Territories marked with an asterisk, the Uniform Negotiable Instruments Law has been adopted. This act, as framed by the Commissioners for Uniform State Laws, and as generally adopted, does away with the distinction between sight and

demand instruments, and abolishes days of grace.

¹⁾ The time is extended if instrument is under seal. — ²⁾ Rate may be higher on sums under \$ 50.00. — ³⁾ 14 years on witnessed notes.

VII.

THE LAW OF BANKRUPTCY

Bankruptcy.

(By Joseph Walker Magrath, Counsellor at Law, New York City.)¹⁾

Analysis.

I. LEGISLATION ON THE SUBJECT OF BANKRUPTCY

- A. Power of Congress and State Legislatures, 244*
- B. Rules, Forms, and Orders, 244*
- C. Construction of the Bankruptcy Acts, 244*

II. JURISDICTION AND POWERS OF COURTS

- A. Courts Exercising Original Jurisdiction in Bankruptcy, 245*
- B. Powers of Courts of Bankruptcy, 245*
- C. Jurisdiction of Other United States Courts and of State Courts, 246*
- D. Jurisdiction Dependent upon Residence, Place of Business, or Location of Property, 246*
- E. Transfer of Causes, 247*
- F. Stay of Suits in Other Courts, 247*
- G. Appellate Jurisdiction, 248*

III. REFEREES

- A. Creation of Office, 248*
- B. Appointment and Removal, 248*
- C. Qualification by Oath and Bond, 249*
- D. Powers of Referee, 249*
- E. Duties of Referee, 249*
- F. Compensation of Referee, 250*

IV. WHO MAY BECOME BANKRUPTS

- A. Voluntary Bankrupts, 250*
 - 1. Statutory Provision, 250*
 - 2. Amount of Indebtedness, 250*
 - 3. Infants, 250*
 - 4. Lunatics, 250*
 - 5. Married Women, 250*
 - 6. Indians, 250*
 - 7. Aliens, 250*
 - 8. Corporations, 250*
 - 9. Partnerships, 251*
- B. Involuntary Bankrupts, 251*
 - 1. Statutory Provision, 251*
 - 2. Wage-Earners, 251*
 - 3. Persons Engaged in Farming or Tillage of the Soil, 251*
 - 4. Infants, 251*
 - 5. Lunatics, 251*
 - 6. Married Women, 251*
 - 7. Indians, 251*
 - 8. Aliens, 251*
 - 9. Unincorporated Companies, 251*
 - 10. Corporations, 251*
 - 11. Partnerships, 252*
 - 12. Banks and Bankers, 252*

V. ACTS OF BANKRUPTCY

- A. Prerequisite to Proceeding in Involuntary Bankruptcy, 252*
- B. What are Acts of Bankruptcy, 252*
- C. Insolvency, 252*
- D. First Act of Bankruptcy — Transferring, Concealing, or Removing Property with Intent to Hinder, Delay, or Defraud Creditors, 253*

¹⁾ The text has been revised so as to bring it into conformity with the Bankruptcy Act amending Acts of 1906 and 1910. These changes are printed in brackets. C. H. Huberich.

- E. Second Act of Bankruptcy — Transfer of Property to Creditor with the Intent to Prefer Him over Other Creditors, 253*
- F. Third Act of Bankruptcy — Suffering or Permitting a Creditor to Obtain Preference through Legal Proceedings and Not Discharging such Preference, 254*
- G. Fourth Act of Bankruptcy — Assignment for Benefit of Creditors, or Voluntary or Involuntary Receivership, 254*
- H. Fifth Act of Bankruptcy — Written Admission of Inability to Pay Debts and Willingness to be Adjudged a Bankrupt on that ground, 255*

VI. PROCESS, PLEADINGS, AND ADJUDICATION

- A. Statutory Provisions, 255*
- B. Who may File Petition for Adjudication of Bankruptcy, 256*
- C. Form and Contents of Petition, 257*
- D. Filing of Petition, 257*
- E. Amendment of Petition, 258*
- F. Process, 258*
- G. Appearances, 258*
- H. Seizure of Property while Petition Pending, 258*
- I. Trial, 258*
- J. Dismissal of Petition, 259*

VII. RECEIVERS, 259

VIII. SCHEDULES

- A. Statutory Requirement, 259*
- B. By Whom Schedules Prepared, 260*
- C. Form of Schedules, 260*
 - 1. Forms Prescribed by Supreme Court, 260*
 - 2. Schedule of Creditors and Liabilities, 260*
 - 3. Schedule of Property and Claims of Exemptions, 260*
- D. Verification of Schedules, 261*
- E. Time for Filing Schedules, 261*
- F. Amendment of Schedules, 261*

IX. PROPERTY EXEMPTIONS OF BANKRUPT, 261

X. DUTIES OF BANKRUPTS

- A. Attendance at Meetings and Hearings and Submission to Examination as to Conduct of Business, etc., 262*
- B. Production of Books, Papers, and Accounts, and Submission to Examination as to Solvency, 262*
- C. Preparation of Schedules, Lists, etc., 263*
- D. Examination of and Report upon Claims, 263*
- E. Execution of Transfers and other Papers, 263*
- F. Advising of Attempts to Evade Bankruptcy Act, 263*
- G. Compliance With Orders of Court and Referee, 263*

XI. MEETINGS OF CREDITORS

- A. Statutory Provisions, 263*
- B. Notice of Meetings, 263*
- C. Appearance at Meetings, 264*
- D. First Meeting, 264*
 - 1. General Considerations, 264*
 - 2. Adjournments, 264*
- E. Subsequent Meetings, 264*
- F. Final Meeting, 264*
- G. Voting at Meetings, 264*

XII. TRUSTEES

- A. Creation of Office, 266*
- B. Appointment and Removal, 266*
- C. Bond of Trustee, 266*
- D. Duties of Trustee, 267*
- E. Title of Trustee to Property of Bankrupt, 268*
- F. Avoidance of Transfers by Bankrupt, 269*
- G. Continuance by Trustee of Actions to which Bankrupt a Party, 269*

- H. Limitation of Actions by or against Trustee, 269*
- I. Subrogation of Trustee to Rights of Creditor, 269*
- J. Compensation of Trustee, 269*

XIII. ADMINISTRATION OF ESTATE OF BANKRUPT

- A. Supervision of Judge or Referee, 269*
- B. Concurrence of Trustees, 269*
- C. Designation of Depositaries, 269*
- D. Disbursement of Money on Deposit, 270*
- E. Redemption of Property, 270*
- F. Appraisal of Property, 270*
- G. Sales of Property, 270*
 - 1. General Considerations, 270*
 - 2. Notice to Creditors, 270*
- H. Arbitration of Controversies, 270*
- I. Compromise of Controversies or Compounding Claims, 271*
- J. Expenses of Administration of Estate, etc., 271*

XIV. PROOF, ALLOWANCE, AND PAYMENT OF CLAIMS

- A. Proof of Claims, 271*
 - 1. General Method of Proof, 271,*
 - 2. Time for Proving Claims, 274*
 - 3. Proof of Claim Founded on Written Instrument, 274*
 - 4. Proof of Assigned Claim, 275*
 - 5. Attaching Statements and Transcripts, 275*
 - 6. Amendment of Proof of Claim, 275*
 - 7. Filing Claims, 275*
 - 8. Subrogation to Rights of Creditor, 275*
- B. Allowance of Claims, 275*
 - 1. Allowance as of Course, 275*
 - 2. Hearing on Objections, 275*
 - 3. Reconsideration of Claims, 275*
- C. Debts which may be Proved or Allowed, 276*
 - 1. General Considerations, 276*
 - 2. Debts Founded on Contract, 276*
 - 3. Liabilities Evidenced by Written Instruments, 276*
 - 4. Debts Founded on Open Accounts, 276*
 - 5. Judgments, 276*
 - 6. Contingent Claims, 276*
 - 7. Unliquidated Claims, 276*
 - 8. Corporate Bonds, 276*
 - 9. Costs, 276*
 - 10. Rent, 277*
 - 11. Claims Founded in Tort, 277*
 - 12. Claims Barred by Statute of Limitations, 277*
 - 13. Claims of One Bankrupt Estate against Another, 277*
 - 14. Debts Owing to United States, States, Counties, etc., 277*
 - 15. Alimony, 277*
 - 16. Debts Binding more than One Person, 277*
 - 17. Claims of Secured or Preferred Creditors, 277*
 - 18. Claims of Creditors who have Received Illegal Conveyances, Transfers, etc., 278*
 - 19. Time of Inception of Claim, 278*
 - 20. Provability as Affected by Person Proving, 278*
- D. Set-Offs and Counterclaims, 278*
- E. Debts having Priority, 278*
- F. Declaration and Payment of Dividends, 279*

XV. LIENS

- A. General Considerations, 280*
- B. Claims Not Constituting Valid Liens, 281*
- C. Liens obtained through Legal Proceedings, 281*
- D. Fraudulent Transfers and Liens, 281*

XVI. PREFERENCES

- A. Voidable Under Statute, 282*
- B. What Constitutes a Preference, 282*
- C. Payments to Attorneys, etc., 283*
- D. Subsequent Extension of Credit to Bankrupt, 283*

XVII. COMPOSITIONS

- A. What Are, 283*
- B. Time for Offering, 283*
- C. Acceptance by Creditors, 283*
- D. Deposit of Consideration, 284*
- E. Application for Confirmation, 284*
- F. Hearing upon Application, 284*
- G. Confirmation of Composition, 284*
 - 1. Nature and Effect, 284*
 - 2. Considerations Governing Confirmation 284,*
 - a) Best Interest of Creditors, 284*
 - b) Acts or Omissions Barring Discharge, 285*
 - c) Good Faith, 285*
 - 3. Appeal from Order Refusing Confirmation, 285*
- H. Distribution, 285*
- I. Setting Aside Compositions, 285*

XVIII. CLOSING AND REOPENING ESTATES, 286**XIX. EXEMPTION OF BANKRUPT FROM ARREST, 286****XX. DETENTION OF BANKRUPT, 287****XXI. DISCHARGE**

- A. Right to Discharge, 287*
- B. Application for Discharge, 287*
- C. Notice to Creditors, 287*
- D. Opposition to Discharge, 287*
- E. Hearing on Application, 288*
- F. Reasons for Refusing Discharge, 288*
 - 1. Commission of Offense Punishable by Imprisonment under the Bankruptcy Act, 288*
 - 2. Destruction or Concealment of or Failure to Keep Books and Records, 289*
 - 3. Obtaining Property on Credit by False Statement of Financial Condition, 289*
 - 4. Fraudulent Transfer, Removal, Destruction, or Concealment of Property, 290*
 - 5. Previous Discharge within Six Years, 290*
 - 6. Refusal to Obey Order of Court or to Answer Material Question, 290*
- G. Effect of Discharge, 291*
 - 1. General Considerations, 291*
 - 2. Debts and Obligations Discharged, 291*
- H. Revocation of Discharge 292,*

XXII. BANKRUPTCY OF PARTNERSHIP

- A. Partnership may become Bankrupt, 293*
- B. What Court has Jurisdiction, 293*
- C. Appointment of Trustee and Administration of Estate, 294*
- D. Administration by Solvent Partner, 294*
- E. Proof of Claims and Marshaling Assets, 294*
- F. Appropriation to Individual and to Partnership Debts, 294*
- G. Apportionment of Expenses, 295*
- H. Effect of Discharge, 295*

XXIII. EFFECT OF DEATH OR INSANITY OF BANKRUPT, 295**XXIV. NOTICES TO CREDITORS**

- A. General Considerations, 295*
- B. Designation of Address by Creditor, 295*
- C. Designation of Newspaper for Publication of Notices, 296*

- XXV. COMPELLING ATTENDANCE AND EXAMINATION OF WITNESSES, 296
 XXVI. OATHS AND AFFIRMATIONS, 296
 XXVII. DEPOSITIONS, 296
 XXVIII. COMPUTATION OF TIME, 296
 XXIX. EFFECT OF CERTIFIED COPIES OF PROCEEDINGS AND ORDERS, 297
 XXX. OFFENSES AGAINST THE BANKRUPTCY ACT
 A. By Trustee, 297
 B. By Referee, 297
 C. By Bankrupt, 297
 D. By Any Person, 297
 E. Limitation of Prosecutions, 297

I. LEGISLATION ON THE SUBJECT OF BANKRUPTCY. — A. Power of Congress and State Legislatures. — Under the system of government prevailing in the United States, the national legislative assembly — known as Congress — has only such powers as are granted to it by the constitution of the United States. But the constitution expressly confers upon Congress the power to establish “uniform laws on the subject of bankruptcies throughout the United States”¹). The mere fact that this power has been granted to the National Congress does not deprive the various States composing the United States of the power to enact laws on the subject of bankruptcy which shall operate within their respective territorial limits, but the power of the individual States is subordinate to that of the National Congress, and as Congress has actually exercised the power vested in it, and enacted laws establishing a system of bankruptcy of uniform operation throughout the country, the effect of such laws is to suspend the operation of all State laws on the subject in so far (and in so far only) as they relate to the same subject matter and affect the same persons as the national laws²). The laws on this subject enacted by the legislative assemblies of the various States are usually termed “Insolvency Laws” while the term “Bankruptcy Law” is applied only to the enactments of the National Congress³), and hence it is to be understood that the latter term is used with that meaning in the following discussion. In the execution of the power conferred upon it by the constitution the National Congress has from time to time enacted various laws on the subject of bankruptcy. The law now in force is the statute of July 1st, 1898, which has been, however, amended in a number of important particulars by the statutes of February 5th, 1903, [June 15, 1906, and June 25, 1910]. [The Act of 1898, as amended, is] set out in full at the end of this discussion of the present law of Bankruptcy in the United States⁴).

B. Rules, Forms, and Orders. — The Supreme Court of the United States has been given power to prescribe, and to amend from time to time, such rules, forms, and orders, as may be necessary in relation to the procedure under and the carrying into force and effect of the Bankruptcy Act⁵). Accordingly that court has adopted and established a number of general orders and forms in bankruptcy, which must be followed; and the filing of papers may be refused where they are not in accordance with the official forms. But in case the orders or forms are not in harmony with the law itself, the law, of course, governs⁶). The forms thus prescribed by the United States Supreme Court are not, however, exclusive, and do not cover all possible cases which may arise; and a number of supplemental forms have been compiled by the standard text writer on the subject of bankruptcy, which, while merely suggestions based upon the author's experience, and in no sense official, may be safely followed in cases to which they apply⁷).

C. Construction of the Bankruptcy Acts. — It is well settled as a rule of construction that the National Bankruptcy Act of July 1st, 1898, and the emendatory acts are remedial statutes, and, according to the general rule for the construction of

¹) United States Constitution, Art. 1, § 8, cl. 4. — ²) *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122. — ³) 5 Cyc. 240. — ⁴) [The Federal Act is in force in Porto Rico, Hawaii, and Alaska. In the Philippines the topic of bankruptcy is regulated by a special law,

the text of which is appended to this article.] — ⁵) Bankr. Act (1898) § 30. [The General Rules are reprinted below.] — ⁶) *Collier on Bankr.* (6th ed.) p. 330. — ⁷) *Collier on Bankr.* (6th ed.) pp. 737—845.

such statutes, should be interpreted reasonably and according to the fair import of their terms, with a view to effect their object, and to promote justice¹).

II. JURISDICTION AND POWERS OF COURTS. — A. Courts Exercising Original Jurisdiction in Bankruptcy. — The courts of bankruptcy, under the United States Bankruptcy Act, are the District Courts of the United States and of the Territories, the Supreme Court of the District of Columbia, and the United States Courts of the Indian Territory (now a portion of the State of Oklahoma) and of Alaska; and these courts are invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction, both at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings during their respective terms, or in vacation, or in chambers²). Under the American system the District Courts, when sitting in bankruptcy, appear to be separate courts, exercising a jurisdiction distinct and different from that which they exercise in other matters, but the distinction is one of practice rather than one founded upon statute³). The courts of bankruptcy are always open for the transaction of business, although in most of the districts, for the convenience of the courts, certain days are designated for the hearing of bankruptcy matters⁴).

B. Powers of Courts of Bankruptcy. — The District Courts of the United States, as courts of bankruptcy, are of statutory origin, and have no powers other than those expressly conferred upon them by the Bankruptcy Act, or necessarily implied from the terms thereof⁵). The statute expressly confers upon such courts the power to adjudge persons to be bankrupts; to bring in and substitute parties to the bankruptcy proceedings when this is necessary to a complete determination of the matters in controversy⁶); to transfer cases to other courts of bankruptcy; to extradite bankrupts from their districts to other districts⁷); to appoint receivers, or the marshals, in case this is necessary for the preservation of the estate, to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or a trustee is qualified⁸); to appoint trustees in case the creditors fail to do so, and to remove trustees⁹); to authorize the business of the bankrupt to be continued for a limited time by the receivers, the marshals, or the trustees, if this is necessary for the best interest of the estate, and to allow such officers additional compensation for such services¹⁰); to allow or disallow claims against the estate of the bankrupt, and to reconsider claims which have been allowed or disallowed; to determine all claims of the bankrupt to property exemptions¹¹); to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto; to reconsider and confirm, modify, overrule, or return with instructions for further proceedings, records, and findings certified to them by referees; to confirm or reject compositions between the debtor and his creditors, and to set aside compositions and reinstate cases; to close the estate when it appears that it has been fully administered, and to reopen it when it appears that it was closed before being fully administered; to discharge or refuse to discharge the bankrupt, and to set aside discharges and reinstate the cases; to tax costs and render judgments therefor¹²); to enforce obedience by the bankrupt and other persons to

¹) 5 Cyc. 242. — ²) Bankr. Act (1898) § 2. — ³) Collier on Bankr. (6th ed.) p. 13. — ⁴) Collier on Bankr. (6th ed.) p. 15. — ⁵) Collier on Bankr. (6th ed.) p. 14. — ⁶) Bankr. Act (1898) § 2. This power does not extend the jurisdiction of a court of bankruptcy to controversies not within its statutory jurisdiction. In re Ward, 104 Fed. Rep. 985, 5 Am. Bankr. Rep. 215. — ⁷) Bankr. Act (1898) § 2. Whenever a warrant for the apprehension of a bankrupt has been issued and he is found within the jurisdiction of a court other than the one which issued the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another. Bankr. Act (1898) § 10. — ⁸) Bankr. Act (1898) § 2. Even independent of the power expressly given by the statute, a court of bankruptcy may, by virtue

of its general equity powers, appoint receivers, and preserve the estate of a bankrupt by taking it into the legal custody of the court. 5 Cyc. 246. — ⁹) Bankr. Act (1898) § 2. — ¹⁰) Bankr. Act (1898) § 2 as amended. [See also § 48.] Such compensation cannot be at a greater rate than the Bankruptcy Law allows to trustees for similar services. Bankr. Act (1903) § 1. — ¹¹) Bankr. Act (1898) § 2. The matter of exemptions is governed by the statutes of the various states, and the power of a court of bankruptcy to determine claims of the bankrupt to exemptions is to be exercised without enlargement or diminution of the exemptions which are allowed by the laws of the state where the bankrupt has his domicile. In re Woodard, 95 Fed. Rep. 260, 2 Am. Bankr. Rep. 373. — ¹²) Bankr. Act (1898) § 2. A court of bankruptcy may award costs against a creditor who has filed

all lawful orders by fine or imprisonment or both; to punish persons for contempts committed before referees¹); to arraign, try, and punish bankrupts and other persons for violations of the Bankruptcy Act; to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Bankruptcy Act²) [and to exercise ancillary jurisdiction over persons and property within their respective territorial limits in aid of bankruptcy proceedings pending in any other court of bankruptcy³]]. It is further provided that nothing in the section enumerating the powers of courts of bankruptcy shall be construed to deprive such courts of any power which they would possess if certain specific powers were not enumerated in the statute⁴), and so it may be taken to be settled that courts of bankruptcy have, within their respective territorial limits, ample jurisdiction to do everything which may be necessary for the enforcement of the provisions of the Bankruptcy Act⁵).

C. Jurisdiction of Other United States Courts and of State Courts. — The United States Circuit Courts have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants⁶). The United States Circuit Courts have also concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of offenses against the Bankruptcy Law⁷). Suits by the trustee must be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if the proceedings in bankruptcy had not been instituted⁸), unless by consent of the proposed defendant⁹). But this rule is subject to an exception in the case of suits for the recovery of property transferred by the bankrupt to a creditor in order to give him a preference to which he was not entitled, or property conveyed, transferred, assigned, or incumbered by the bankrupt with the intent and purpose to hinder, delay, or defraud his creditors or any of them, as to which suits the court of bankruptcy and the State court which would have had jurisdiction if the bankruptcy had not intervened have concurrent jurisdiction¹⁰).

D. Jurisdiction Dependent upon Residence, Place of Business, or Location of Property. — A court of bankruptcy may adjudge to be a bankrupt: a person who

specifications of objection in opposition to the discharge of the bankrupt in case he fails to prevent the discharge, although the Bankruptcy Act contains no provision as to awarding costs against a creditor in such case. In *re Wolpert*, 1 Am. Bankr. Rep. 436.

¹) Bankr. Act (1898) § 2. This power to punish for contempt and disobedience to its lawful orders is inherent in every court of general jurisdiction. It rests upon the fundamental principles of judicial establishments, and is inseparable from the existence as well as the usefulness of a court of general jurisdiction. 5 Cyc. 247. — ²) Bankr. Act (1898) § 2. — ³) Bankr. Act (1898) § 2. [⁴) Bankr. Act. (1898) § 2, subd. (20).] — ⁵) Collier on Bankr. (6th ed.) p. 15. — ⁶) Bankr. Act (1898) § 23 (a). [After January 1, 1912, the jurisdiction heretofore vested in the Circuit Courts is transferred to the District Courts.] The controversies of which the United States Circuit Courts are given jurisdiction are those arising between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees. The term "adverse claimants" has been the subject of more or less discussion. It has been held that holdings must be construed as adverse when the circumstances are such that the property cannot

be recovered without resort to legal remedies. The adverse claims are those arising generally by reason of conveyances or assignments made before bankruptcy proceedings were instituted. As a result of the requirement that controversies of which Circuit Courts assume jurisdiction must be between trustees, as such, and adverse claimants, it would seem to follow that if such claims are not adverse they are to be summarily adjudicated in the bankruptcy courts; but if such claims are adverse, that is, where there is a color of title asserted against the trustee, the claimants are entitled to be heard in a plenary suit. 5 Cyc. 249, 250. — ⁷) Bankr. Act (1898) § 23 (c). [After January 1, 1912, the jurisdiction heretofore vested in the Circuit Courts is transferred to the District Courts.] — ⁸) Bankr. Act (1898) § 23, subd. b. as amended by Bankr. Act (1903) § 8. This provision applies to State courts as well as to the Circuit Courts of the United States. *Perkins v. McCauley*, 98 Fed. Rep. 286, 3 Am. Bankr. Rep. 445. — ⁹) Bankr. Act (1898) § 23, subd. b. The consent of the defendant may be implied from his conduct. In *re Connolly*, 100 Fed. Rep. 620, 3 Am. Bankr. Rep. 842. — ¹⁰) Bankr. Act (1898) §§ 23, 60, subd. (b), 67, subd. (e), and 70, subd. (e).

has resided or had his domicile or his principal place of business within the territorial jurisdiction of the court for the preceding six months or the greater portion thereof; a person who does not reside or have his domicile or his principal place of business within the United States but who has property which is situated within the territorial jurisdiction of the court; or a person who has been adjudged a bankrupt by a court of competent jurisdiction outside of the United States, and who has property which is situated within the territorial jurisdiction of the United States court¹). In its provisions as to jurisdiction the present Bankruptcy Act is a great improvement on the Bankruptcy Act of 1867, which provided that the courts might adjudge to be bankrupts persons who had "resided or carried on business" within their respective territorial jurisdictions "for the six months next immediately preceding the time of filing such petition, or for the longest period during such time"²). Under the former statute questions frequently arose as to what constituted a residence within the meaning of the provision quoted, and it is evident that the word "domicile" was inserted in the Bankruptcy Act of 1898 with the object of preventing the arising of any such questions in the future³). The present statute is also much more specific and clear in designating the bankrupt's "principal place of business" rather than merely the place where he has "carried on business" as in the former Act. The expression "greater portion of six months" as used in the Bankruptcy Act is held to mean any residence of at least three months' duration during the six months immediately prior to the commencement of the bankruptcy proceedings⁴).

E. Transfer of Causes. — In case petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction under the Bankruptcy Act, the cases must all be transferred to and consolidated in the one of such courts in which the proceedings can be conducted with the greatest convenience to the parties in interest⁵).

F. Stay of Suits in Other Courts. — An action or suit which is founded upon a claim from which a discharge in bankruptcy would be a release, and which is pending against a person alleged to be a bankrupt at the time of the filing of a petition in bankruptcy against him, must be stayed until after an adjudication of bankruptcy or the dismissal of the petition; and if such person is adjudged to be a bankrupt, such action or suit may be further stayed until twelve months after the date of the adjudication of bankruptcy, or, if within that time such person applies for a discharge, then until the question of such discharge is determined⁶). Under these provisions it has been held proper to stay attachment proceedings⁷), proceedings which might result in a body execution against the defendant⁸), proceedings supplementary to an execution⁹), and even an execution sale¹⁰) or the distribution of the proceeds of an execution sale under a levy made within four months before the filing of the petition in bankruptcy¹¹). But an action founded upon a claim which would not be released by a discharge in bankruptcy, as a claim based upon fraud of the alleged bankrupt, should not be stayed¹²). And so also, as a lienholder is entitled to the benefit of his security, where a State court has acquired jurisdiction in a proceeding to foreclose a mortgage, it may proceed to a sale of the property and a distribution of the proceeds notwithstanding bankruptcy proceedings against the mortgagor¹³); although an action to foreclose a real estate mortgage has been restrained where the mortgage exceeded the value of the property and there was likely to be a deficiency judgment against the alleged bankrupt¹⁴). The stay operates merely as a suspension of proceedings against the alleged bankrupt until the question of bankruptcy or of the discharge is settled, and if the petition in bankruptcy is dismissed, or if after an adjudication of bankruptcy a discharge is refused, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require¹⁵).

¹) Bankr. Act (1898) § 2, subd. (1). —

²) Bankr. Act (1867) § 11. — ³) 5 Cyc. 243. —

⁴) In re Berner, 3 Am. Bankr. Rep. 325. —

⁵) Bankr. Act (1898) § 32. — ⁶) Bankr. Act (1898) § 11, subd. a. — ⁷) Bear v. Chase, 99 Fed. Rep. 920, 3 Am. Bankr. Rep. 746. —

⁸) In re Grist, 1 Am. Bankr. Rep. 89. —

⁹) In re Kletchka, 92 Fed. 901, 1 Am. Bankr.

Rep. 479. — ¹⁰) In re Northrop, 1 Am. Bankr.

Rep. 427. — ¹¹) In re Kenney, 95 Fed. 427,

2 Am. Bankr. Rep. 494. — ¹²) In re Cole,

106 Fed. Rep. 837, 5 Am. Bankr. Rep. 780.

— ¹³) Moran v. Sturges, 154 U. S. Rep. 256. —

¹⁴) In re Sabine, 1 Am. Bankr. Rep. 315. —

¹⁵) Hill v. Harding, 107 U. S. Rep. 631.

G. Appellate Jurisdiction. — The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, have appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy from which they have appellate jurisdiction in other cases; and the Supreme Court of the United States exercises a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia¹). The several Circuit Courts of Appeals have jurisdiction in equity, either interlocutory or final, to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, which power must be exercised on due notice and petition by any party aggrieved²). Appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States and to the Supreme Court of the Territories from a judgment adjudging or refusing to adjudge the defendant a bankrupt; from a judgment granting or denying a discharge, and from a judgment allowing or rejecting a debt or claim of five hundred dollars or over³). An appeal may be taken to the Supreme Court of the United States from a final decision of a court of appeals allowing or rejecting a claim where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or where a justice of the Supreme Court of the United States certifies that in his opinion the determination of the question or questions involved in the allowance or rejection of the claim is essential to a uniform construction of the Bankruptcy Law throughout the United States⁴). Controversies may be certified to the Supreme Court of the United States from other courts of the United States, in which case the Supreme Court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the laws of the United States⁵). An appeal from a court of bankruptcy to a Circuit Court of Appeals must be allowed by a judge of the court appealed from or of the court appealed to⁶). There is no provision in the Bankruptcy Act as to who may take an appeal, but it has been held on very sound reasoning that an appeal from the allowance of a claim by a court of bankruptcy can be taken only by the trustee in bankruptcy as the representative of all the creditors⁷). It would seem beyond question that a creditor whose claim is disallowed has the right to appeal from such ruling. Trustees in bankruptcy are not required to give any bond when they take appeals or sue out writs of error⁸).

III. REFEREES. — A. Creation of Office. — The Bankruptcy Act creates the office of referee in bankruptcy, which is a most important one in the administration of the law⁹), and requires the various courts of bankruptcy to appoint as many referees as are necessary to assist in expeditiously transacting the pending bankruptcy business¹⁰).

B. Appointment and Removal. — The referee is appointed by the court for a term of two years, and may be removed when his services are not needed or for other cause, and the court may designate and from time to time change, the limits of the district of a referee¹¹). In order that a person may be eligible for appointment as a referee he must be competent to perform the duties of the office and must be a resident of or have an office in the territorial district for which he is appointed, and he must not hold any office of profit or emolument under the laws of the United States or of any State, other than that of notary public, commissioner of deeds, justice of the peace, or master in chancery, nor be related, by consanguinity or affinity

¹) Bankr. Act (1898) § 24, subd. a. [Certain changes in the organization of the Federal Courts become effective on January 1, 1912. See article on Courts and Procedure, *supra*.] — ²) Bankr. Act (1898) § 24, subd. b. —

³) Bankr. Act (1898) § 25, subd. a. An allowance of an attorney's fee exceeding five hundred dollars may be reviewed. In *re Roche*, 101 Fed. Rep. 956, 4 Am. Bankr. Rep. 369. —

⁴) Bankr. Act (1898) § 25, subd. b. — ⁵) Bankr. Act (1898) § 25, subd. d. — ⁶) 5 Cyc. 261. —

⁷) This rule is laid down in *Chatfield v. O'*

Dwyer, 101 Fed. 799, 4 Am. Bankr. Rep. 313, where it is further held that if the trustee refuses to take an appeal on the request of a creditor, the court of bankruptcy may direct an appeal by the trustee or permit a creditor to appeal in the name of the trustee. There are, however, cases in which an individual creditor has been allowed to appeal from the allowance of a claim. — ⁸) Bankr. Act (1898) § 25, subd. c. — ⁹) Bankr. Act (1898) § 33. — ¹⁰) Bankr. Act (1898) § 37. — ¹¹) Bankr. Act (1898) § 34.

within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or of the Circuit Courts of the United States, or to any of the judges or justices of the appellate courts of the district in which he may be appointed¹). When the referee is absent or disqualified, or when the office of referee is vacant, the judge of the court of bankruptcy may act as referee, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, fill the vacancy temporarily²).

C. Qualification by Oath and Bond. — A referee must take the same oath of office as that prescribed for judges of the United States courts³), and is required, before assuming the duties of his office, and within such time after his appointment as the court shall prescribe, to enter into a bond to the United States, in such sum, not exceeding five thousand dollars, as shall be fixed by the court, and with at least two sureties to be approved by the court, conditioned for the faithful performance of his official duties⁴). This bond must be filed of record in the office of the clerk of the court, and may be sued upon in the name of the United States for the use of any person injured by a breach of its conditions⁵); but a suit upon the referee's bond must be brought within two years after the alleged breach of the conditions thereof, and cannot be brought thereafter⁶). If the referee does not give the bond within the time limited therefor, he is deemed to have declined the appointment, and the office is vacant⁷).

D. Powers of Referee. — When a case is referred to a referee, all the proceedings therein, except such as are required by the Bankruptcy Act or by the general orders in bankruptcy to be had before the judge, are to be had before the referee⁸). A referee has power to consider all petitions in bankruptcy referred to him by the clerk of the court of bankruptcy, and to make adjudications of bankruptcy or dismiss the petitions and to perform such part of the duties of a court of bankruptcy as is prescribed by the rules or orders of the court of his district, except as to questions arising out of the applications of bankrupts for the confirmation of compositions or for discharges. He may exercise the power vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before him, except the power of commitment; and may exercise the powers of a judge of a court of bankruptcy for the taking possession and releasing the property of the bankrupt when the clerk issues a certificate showing the absence of the judge from the judicial district or from the division of the district, or the judge's sickness or inability to act. Upon the application of the trustee, during the examination of the bankrupt or other proceedings, the referee may authorize the employment of stenographers at the expense of the estate⁹). A referee cannot act in a case in which he is interested, either directly or indirectly, nor can he practice as an attorney or counselor at law in any bankruptcy proceeding; and the statute also prohibits his purchasing, either directly or indirectly, any property of an estate in bankruptcy¹⁰).

E. Duties of Referee. — The duties of the referee are to call upon and receive from the clerk of the court of bankruptcy all papers filed in the court of bankruptcy which have been referred to him, when his office is in the same city or town where the court of bankruptcy convenes; to examine all schedules of property and lists of creditors filed by the bankrupt, and cause such as are incomplete or defective to be amended; to prepare and file the schedules of property and lists of creditors required to be filed by bankrupts, or cause the same to be done, when the bankrupt fails, neglects, or refuses to do so; to give the required notices to creditors; to declare dividends; and to prepare and deliver to the trustee dividend sheets showing the dividends declared and to whom they are payable. He must furnish such information concerning the estates in process of administration before him as may be

¹) Bankr. Act (1898) § 35. — ²) Bankr. Act (1898) § 43. — ³) Bankr. Act (1898) § 36. — ⁴) Bankr. Act (1898) § 50, subds. a, e. Corporations organized for the purpose of becoming sureties on bonds or authorized by law to do so may be accepted as sureties on the bonds of referees when the courts are satisfied that the interests rights of all parties in interest will be amply protected thereby. Bankr. Act (1898) § 50, subd. g. The sureties must

be the owners of property the actual value of which, over and above their liabilities and exemptions, is at least equal to the amount of the bond. Bankr. Act (1898) § 50 subd. f. — ⁵) Bankr. Act (1898) § 50, subd. h. — ⁶) Bankr. Act (1898) § 50, subd. i. — ⁷) Bankr. Act (1898) § 50, subd. k. — ⁸) U. S. Supr. Ct. Gen. Orders in Bankr. No. XII. — ⁹) Bankr. Act (1898) § 38. — ¹⁰) Bankr. Act (1898) § 39, subd. b.

requested by the parties in interest; and upon the application of any party in interest he must preserve the evidence taken or the substance thereof as agreed upon by the parties before him when a stenographer is not in attendance; and whenever requested to do so by any of the parties, he must make up records of the evidence or the substance thereof, together with his findings thereon, and transmit them to the judge. It is the duty of the referee to safely keep, perfect, and transmit to the clerk of the court of bankruptcy the records required to be kept by him, when the case is concluded, and if any papers on file before him are needed in any proceeding in court it is his duty to transmit them to the clerk¹), and secure the return of such papers after they have been used²).

F. Compensation of Referee. — The statute fixes the compensation to be allowed to referees³), and prohibits their receiving in any form or guise, or the court allowing them, any further compensation than is expressly authorized and prescribed⁴).

IV. WHO MAY BECOME BANKRUPTS. — A. Voluntary Bankrupts. —

1. STATUTORY PROVISION. — The Bankruptcy Act provides that any person, [natural or artificial], except a municipal, railroad, insurance, or banking corporation,] who owes debts may take advantage of its provisions and become entitled to the benefits thereof as a voluntary bankrupt⁵).

2. AMOUNT OF INDEBTEDNESS. — There is no provision in the Bankruptcy Act as to the amount of debts which a person must owe in order to be entitled to become a voluntary bankrupt.

3. INFANTS. — Although an infant is undoubtedly a person and hence within the strict meaning of the Bankruptcy Act, yet, as his contracts and debts are in most instances voidable and not binding upon him, it is considered that he is not entitled to become a voluntary bankrupt⁶).

4. LUNATICS. — A lunatic may not, save in a lucid interval, file a voluntary petition in bankruptcy⁷), but there seems to be no reason why the guardian or committee of a person who has been adjudged to be a lunatic may not, in his behalf, take advantage of the provisions of the Bankruptcy Act⁸). It appears, however, that the question as to the right of a lunatic to become a voluntary bankrupt is not definitely settled⁹).

5. MARRIED WOMEN. — A married woman is entitled to the benefits of the Bankruptcy Act in the States where she has the power to contract debts which are binding upon her, and as the disabilities of married women have been removed by statute in most, if not all, of the States, it may be laid down as a general rule that a married woman has the same right as any other person to become a voluntary bankrupt¹⁰).

6. INDIANS. — Indians are subject to certain statutory disabilities with reference to the making of contracts, but when an Indian can contract valid debts, he can take advantage of the Bankruptcy Act¹¹).

7. ALIENS. — It would seem not necessary to entitle a person to become a voluntary bankrupt that he should be a citizen of the United States, for the Bankruptcy Act expressly gives the courts of bankruptcy jurisdiction to declare persons to be bankrupts who do not reside or have their domicile within the United States, but who have property within the jurisdiction of the courts¹²).

8. CORPORATIONS. — The privilege of becoming a voluntary bankrupt is withheld from [municipal, railroad, insurance, or banking] corporations by the express terms of the Bankruptcy Act¹³), and it has been questioned, when a corporation has signified its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and has induced its creditors to file a petition in involuntary bankruptcy against it, whether such a petition is not in effect a voluntary one, and thus an evasion of the Bankruptcy Act, but it would seem

¹) Bankr. Act (1898) § 39, subd. a. If it is impracticable to transmit the original papers certified copies thereof must be transmitted by mail. Bankr. Act (1898) § 39, subd. a (8).

²) Bankr. Act (1898) § 39, subd. a. —

³) Bankr. Act (1898) § 40, as amended by Bankr. Act (1903) § 9. — ⁴) Bankr. Act (1898) § 72. — ⁵) Bankr. Act (1898) § 4, subd. a. —

⁶) See *In re Duguid*, 100 Fed. Rep. 274, 3 Am. Bankr. Rep. 794. — ⁷) Collier on Bankr. (6th

ed.) p. 63. — ⁸) See 5 Cyc. 282. — ⁹) Collier on Bankr. (6th ed.) p. 64. — ¹⁰) See 5 Cyc. 282; Collier on Bankr. (6th ed.) p. 64. —

¹¹) See Collier on Bankr. (6th ed.) pp. 64, 65.

— ¹²) Bankr. Act (1898) § 2, subd. (1). —

¹³) Bankr. Act (1898) § 4, subd. a. [Under the amending Act of June 25, 1910, moneyed, business, or commercial corporations may become voluntary bankrupts.]

that the weight of authority is in favor of permitting the filing of a petition in bankruptcy in such cases¹).

9. **PARTNERSHIPS.** — A partnership which owes debts is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt²).

B. Involuntary Bankrupts. — 1. **STATUTORY PROVISION.** — Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any [moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation] owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or upon an impartial trial, and upon being so adjudged is subject to the provisions of and entitled to the benefits of the Bankruptcy Act³).

2. **WAGE-EARNERS.** — There is no difficulty in determining what is meant by a wage-earner within the above exception, for the statute itself provides that the term wage-earner shall be construed to mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year⁴).

3. **PERSONS ENGAGED IN FARMING OR TILLAGE OF THE SOIL.** — The exception in regard to persons engaged chiefly in farming or the tillage of the soil seems to be strictly construed, and in order to bring a person within the exception his principal occupation must be farming or the tillage of the soil⁵). While it is difficult, if not impossible, to state facts which will in all cases, determine whether or not a particular person is engaged chiefly in the excepted occupations at a particular time⁶), it may be stated generally that mere physical exertions are not the determining factor, but the matter depends upon whether farming or the tillage of the soil is the occupation which the individual deems of paramount importance to his welfare⁷). It is a person's occupation at the time when the alleged act of bankruptcy was committed which determines whether or not he is within the exception, and so if at that time the individual was not engaged chiefly in the excepted occupations, the fact that he afterwards, become chiefly engaged therein will not bring him within the exception even though the change of occupation took place before the petition in bankruptcy was filed against him⁸).

4. **INFANTS.** — A petition in involuntary bankruptcy cannot be successfully prosecuted against an infant when his debts are of such a character that they can be avoided by him on the ground of his infancy⁹), but there seems to be no good reason why an infant who is indebted for necessities to the amount of one thousand dollars should not be adjudged an involuntary bankrupt.

5. **LUNATICS.** — A lunatic may, perhaps, be adjudged an involuntary bankrupt, provided he was sane, or had a lucid interval, at the time of the commission of the act of bankruptcy, although this is doubtful.

6. **MARRIED WOMEN.** — A married woman may undoubtedly be adjudged an involuntary bankrupt, in those States where her disabilities with reference to contracts have been removed by statute.

7. **INDIANS.** — Likewise an Indian, subject to such limitations as are imposed by his statutory disabilities with reference to the making of contracts, may be adjudged an involuntary bankrupt¹⁰).

8. **ALIENS.** — An alien having property within the jurisdiction of the court may, under the express terms of the Bankruptcy Act, be adjudged a bankrupt in involuntary proceedings¹¹).

9. **UNINCORPORATED COMPANIES.** — The phrase "any unincorporated company" is manifestly intended to include all those private bodies which occupy the middle ground between corporations and partnerships, such as Lloyds associations and joint stock associations organized under State laws limiting liability to the capital subscribed by the members¹²).

10. **CORPORATIONS.** — In respect to corporations, only those are included which [come under the class of moneyed, business, or commercial corporations.

1) 5 Cyc. 281. — 2) 5 Cyc. 412. See Bankruptcy Act (1898) § 5. — 3) Bankr. Act. (1898) § 4, subd. b. — 4) Bankr. Act (1898) § 1, subd. (27). — 5) Collier on Bankr. (6th ed.) p. 66. — 6) 5 Cyc. 285, 286. — 7) Collier on Bankr. (6th ed.) p. 66. — 8) In re Luckhardt, 101 Fed. Rep. 807, 4 Am. Bankr. Rep. 307. — 9) In re Eidemiller, 105 Fed. Rep. 595, 5 Am. Bankr. Rep. 570. — 10) Collier on Bankr. (6th ed.) p. 65. — 11) Bankr. Act (1898) § 2, subd. (1). — 12) Collier on Bankr. (6th ed.) p. 66.

Municipal, railroad, insurance, and banking corporations are expressly excepted.] In this connection, the purposes of the corporation as set forth in its charter are not usually, or at least necessarily, controlling, but the test is the pursuit in which the corporation is actually chiefly engaged¹). And in this particular it is not to be doubted that the law is to be interpreted liberally to carry out its purpose, which is that all business corporations, as distinguished from public, quasi-public, and money saving or money lending corporations shall be subject to involuntary bankruptcy²). The bankruptcy of a corporation does not release its officers, directors or stockholders, as such, from any liability to which they may be subject under the laws of the United States, or of any State or Territory³).

11. PARTNERSHIPS. — A partnership may be adjudged a bankrupt in involuntary proceedings⁴).

12. BANKS AND BANKERS. — Private bankers may be adjudged involuntary bankrupts, but it is otherwise as to national banks or banks incorporated under State or Territorial laws⁵). [Banking corporations are expressly excluded from the operation of the law⁶).]

V. ACTS OF BANKRUPTCY. — **A. Prerequisite to Proceeding in Involuntary Bankruptcy.** — Under the system of bankruptcy prevailing in the United States, a person is not liable to be declared an involuntary bankrupt unless he has done or suffered to be done certain acts, termed by the statute "acts of bankruptcy," which either amount to actual or constructive frauds on creditors, or are tantamount to declarations of hopeless insolvency⁷), and even where such an act has been committed, the petition to have the person adjudged to be a bankrupt must be filed within four months thereafter in order to be effective⁸).

B. What are Acts of Bankruptcy. — A person commits an act of bankruptcy, within the statutory definition of such acts: 1. When he conveys, transfers, conceals, or removes, or permits to be concealed or removed, any part of his property, with the intent to hinder, delay, or defraud his creditors or any of them⁹); 2. When he transfers, while he is insolvent, any portion of his property to one or more of his creditors with the intent to give such creditors a preference over his other creditors¹⁰); 3. When he suffers or permits, while he is insolvent, any creditor to obtain a preference through legal proceedings, and does not, at least five days before a sale or final disposition of any property affected by such preference, vacate or discharge such preference¹¹); 4. When he makes a general assignment for the benefit of his creditors, or, being insolvent, applies for a receiver or trustee of his property, or when, because of his insolvency, a receiver or trustee has been put in charge of his property under the laws of the United States, or of one of the States, or of a Territory¹²); or 5. When he admits in writing that he is unable to pay his debts and that he is willing to be adjudged a bankrupt on that ground¹³). It is now necessary to discuss these "acts of bankruptcy" somewhat in detail.

C. Insolvency. — Insolvency of the alleged bankrupt at the time of the commission of some of the acts designated above is necessary in order that they shall constitute acts of bankruptcy within the meaning of the Bankruptcy Act. But this is not true of all or such acts, for the Supreme Court of the United States has held that a person who has made a general assignment for the benefit of his creditors, or admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, may be adjudged a bankrupt, although he may not be actually insolvent as that term is defined in the statute¹⁴). In respect to what constitutes insolvency the statute of the United States establishes a rule differing very materially from that prevailing in other countries. In most countries the cessation of payments is the essential of insolvency¹⁵); but the United States Bankruptcy Act expressly provides that a person shall be deemed insolvent within the provisions of the Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or per-

¹) In re Chicago Joplin Lead and Zinc Co., 104 Fed. Rep. 67, 4 Am. Bankr. Rep. 712. — ²) Collier on Bankr. (6th ed.) p. 71.

— ³) Bankr. Act (1898) § 4. — ⁴) Bankr. Act (1898) § 5. — ⁵) Bankr. Act (1898) § 4, subd. b. — ⁶) Bankr. Act (1898) § 4, subd. b.]

— ⁷) Collier on Bankr. (6th ed.) p. 37. — ⁸) Bankr. Act (1898) § 3, b. — ⁹) Bankr. Act

(1898) § 3, subd. a, (1). — ¹⁰) Bankr. Act

(1898) § 3, subd. a (2). — ¹¹) Bankr. Act

(1898) § 3, subd. a (3). — ¹²) Bankr. Act

(1898) § 3, subd. a, (4). — ¹³) Bankr. Act (1898)

§ 3, a, (5). — ¹⁴) West v. Lea, 174 U. S. Rep.

590, 19 Supr. Ct. Repr. 836, 2 Am. Bankr.

Rep. 463. — ¹⁵) Collier on Bankr. (6th ed.)

p. 4.

mitted to be concealed or removed, with the intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts¹).

D. First Act of Bankruptcy. — *Transferring, Concealing, or Removing Property With the Intent to Hinder, Delay, or Defraud Creditors.* The first act of bankruptcy, as already stated, consists in the debtor having "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, and part of his property, with the intent to hinder, delay, or defraud his creditors, or any of them"²). In this provision the word "convey" has its common meaning, and is equivalent to "grant"³). The word "transfer" is defined by the statute itself, and includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security⁴). "Conceal" means a separation of some tangible thing, money, or chose in action from the body of the estate of the debtor, and the secretion of the same from those who have the right to seize upon it for the payment of their debts⁵); and as the Bankruptcy Act expressly provides that the word "conceal" shall be construed to include secrete, falsify, and mutilate⁶), a falsification or mutilation of books or business records would amount to a concealment. "Remove" signifies an actual or physical change in the position or locality of the property which constitutes the subject of the removal⁷). The conveyances and transfers which are declared by the Bankruptcy Act to be acts of bankruptcy are those which are deemed fraudulent under the rules prevailing at common law or established by statute⁸). It is to be noted that the Bankruptcy Act requires an intent on the part of the debtor to hinder, delay, or defraud his creditors, and it is, of course, difficult to establish such an intent by direct proof and seldom that it can be so established. But it may be established by the admissions or declarations of the debtor, or may even be inferred as a necessary consequence from the act of conveying, transferring, concealing, or removing property⁹). A conveyance by the debtor of property to a trustee of his own selection, for the equal benefit of all his creditors, although not a general assignment because it contains certain conditions of defeasance, is nevertheless an act of bankruptcy, for the reason that it tends to defeat or delay the operation of the Bankruptcy Act, by providing a different method of administration of the estate of the debtor than that which is contemplated by the Bankruptcy Act¹⁰). But where a debtor borrows money, and at the same time makes a transfer of property as security for the repayment thereof, this does not constitute an act of bankruptcy¹¹). Under the statute it is a complete defense to any proceedings in bankruptcy based upon the first act of bankruptcy that the debtor is not insolvent, as the term is defined in the statute, at the time of the filing of the petition against him. The burden of proving his solvency is on the debtor, but if he succeeds in establishing his solvency the proceedings must be dismissed¹²).

E. Second Act of Bankruptcy. — *Transfer of Property to Creditor with the Intent to Prefer Him over Other Creditors.* The second act of bankruptcy consists of the debtor having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors"¹³). In this, as in the first act of bankruptcy, a "transfer" includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, whether absolutely or conditionally, and whether as a payment, pledge, mortgage, gift, or security¹⁴), and it is immaterial how the transfer is made¹⁵). The insolvency of the debtor at the time of making the transfer is, by the express terms of the statute, very material, and a preferential transfer to a creditor does not constitute an act of bankruptcy unless at the time of making it the debtor is actually insolvent¹⁶). The transaction must be between the debtor and one or more of his creditors and there must be other creditors at the time of the transaction¹⁷). The term property includes money, and hence a payment of money on account to a

¹) Bankr. Act (1898) § 1, subd. (15). — ²) Bankr. Act (1898) § 3, subd. a (1). — ³) Collier on Bankr. (6th ed.) p. 42. — ⁴) Bankr. Act (1898) § 1, subd. (25). — ⁵) 5 Cyc. 288. — ⁶) Bankr. Act (1898) § 1 subd. (22). — ⁷) Collier on Bankr. (6th ed.) p. 42. — ⁸) 5 Cyc. 288, 289. — ⁹) Collier on Bankr. (6th ed.) p. 41. — ¹⁰) 5 Cyc. 289. — ¹¹) 5 Cyc.

289. — ¹²) Bankr. Act (1898) § 3, subd. c. — ¹³) Bankr. Act (1898) § 3, subd. a (2). — ¹⁴) Bankr. Act (1898) § 1, subd. (25). — ¹⁵) Collier on Bankr. (6th ed.) p. 45. — ¹⁶) See 5 Cyc. 296. — ¹⁷) Where at the time of the transfer there were no creditors, one who subsequently becomes a creditor cannot complain. Collier on Bankr. (6th ed.) p. 43.

creditor with the intent to prefer him over other creditors is an act of bankruptcy¹). An intent on the part of the debtor to give a preference must be established²), but where the necessary consequence of a transfer or payment made by an insolvent debtor is to liquidate the debt or debts of one or more of his creditors to the entire or partial exclusion of the other creditors an intent to prefer will be presumed³). If there is an intent on the part of the debtor to prefer a creditor, and the transfer has that effect, an act of bankruptcy is committed, although the motive of the debtor may be honest⁴), and the fact that a preferential transfer is secured by means of coercion or threats on the part of the preferred creditor does not affect the character of such transfer as an act of bankruptcy⁵). There is no act of bankruptcy committed where the transfer is made by the debtor in pursuance of an honest effort on his part to extricate himself from his financial embarrassments⁶), or where a creditor exercises his rights under a valid pre-existing contract in possessing himself of the property of the debtor and making a sale thereof⁷). But a conveyance by an insolvent debtor to his creditor of personal property greater in value than the amount of the debt, the difference being paid by the creditor to the debtor in cash, is an act of bankruptcy⁸). As an agreement to insure goods and assign the policies of insurance to secure a creditor is not necessarily prejudicial to other creditors, an assignment of such policies after the debtor becomes insolvent is not an act of bankruptcy⁹).

F. Third Act of Bankruptcy. — *Suffering or Permitting a Creditor to Obtain a Preference through Legal Proceedings and Not Discharging such Preference.* The third act of bankruptcy consists in the debtor having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference"¹⁰). This has been well termed the passive act of bankruptcy¹¹). The decisions are not all in accord as to the exact meaning which should be attached to the words "suffered or permitted" as used in the statute in defining this act of bankruptcy, but the prevailing doctrine is that a debtor suffers or permits a preference to be obtained by legal proceedings where he simply remains passive and supine and allows his property to be taken by judicial proceedings by one creditor to the detriment of the others¹²). The term "legal proceedings" in this connection means proceedings in a court of justice to enforce a legal remedy or obtain equitable relief¹³), and refers to any proceedings in a court of justice, whether interlocutory or final, by which any of the property of the insolvent debtor is seized and diverted from his creditors¹⁴). And a creditor obtains a preference within the meaning of this provision when the result of the proceedings is to produce inequality between creditors of the same class¹⁵). In order that this third act of bankruptcy shall be complete the debtor must not only have suffered or permitted a creditor to obtain a preference through legal proceedings, but he must also have failed to vacate or discharge such preference at least five days before "a sale" or final disposition of any property affected by the preference. An enlargement by construction of the words "a sale" is obviously necessary in order to carry out the intent of the Bankruptcy Act, for if a petition in bankruptcy could not be filed until after an actual sale of the property had been made, the creditors would often be left without any available remedy, and so the provision under discussion is construed to require the debtor to vacate any preference obtained through legal proceedings at least five days before the day set for the sale under such proceedings¹⁶). The act of insolvency is committed when a creditor, through legal proceedings, has obtained a preference, and the debtor has permitted it to remain undischarged, and the intent of the debtor in suffering or permitting such preference to be obtained is immaterial¹⁷).

G. Fourth Act of Bankruptcy. — *Assignment for Benefit of Creditors, or Voluntary or Involuntary Receivership.* The fourth act of bankruptcy is committed when the debtor has "made a general assignment for the benefit of his creditors,

¹) Pirie v. Chicago Title, etc., Co., 182 U. S. Rep. 438, 5 Am. Bankr. Rep. 814. — ²) 5 Cyc. 295. — ³) See Johnson v. Wald, 93 Fed. Rep. 640, 2 Am. Bankr. Rep. 84. — ⁴) 5 Cyc. 295, 296. — ⁵) 5 Cyc. 296. — ⁶) In re Wolf, 98 Fed. Rep. 84, 3 Am. Bankr. Rep. 555. — ⁷) Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. Bankr. Rep. 578. —

⁸) 5 Cyc. 295. — ⁹) Collier on Bankr. (6th ed.) pp. 44, 45. — ¹⁰) Bankr. Act (1898) § 3, subd. a (3). — ¹¹) Collier on Bankr. (6th ed.) p. 45. — ¹²) 5 Cyc. 293, 294. — ¹³) Collier on Bankr. (6th ed.) p. 47. — ¹⁴) 5 Cyc. 293. — ¹⁵) Collier on Bankr. (6th ed.) p. 47. — ¹⁶) Collier on Bankr. (6th ed.) p. 47. — ¹⁷) 5 Cyc. 292.

or, being insolvent, applied for a receiver or trustee of his property", or where "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States"¹). This provision of the Bankruptcy Act was not intended to and does not make general assignments for the benefit of creditors unlawful, but the effect is merely that when such an assignment is made the creditors have the right to force the assignor into bankruptcy²). Any general assignment for the benefit of creditors, whether with or without preferences, is an act of bankruptcy³). So, an act of bankruptcy is committed where there is a confession of judgment to a trustee for the benefit of all creditors⁴), or where a general assignment for the benefit of creditors is made by a corporation by a vote of a majority of the board of directors and of the stockholders⁵). Prior to the amendatory act of 1903 it had been held that a voluntary application for a receivership was not an act of bankruptcy⁶), although the question may not have been fully settled⁷), but the express provisions of the statute have now settled that such an application is an act of bankruptcy. The reason for this addition to the law was that it placed copartnerships and corporations on the same footing with individual insolvents when they attempted in a similar manner to evade the Bankruptcy Act⁸). As the law now stands it is not possible for a State court, by appointing a receiver for an insolvent debtor, to obtain priority of jurisdiction over the court of bankruptcy to administer the assets of such debtor⁹). In order that an application for a receiver shall constitute an act of bankruptcy, the application must be based on insolvency, and so the appointment of a temporary receiver in a stockholders' suit to restrain a corporation from the further exercise of its corporate franchises is not an act of bankruptcy¹⁰). It has also been held that an application by an administrator of a deceased partner for a receiver to wind up the affairs of an insolvent firm in which the surviving partner joins, is not an act of bankruptcy¹¹). It seems that where an application for a receiver is relied on as an act of bankruptcy it must be alleged and proved that the debtor was insolvent both at the time of the commission of the act and at the time of the filing of the petition in bankruptcy¹²).

H. Fifth Act of Bankruptcy. — *Written Admission of Inability to Pay Debts and Willingness to be Adjudged a Bankrupt on that ground.* The fifth act of bankruptcy consists of the debtor having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground"¹³). While it was at one time questioned whether this act of bankruptcy could be committed by a corporation as well as by a natural person, it is now well settled that a corporation may, through its properly authorized officers, make such an admission of its inability to pay its debts and of its willingness to be adjudged a bankrupt as the statute contemplates¹⁴). The concurrence of three things is necessary to the commission of this act of bankruptcy: 1. a writing signed by the debtor or by some duly authorized officer or agent of the debtor, 2. a distinct admission in such writing of the inability of the debtor to pay his debts, and 3. an unqualified expression of the willingness of the debtor to be adjudged a bankrupt on that ground¹⁵); and it would seem that any writing which substantially covers these three essentials is sufficient, although the exact words of the statute are not used therein¹⁶). The force and effect of an admission of inability to pay debts as an act of bankruptcy is not impaired or affected by a specification of the cause of such inability¹⁷), neither, where the writing is sufficient, is the character of the act affected by the fact that the debtor requests certain creditors to file a petition in bankruptcy against him¹⁸).

VI. PROCESS, PLEADINGS, AND ADJUDICATION. — A. Statutory Provisions. — Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, must be made upon the person named as defendant in the same

¹) Bankr. Act (1898) § 3, subd. a (4) § 2. — ²) Collier on Bankr. (6th ed.) p. 49. — ³) 5 Cyc. 291. — ⁴) In re Green, 106 Fed. Rep. 313, 5 Am. Bankr. Rep. 848. — ⁵) Clark v. American Mfg., etc., Co., 101 Fed. Rep. 962, 4 Am. Bankr. Rep. 351, 42 Cir. Ct. App. Rep. 120. — ⁶) In re Empire Metallic Bedstead Co., 98 Fed. Rep. 981, 3 Am. Bankr. Rep. 575, 39 Cir. Ct. App. Rep. 372. — ⁷) See Collier on Bankr. (6th ed.) p. 50. — ⁸) See Collier on Bankr. (6th ed.) p. 51. — ⁹) Collier on Bankr.

(6th ed.) p. 51. — ¹⁰) Collier on Bankr. (6th ed.) p. 52. — ¹¹) Moss Nat. Bank v. Arend, 146 Fed. Rep. 351, 16 Am. Bankr. Rep. 867, cited in Collier on Bankr. (6th ed.) p. 51. — ¹²) Collier on Bankr. (6th ed.) p. 57. — ¹³) Bankr. Act (1898) § 3, subd. a (5). — ¹⁴) 5 Cyc. 287, 288. — ¹⁵) Collier on Bankr. (6th ed.) p. 53. — ¹⁶) Collier on Bankr. (6th ed.) p. 54. — ¹⁷) In re Kerston, 110 Fed. Rep. 929, 6 Am. Bankr. Rep. 516. — ¹⁸) Collier on Bankr. (6th ed.) p. 54.

manner that service of such process is had upon the commencement of a suit in equity in the courts of the United States, except that the process must be returnable in fifteen days unless the judge fixes a longer time for cause shown. But in case personal service cannot be made notice must be given by publication in the same manner and for the same time as is provided by law for notice by publication in suits to enforce legal or equitable liens in the courts of the United States, except that, unless the judge directs otherwise, the order is not to be published more than once a week for two consecutive weeks, and that the return day must be ten days after the last publication unless the judge, for cause, fixes a longer time¹). The bankrupt, or any creditor, has the right to appear and plead to the petition within five days after the return day or within such further time as the court may allow²). The law requires that all pleadings setting up matters of fact shall be verified under oath³). If the bankrupt or any of the creditors appears within the time limited and controverts the facts alleged in the petition, the judge must determine as soon as may be the issues presented by the pleadings, and make the adjudication or dismiss the petition. This determination is made by the judge without the intervention of a jury, except in those cases in which a jury trial is given by the Bankruptcy Act⁴). If no pleadings are filed by the bankrupt or any of his creditors, the judge, if present, must on the day after the last day allowed for the filing of pleadings, or as soon as practicable thereafter, make the adjudication of bankruptcy or dismiss the petition⁵). If the judge is absent from the district, or from the division of the district, in which the petition is pending, on the day after the last day on which pleadings can be filed, and no pleadings have been filed by the bankrupt or any of his creditors, it is the duty of the clerk to forthwith refer the case to the referee⁶). Upon the filing of a voluntary petition the judge hears the same, and makes the adjudication of bankruptcy or dismisses the petition. If the judge is absent from the district or the division of the district, in which the petition is filed, it is the duty of the clerk to forthwith refer the case to the referee⁷).

B. Who may File Petition for Adjudication of Bankruptcy. — Any [qualified] person who owes debts, except a corporation, has a right to file a petition praying that he be adjudged a voluntary bankrupt⁸), and a State court cannot enjoin a person from applying to a court of bankruptcy to be adjudged a bankrupt⁹). Three or more creditors who have provable claims against the debtor which amount in the aggregate to the sum of five hundred dollars or more, in excess of the value of the securities, if any, held by them, may file a petition to have the debtor adjudged a bankrupt¹⁰); and such petition may be filed by a single creditor whose claim equals such amount, in case all the creditors are less than twelve in number¹¹). Creditors of the bankrupt who are employed by him at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, and who have not joined in the petition, are not to be counted in computing the number of creditors for the purpose of determining how many must join in the petition¹²). In order to entitle a person to present or join in a petition for an adjudication of involuntary bankruptcy it is necessary that he should have been a creditor of the alleged bankrupt at the time of the commission of the alleged act of bankruptcy¹³). A stockholder in a corporation or a member of a partnership cannot, merely as such, present a petition to have the corporation or partnership adjudged an involuntary bankrupt; but he may do so if he is also a creditor of the corporation or partnership¹⁴). A cre-

¹) Bankr. Act (1898) § 18 subd. a. — ²) Bankr. Act (1898) § 18 subd. b. — ³) Bankr. Act (1898) § 18, subd. c. — ⁴) Bankr. Act (1898) § 18, subd. d. — ⁵) Bankr. Act (1898) § 18, subd. e. — ⁶) Bankr. Act (1898) § 18, subd. f. — ⁷) Bankr. Act (1898) § 18, subd. f. — ⁸) Bankr. Act (1898) § 59, subd. a. [As to what persons are capable of becoming bankrupt, see IV, supra.] — ⁹) 5 Cyc. 299. — ¹⁰) Bankr. Act (1898) § 59, subd. b. — ¹¹) Bankr. Act (1898) § 59, subd. b. If the petition is filed by less than three creditors, and it is averred therein that the creditors of the bankrupt are less than twelve in number, and the answer avers the existence of a larger number of creditors, the debtor must file with his answer a

list under oath of all the creditors, with their addresses. Thereupon the court must cause all such creditors to be notified of the pendency of the petition, and must delay the hearing upon the petition in order that the parties in interest shall have an opportunity to be heard. If upon such hearing it appears that a sufficient number of creditors have joined in the petition, or if prior to or during the hearing a sufficient number of the creditors join therein, the case may be proceeded with; but otherwise it must be dismissed. Bankr. Act (1898) § 59, subd. d. — ¹²) Bankr. Act (1898) § 59, subd. e. — ¹³) Collier on Bankr. (6th ed.) pp. 460, 461. — ¹⁴) Collier on Bankr. (6th ed.) pp. 461, 462.

ditor whose claim is fully secured cannot present or join in a petition for an adjudication of involuntary bankruptcy against his debtor, but a creditor whose claim is secured in part only may do so, although for the purpose of ascertaining whether the necessary amount of claims is represented in the petition, his claim can be counted only to the extent that it exceeds the value of the security which he holds¹). A creditor who has received a preference may petition for an adjudication of bankruptcy against his debtor if he surrenders his preference, but not otherwise²). It has also been asserted that an attaching creditor is in the position of a preferred creditor, and therefore cannot follow up his attachment with a petition for an adjudication of involuntary bankruptcy unless he surrenders, or at least offers to surrender, his levy³). Creditors who have participated in the act of bankruptcy complained of, as by becoming parties to a general assignment and accepting dividends, thereon, cannot afterwards be petitioning creditors in bankruptcy⁴).

C. Form and Contents of Petition. — The Supreme Court of the United States has established forms for petitions in bankruptcy by the bankrupt himself, by a bankrupt partnership, and by creditors, and whenever it is possible these forms should be used and followed without unnecessary departure therefrom⁵). Where a petition is presented by the bankrupt himself, it should show that he has resided or has had his domicile or his principal place of business within the district for the greater portion of six months immediately preceding the filing of the petition; that he owes debts which he is unable to pay in full; that he is willing to surrender for the benefit of his creditors all his property except such as is exempt by law; that he desires to obtain the benefit of the acts of Congress relating to bankruptcy; and that the schedules annexed are full and true, and should conclude with a prayer that he be adjudged a bankrupt within the purview of the Bankruptcy Acts, and be verified by the petitioner⁶). A petition in voluntary bankruptcy by a partnership should allege the names of the partners, the existence of the partnership, and the firm name; that the principal place of business of the partnership during the greater portion of the six months preceding the filing of the petition has been within the district; that the partners owe debts which they are unable to pay in full; that they are willing to surrender for the benefit of their creditors all their property except such as is exempt by law; that they desire to obtain the benefit of the acts of Congress relating to bankruptcy; and that the annexed schedules of the partnership property, debts, and creditors, are true, full, and accurate. Then should follow an allegation on the part of each partner that the annexed schedules of his individual property, debts, and creditors are true, full, and accurate. The petition should close with a prayer that the petitioners be adjudged to be bankrupts within the purview of the bankruptcy acts, and should be verified by all the petitioners⁷). A petition in involuntary bankruptcy by creditors of the bankrupt should allege that the bankrupt has resided or had his domicile or his principal place of business within the district for the greater part of six months immediately preceding the filing of the petition; that the bankrupt owes debts to the amount of one thousand dollars; that the petitioners are creditors of the bankrupt having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars; and should set forth the nature and amount of such claims. It should then be alleged that the bankrupt is insolvent and has committed an act of bankruptcy within four months immediately preceding the filing of the petition, and such act of bankruptcy should be specified. The petition should then conclude with a prayer that service of the petition, together with a subpoena be made upon the bankrupt as provided by the statute, and that he be adjudged by the court to be a bankrupt and within the purview of the Bankruptcy Acts, and should be verified by three of the petitioners⁸).

D. Filing of Petition. — In cases of involuntary bankruptcy, the statute requires that petitions shall be filed in duplicate, one copy for the clerk and one copy for service on the bankrupt⁹), and this means that the petitioners must file two petitions, each of which is an original, and not merely an original and a copy thereof¹⁰).

¹) Collier on Bankr. (6th ed.) p. 463; 5 Cyc. 303. — ²) 5 Cyc. 303, 304; Collier on Bankr. (6th ed.) pp. 463, 464. — ³) 5 Cyc. 304; Collier on Bankr. (6th ed.) p. 464. — ⁴) Collier on Bankr. (6th ed.) p. 464. — ⁵) Collier on Bankr. (6th ed.) p. 238. — ⁶) U. S. Supr.

Ct. Forms in Bankr. No. 1. — ⁷) U. S. Supr. Ct. Forms in Bankr. No. 2. — ⁸) U. S. Supr. Ct. Forms in Bankr. No. 3. — ⁹) Bankr. Act (1898) § 59, subd. c. — ¹⁰) Collier on Bankr. (6th ed.) p. 465.

This requirement is imperative and a failure to comply therewith is a jurisdictional defect¹). The petition must be filed in the court having jurisdiction of the proceedings²), but a delivery of the petition to the clerk outside of his office and his acceptance of it amounts to a filing³). The filing of the petition is the commencement of the proceeding⁴), and constitutes notice to all the world⁵). The jurisdiction of the court attaches as soon as the petition is filed⁶).

E. Amendment of Petition. — The courts have power to allow amendments to the petition on application of the petitioners; but they are reluctant to allow amendments the object of which is to introduce new facts or essentially change the grounds of the petition⁷).

F. Process. — In voluntary proceedings in bankruptcy there is no need of process, but when a petition in involuntary bankruptcy is filed, the clerk should at once issue a subpoena⁸) under the seal of the court, addressed to the alleged bankrupt, commanding him to appear before the court at the place and on the day mentioned therein, to answer to the petition⁹). The service of the subpoena is made in the same manner as other process is served¹⁰).

G. Appearances. — Either the bankrupt or any creditor who owes a demand or claim provable in bankruptcy may appear in the proceedings¹¹) and plead to the petition at any time within five days after the return day, or within such further time as the court may allow¹²). The appearance by the bankrupt may be either in person or by an attorney who is authorized to practice in the circuit or district court of the United States of the district¹³), and where the appearance is by attorney notices and orders which are not required by the Bankruptcy Act or the General Orders in Bankruptcy to be served upon the party personally may be served upon his attorney¹⁴).

H. Seizure of Property while Petition Pending. — When it is made to appear upon satisfactory proof by affidavit that a person against whom an involuntary petition in bankruptcy has been filed and is pending has neglected, or is neglecting, or is about to neglect his property, by reason of which the property has deteriorated, is deteriorating, or is about to deteriorate in value, the judge may issue a warrant to the marshal to seize such property and hold it subject to further orders. But before such a warrant is issued the petitioner applying therefor must enter into a bond with sureties, in an amount to be fixed by the judge, to indemnify the alleged bankrupt for the damages which he shall sustain if the seizure proves to have been wrongfully obtained. The property must be released if the alleged bankrupt gives bond with sureties, in an amount to be fixed by the judge, conditioned to turn over such property to the trustee, or to pay to him the value thereof in money, if he is adjudged to be a bankrupt¹⁵). This provision applies only to cases where the property is physically in the possession of the bankrupt or his agent, and where the property is held adversely, even though fraudulently, the usual remedy of a plenary suit must be resorted to¹⁶).

I. Trial. — The trial of the issues presented by the pleadings is brought on on the notice required by the practice of the district court in which the proceeding is brought, or under the district bankruptcy rules¹⁷). The issues may be tried by the court, or, if the judge is absent, the case may be referred to a referee¹⁸). A court of bankruptcy is a court of equity, and a jury trial is not granted as a matter of right in civil

¹) Collier on Bankr. (6th ed.) p. 465. — ²) 5 Cyc. 297. — ³) In re Wolf, 98 Fed. Rep. 84, 3 Am. Bankr. Rep. 555. — ⁴) Even though the subpoena does not immediately issue, or, if issued, is not served within the time limited. Collier on Bankr. (6th ed.) pp. 239, 240. — ⁵) Collier on Bankr. (6th ed.) p. 240. — ⁶) Collier on Bankr. (6th ed.) p. 239. — ⁷) 5 Cyc. pp. 306, 307. — ⁸) Collier on Bankr. (6th ed.) pp. 241, 242. — ⁹) 5 Cyc. 309. — ¹⁰) Bankr. Act (1898) § 18, subd. a. — ¹¹) Collier on Bankr. (6th ed.) p. 245. — Creditors other than the original petitioners may at any time enter their appearances in the proceedings, and either join in the petition or file answers and be heard in opposition to

the prayer of the petition. Bankr. Act (1898) § 59, subd. f. A preferred creditor or one who has an attachment cannot appear in the bankruptcy proceedings without surrendering his preference or attachment. Collier on Bankr. (6th ed.) p. 245. — ¹²) Bankr. Act (1898) § 18, subd. b, 5 Cyc. 310. The answer of the bankrupt in involuntary proceedings or of a creditor in voluntary proceedings may controvert any material allegation of the petition. 5 Cyc. 311. — ¹³) U. S. Supr. Ct. Gen. Orders in Bankr. No. IV; 5 Cyc. 309. — ¹⁴) U. S. Supr. Ct. Gen. Orders in Bankr. No. IV. — ¹⁵) Bankr. Act (1898) § 69. — ¹⁶) Collier on Bankr. (6th ed.) p. 582. — ¹⁷) Collier on Bankr. (6th ed.) p. 249. — ¹⁸) 5 Cyc. 312.

matters arising under the bankruptcy act¹⁾, except that a person against whom an involuntary petition in bankruptcy has been filed is, by the express terms of the Bankruptcy Act, entitled to have a trial by jury in respect to the question of his insolvency or of any act of bankruptcy which it is alleged in the petition that he has committed²⁾. A creditor who appears will be allowed to manage before the court only his own individual interests³⁾. Evidence may be introduced in proceedings to determine the question of bankruptcy in the same manner as in other proceedings⁴⁾. The petitioner has the burden of proof as to any fact requisite to confer jurisdiction on the court, and so where the proceedings are involuntary the burden of proof is, as a general rule, upon the petitioning creditor to show that an act of bankruptcy has been committed⁵⁾. So also, the burden of proving the insolvency of the bankrupt, when this is material, rests upon the petitioning creditor⁶⁾, unless the act of bankruptcy consists of a transfer or conveyance by the alleged bankrupt of his property with the intent to hinder, delay, or defraud his creditors, or unless the bankrupt, having denied the allegation of his insolvency, fails to appear in court on the hearing with his books, papers, and accounts, and submit to an examination as to matters tending to establish his solvency, in which cases the burden of proving his solvency rests upon the alleged bankrupt⁷⁾.

J. Dismissal of Petition. — A petition in involuntary bankruptcy may be dismissed if the issues presented by the pleadings are decided adversely to the petitioning creditors, or, in case no pleadings have been filed by the alleged bankrupt or any of his creditors other than the petitioners, if the facts alleged in the petition are not sufficient to warrant an adjudication of bankruptcy⁸⁾. But a proceeding in bankruptcy, when once begun, must result in either an adjudication of bankruptcy or a dismissal on the merits⁹⁾. And a petition in bankruptcy, whether voluntary or involuntary cannot be dismissed by the petitioner or petitioners, or by consent of the parties, or for want of prosecution, until after notice has been given to the creditors [and to that end the court, before entertaining an application for dismissal, must require the bankrupt to file a list under oath of all his creditors, with their addresses, and cause notice to be sent to all such creditors of the pendency of such application, and delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard]¹⁰⁾. Nor can a petitioning creditor withdraw and thus reduce the number of petitioning creditors to less than the three required by the statute¹¹⁾.

VII. RECEIVERS. — The filing of a petition in bankruptcy does not deprive the alleged bankrupt of the title to his property, but until an adjudication of bankruptcy such title remains in him, subject to the control of the court to be exercised either by a receiver or by the marshal if this is necessary for the protection of the interests of creditors¹²⁾. The receiver may be appointed by the court¹³⁾, or by the referee under the power vested in him by the statute authorizing him to perform the duties of the court¹⁴⁾; and it seems proper that the creditors should be permitted to nominate the person to be appointed as receiver¹⁵⁾. The object of the appointment of a receiver is to preserve the property of the bankrupt so as to prevent its deterioration or waste¹⁶⁾, and a receiver should be appointed only when this is absolutely necessary to preserve the assets¹⁷⁾, but when a proper occasion arises the receiver may be authorized to carry on the business of the bankrupt¹⁸⁾.

VIII. SCHEDULES. — **A. Statutory Requirement.** — The bankrupt must prepare, make oath to, and file in court a schedule of his property, showing its amount, kind, location, and money value, and a list of his creditors, showing their residences, if known, the amount due to each, the consideration of the indebtedness, and the security, if any, held by any creditors, and also his claim

1) 5 Cyc. 243. — 2) Bankr. Act (1898) § 19, subd. a. In order to be entitled to a trial of such questions by a jury, the person alleged to be a bankrupt must file a written application for a jury trial at or before the time within which an answer must be filed, and if he does not file such an application within such time he is to be deemed to have waived his right to a trial by a jury. Bankr. Act (1898) § 9, subd. a. — 3) U. S. Supr. Ct. Gen. Orders in Bankr. No. IV; 5 Cyc.

309. — 4) 5 Cyc. 313. — 5) 5 Cyc. 313. — 6) 5 Cyc. 313, 314. — 7) 5 Cyc. 313. — 8) 5 Cyc. 314. — 9) Collier on Bankr. (6th ed.) p. 469. — 10) Bankr. Act (1898) § 59, subd. g. — 11) Collier on Bankr. (6th ed.) p. 469. — 12) Collier on Bankr. (6th ed.) p. 19. — 13) Bankr. Act (1898) § 2, subd. (3). — 14) Bankr. Act (1898) § 38, subd. a (4). — 15) Collier on Bankr. (6th ed.) p. 22. — 16) 5 Cyc. 271. — 17) In re Florcken, 107 Fed. Rep. 241, 5 Am. Bankr. Rep. 802. — 18) Bankr. Act (1898) § 2, subd. (5).

for such exemptions as he may be entitled to¹). All these papers must be prepared in triplicate²).

B. By Whom Schedules Prepared. — The duty of preparing schedules of property and lists of creditors rests primarily, as has been seen, upon the bankrupt³). But in cases of involuntary bankruptcy, where the bankrupt is absent or cannot be found, it is the duty of the petitioning creditor to file, within five days after the adjudication of bankruptcy, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor, while if the debtor is found and is served with a notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may either apply for an attachment against the debtor, or himself furnish such schedule⁴). It is also made the duty of the referee in bankruptcy to prepare and file the schedules of property and lists of creditors required to be filed by bankrupts, or to cause the same to be prepared and filed, when the bankrupt fails, refuses, or neglects to do so⁵).

C. Form of Schedules. — 1. **FORMS PRESCRIBED BY SUPREME COURT.** — The Supreme Court of the United States, under the power given to it by the Bankruptcy Act to prescribe all necessary forms for carrying the act into effect⁶) has provided for two schedules to be prepared and filed by the bankrupt, or the petitioning creditor or referee, as the case may be⁷).

2. **SCHEDULE OF CREDITORS AND LIABILITIES.** — The first, designated as "Schedule A", is a statement of all debts of the bankrupt; and should show in detail: 1. All creditors who are to be paid in full, or to whom priority is secured by law; 2. Creditors holding securities⁸); 3. Creditors whose claims are unsecured⁹); 4. Liabilities of the bankrupt on notes or bills discounted, and which ought to be paid by the drawers, makers, acceptors, or indorsers¹⁰); and 5. Accommodation paper to which the debtor is a party¹¹). This is by far the most important schedule; and its purpose is threefold; to give the court information as to the persons entitled to notice; to inform the trustee as to the claims against the estate and the considerations on which they rest; and to an extent at least, to limit the effect of the bankrupt's discharge to parties to the proceeding¹²).

3. **SCHEDULE OF PROPERTY AND CLAIMS OF EXEMPTIONS.** — The second schedule, designated as "Schedule B", is a statement of all the property of the bankrupt, and should show in detail 1. all the real estate of the bankrupt; 2. all the personal property of the bankrupt; 3. all the choses in action in which the bankrupt is interested; 4. all property in reversion, remainder, or expectancy of the bankrupt, including property held in trust for him or subject to any power or right to dispose of or to charge¹³); 5. a particular statement of the property claimed

¹) Bankr. Act (1898) § 7, subd. a (8). —

²) There must be one copy of each paper for the clerk of the court of bankruptcy, one for the referee, and one for the trustee. Bankr. Act (1898) § 7, subd. a (8). — ³) See supra VIII, a. — ⁴) U. S. Supr. Ct. Gen. Orders in Bankr. No. IX. —

⁵) Bankr. Act (1898) § 39, subd. a (6). —

⁶) Bankr. Act (1898) § 30. — ⁷) U. S. Supr. Ct. Forms in Bankr. No. 1, schedules A and B. —

⁸) In this part of the schedule the particulars of the securities held, with the dates of the same, and when they were given, are to be stated under the names of the several creditors, and also the particulars concerning each debt, as required by the Acts of Congress relating to bankruptcy; and whether the debts were contracted as partner or joint contractor with any other person, and if so, with whom. —

⁹) In this part of the schedule, when the name or residence of any drawer, maker, indorser, or holder of any bill or note, etc., is unknown that fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set off stated in the schedule of property. —

¹⁰) In this part of the schedule, the dates of the notes or bills, and when due, with the names and residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor is to be stated, together with his business and place of residence. The same particulars are to be given as to notes or bills on which the debtor is liable as indorser. — ¹¹) In this part of the schedule, the dates of the notes or bills, and when due, together with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; and if the bankrupt is liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. The same particulars are to be given as to other commercial paper. — ¹²) Collier on Bankr. (6th ed.) p. 119. — ¹³) In this part of the schedule a particular description of each interest must be entered.

by the bankrupt as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and if any portion of it is real estate, giving its location, description, and present use¹⁾; and 6. a list of books, papers, deeds, and writings relating to the bankrupt's business and estate²⁾.

D. Verification of Schedules. — Although the statute prescribes that the bankrupt shall make oath to the schedules³⁾, it is not thought that a separate verification thereof is so essential that its absence will affect the jurisdiction of the court where the schedules accompany the petition, but in such case the oath to the petition, when coupled with its reference to the schedules and what they contain, is sufficient to satisfy the statute⁴⁾.

E. Time for Filing Schedules. — In case of voluntary bankruptcy the schedule of property and list of creditors must be filed with the petition, while in case of involuntary bankruptcy they must be filed within ten days after the adjudication unless further time is granted⁵⁾.

F. Amendment of Schedules. — The statute makes it the duty of the referee to cause incomplete or defective schedules to be amended⁶⁾ and the general orders in bankruptcy provide that the court may allow amendments to the schedule on the application of the petitioner⁷⁾. An amendment may be made even after objections to a discharge have been filed, but in such case the utmost good faith should appear⁸⁾. If amendments are made to separate schedules, the same must be made separately, with proper references⁹⁾. The schedule of property may be amended so as to include a claim of exemption¹⁰⁾.

IX. PROPERTY EXEMPTIONS OF BANKRUPT. — The statutes of all the American States allow a debtor to hold certain specified property, or property up to a designated value exempt from the claims of his creditors, so that an unfortunate debtor and his family shall be protected from absolute want; and the Bankruptcy Act expressly provides that it shall not affect the allowance to a bankrupt of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein he has had his domicile for the six month immediately preceding the filing of the petition, or the greater part of such time¹¹⁾. The right to such exemptions is, however, a personal privilege granted to the bankrupt, which he may exercise or waive at his pleasure¹²⁾, and as a rule it can be exercised only by the bankrupt himself and not by any other person¹³⁾, although the statutes of some of the States allow the wife or children of the bankrupt to claim the benefit of the exemption in case of his death or disability¹⁴⁾. The courts of bankruptcy have power to determine the right of the bankrupt to the exemptions claimed, and the kinds of property, and the value and amount to be included in the exemption¹⁵⁾,

If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the schedule should state the date of such deed, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.

¹⁾ The requirements of the form prescribed by the Supreme Court should be observed, although the law does not compel a detailed statement of the articles claimed as exempt. Collier on Bankr. (6th ed.) pp. 120, 121. — ²⁾ This part of the schedule should consist of a true list of all books, papers, deeds, and writings relating to the bankrupt's trade, business, dealings, estate, and effects, or any part thereof, which at the date of the petition, are in the bankrupt's possession or under his custody and control, or which are in the possession or custody of any person in trust for the bankrupt, or of his use, benefit, or advantage, and also of all others which have been previously, at any time, in the bankrupt's possession or under his custody, and which are at the date of the petition held by other persons, giving their names, with the reason for their custody of

the same. — ³⁾ Bankr. Act (1898) § 7, subd. a (8). — ⁴⁾ Collier on Bankr. (6th ed.) p. 121. — ⁵⁾ Bankr. Act (1898) § 7, subd. a (8). — ⁶⁾ Bankr. Act (1898) (§ 39, subd. a (2)). The referee may cause an incomplete or defective schedule to be amended on his own motion or in response to an application under U. S. Supr. Ct. Gen. Orders in Bankr. No. XI. Collier on Bankr. (6th ed.) p. 121. — ⁷⁾ U. S. Supr. Ct. Gen. Orders in Bankr. No. XI. In the application for leave to amend, the petitioner must state the cause of the error in the paper originally filed. U. S. Supr. Ct. Gen. Orders in Bankr. No. XI. — ⁸⁾ Collier on Bankr. (6th ed.) p. 121. — ⁹⁾ U. S. Supr. Ct. Gen. Orders in Bankr. No. XI. — ¹⁰⁾ Collier on Bankr. (6th ed.) pp. 121, 122. — ¹¹⁾ Bankr. Act (1898) § 6. — ¹²⁾ 5 Cyc. 360. A waiver may arise either from the failure of the bankrupt to claim exemptions or by a general or specific surrender of them. Collier on Bankr. (6th ed.) p. 96. An exemption may be waived by the debtor by contract, surrender, or neglect to claim it, and the debtor may waive his exemption in favor of one creditor and insist upon it as against another. 5 Cyc. 362. — ¹³⁾ 5 Cyc. 360. — ¹⁴⁾ 5 Cyc. 360, note. — ¹⁵⁾ 5 Cyc. 361.

but in ascertaining to what exemptions the bankrupt is entitled, the law of the State controls, and the determination of the highest courts of the State as to the meaning of the State law is binding on the courts of bankruptcy, although if the question has not been authoritatively settled by the State courts the Federal courts of bankruptcy may determine it¹). The right of the bankrupt to exemptions is to be determined as of the date of the adjudication of bankruptcy²). It is the duty of the trustee to set apart the exemptions of the bankrupt and report the items and the estimated value thereof to the court as soon as practicable after his appointment³), and not later than twenty days after receiving the notice of such appointment⁴), and this duty cannot be performed by any other person⁵). Any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and, if either party so requests, the referee must certify the exceptions to the court for final determination⁶). Although the trustee takes no title to exempt property of the bankrupt⁷), he has the right to the possession of the property claimed as exempt until the exemptions are fixed; but as soon as the claim of exemption is determined in favor of the bankrupt, it is the duty of the trustee to surrender to him the possession of the exempt property⁸). The fact that the bankrupt has failed to account for and turn over to the trustee all of his assets has been held not to deprive him of his right to his exemptions⁹), although it may be otherwise under State statutes which make the right to exemptions depend on the good faith of the debtor¹⁰).

X. DUTIES OF BANKRUPTS. — A. Attendance at Meetings and Hearings and Submission to Examination as to Conduct of Business, etc. — The bankrupt must attend the first meeting of his creditors, if directed by the court or a judge thereof to do so¹¹), and he is also, required, when he is present at the first meeting of his creditors, and at such other times as the court may order, to submit to an examination concerning the conduct of his business, his dealings with his creditors and other persons, the cause of his bankruptcy, the amount, kind, and location of his property, and all other matters which may affect the administration and settlement of his estate¹²). But he is not required to attend a meeting of his creditors, or to attend at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, unless the court or a judge thereof orders him to do so, for cause shown, and if he is examined or required to attend at any place other than the city, town, or village of his residence, he is entitled to be repaid his actual expenses of such attendance out of the estate¹³). When the bankrupt applies for a discharge, he must attend the hearing upon such application¹⁴), wherever such hearing may be, and at his own expense, even though the court has not ordered him to do so¹⁵).

B. Production of Books, Papers, and Accounts, and Submission to Examination as to Solvency. — Whenever a person against whom a petition in bankruptcy has been

¹) Collier on Bankr. (6th ed.) p. 92. — ²) Collier on Bankr. (6th ed.) p. 589. — ³) Bankr. Act (1898) § 47, subd. a (11). — ⁴) U. S. Supr. Ct. Gen. Orders in Bankr. No. XVII. — ⁵) 5 Cyc. 361, note. — ⁶) U. S. Supr. Ct. Gen. Orders in Bankr. No. XVII. — ⁷) Bankr. Act (1898) § 70, subd. a. — ⁸) Collier on Bankr. (6th ed.) p. 94. — ⁹) *In re Park*, 102 Fed. Rep. 602, 4 Am. Bankr. Rep. 432. — ¹⁰) *In re Waxelbaum*, 101 Fed. Rep. 228, 4 Am. Bankr. Rep. 120. — ¹¹) Bankr. Act (1898) § 7, subd. a (1). If the bankrupt is once ordered to attend a meeting, he must attend every continuance of the meeting, but a referee will not permit the bankrupt to be harassed by repeated applications for adjournments. Collier on Bankr. (6th ed.) p. 113. — ¹²) Bankr. Act (1898) § 7, subd. a (9). The right to examine the bankrupt is essential to a due administration of the law, and the intent of the Bankruptcy Act seems to be that creditors may have an examination of the bankrupt at any time during the pendency of his proceedings. It

seems that if the bankrupt is present at a regular meeting of his creditors the court may order him to be sworn although he does not consent. In the examination the usual method of questions and answers is followed, but the rules of evidence are not the same as at ordinary trials, for the examination is in the nature of an inquisition, and great latitude is allowed to the examiner, although the examination cannot as a rule be extended to property acquired by the bankrupt after the petition was filed. When the examination is reduced to writing it should be read over by the bankrupt and subscribed by him. Collier on Bankr. (6th ed.) pp. 122—125. It is expressly provided that no testimony given by the bankrupt in such an examination shall be offered in evidence against him in any criminal proceeding. Bankr. Act (1898) § 7, subd. a (9). — ¹³) Bankr. Act (1898) § 7. — ¹⁴) Bankr. Act (1898) § 7, subd. a (1). — ¹⁵) Collier on Bankr. (6th ed.) p. 113.

filed takes issue with and denies the allegation of his insolvency, it is his duty under the statute to appear in court on the hearing with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to attend and submit to examination, the burden of proving his solvency is upon him¹). It is considered, however, that this provision of the Bankruptcy Act has reference to the second and third acts of bankruptcy only, those being both legal or constructive frauds, as to neither of which the burden of proof is properly upon the party maintaining the affirmative of the issue²). The books, papers, and accounts referred to are, of course, those which are material in determining the financial condition of the alleged bankrupt³).

C. Preparation of Schedules, Lists, etc. — The statute makes it the duty of a bankrupt to prepare and file schedules of his property and lists of his creditors⁴). Matters relating to these schedules have already been fully discussed⁵).

D. Examination of and Report upon Claims. — It is the duty of the bankrupt to examine into the correctness of all the claims presented against his estate⁶), but he cannot be required to examine any claims except when presented to him, unless ordered to do so by the court or a judge thereof, for cause shown⁷), although whenever any person has to his knowledge proved a false claim against his estate, it is his duty to at once inform the trustee of that fact⁸).

E. Execution of Transfers and other Papers. — The bankrupt must execute and deliver to the trustee transfers of all property which he may have in foreign countries⁹), and, generally, execute and deliver such papers as shall be ordered by the court¹⁰).

F. Advising of Attempts to Evade Bankruptcy Act. — In case it comes to the knowledge of the bankrupt that any of his creditors or any other persons are attempting to evade the provisions of the Bankruptcy Act, it is his duty to at once inform the trustee of the fact¹¹); but the statute provides no punishment for the bankrupt in case of his failure to perform this duty, which is to be regretted¹²).

G. Compliance with Orders of Court and Referee. — The statute requires the bankrupt to comply with all lawful orders of the court¹³), and it seems that this provision includes orders of the referee, for the Bankruptcy Act, in defining the words and phrases used therein, provides that the term "court" may include the referee¹⁴). When an order is made it stands until it is modified or withdrawn by the court, and it is not for the bankrupt or his attorney to determine whether such order is lawful¹⁵). It is not necessary that the order should be in writing, and in practice the referees often give oral directions to the bankrupt, which, if property noted on their record books, are as effective for all purposes as though reduced to writing and actually served¹⁶).

XI. MEETINGS OF CREDITORS. — A. Statutory Provisions. — The Bankruptcy Act provides for meeting of the creditors of the bankrupt at certain times, and requires that at each meeting the creditors shall take such steps as may be pertinent and necessary for the promotion of the best interests of the bankrupt estate, and the enforcement of the Bankruptcy Act¹⁷). It seems to be the purpose of the statute that all meetings should be held in court rooms and on regular days and at regular hours, and should be conducted with dispatch, dignity, and impartiality by the presiding officer¹⁸).

B. Notice of Meetings. — Creditors are entitled to at least ten days' notice by mail of all meetings of creditors¹⁹), and in addition, notice to creditors of the first meeting must be published at least once, and may be published such number of additional times as the court directs, and the last publication must be at least one week before the date fixed for the meeting²⁰).

¹) Bankr. Act (1898) § 3, subd. d. — ²) Collier on Bankr. (6th ed.) p. 56. — ³) Collier on Bankr. (6th ed.) p. 57. — ⁴) Bankr. Act (1898) § 7, subd. a (8). — ⁵) See supra VIII. — ⁶) Bankr. Act (1898) § 7, subd. a (3). — ⁷) Bankr. Act (1898) § 7. — ⁸) Bankr. Act (1898) § 7, subd. a (7). — ⁹) Bankr. Act (1898) § 7, subd. a (5). — ¹⁰) Bankr. Act (1898) § 7, subd. a (4). — ¹¹) Bankr. Act (1898) § 7, subd. a (6). — ¹²) Collier on Bankr. (6th ed.) p. 116. — ¹³) Bankr. Act (1898) § 7, subd. a (2). — ¹⁴) Bankr. Act (1898) § 1, subd. a (7). — ¹⁵) Collier on Bankr. (6th ed.) 114. — ¹⁶) Collier on Bankr. (6th ed.) p. 114. — ¹⁷) Bankr. Act (1898) § 55, subd. c. — ¹⁸) Collier on Bankr. (6th ed.) p. 419. — ¹⁹) Bankr. Act (1898) § 58, subd. a. — ²⁰) Bankr. Act (1898) § 58, subd. b.

C. Appearance at Meetings. — Creditors may appear at meetings either in person or by an attorney or counsellor authorized to practise in the circuit or district court¹).

D. First Meeting. — 1. GENERAL CONSIDERATIONS. — It is the duty of the court to cause the first meeting of the creditors of the bankrupt to be held not less than ten nor more than thirty days after the adjudication of bankruptcy²). This meeting must be held at the county seat of the county in which the bankrupt has resided, or had his domicile or his principal place of business, for the preceding six months or the greater portion thereof; unless that place would be manifestly inconvenient as a place of meeting for the parties in interest, or the bankrupt does not reside or have his domicile or do business within the United States, in either of which cases the court may fix for the meeting such place as is most convenient for the parties in interest³). The judge or the referee must be present and preside at the first meeting⁴); and the bankrupt must attend at such meeting if directed by the court to do so, unless the place at which the meeting is held is more than one hundred and fifty miles distant from his home or principal place of business⁵). Before proceeding with any other business, the judge or referee may allow or disallow the claims of creditors presented at the meeting, and may publicly examine the bankrupt, or cause him to be examined at the instance of any of the creditors⁶). The creditors are authorized to elect a trustee at their first meeting⁷).

2. ADJOURNMENTS. — Adjournments of the first meeting may be had if the business requires it, but all adjourned meetings must in contemplation of law be deemed the same meeting⁸). The practice of keeping the first meeting alive by successive continuances or adjournments is very general, and is to be recommended for the reason that it saves delay and expense in calling creditors together to consider special matters⁹).

E. Subsequent Meetings. — A meeting of the creditors, subsequent to the first, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place¹⁰). It is the duty of the court to call a meeting of the creditors whenever one-fourth or more in number of those who have proven their claims file a written request for such a meeting; and if a request for a meeting to be held at a designated place is signed by a majority in number of the creditors, representing a majority in amount of the claims, the court must call the meeting to be held at the place so designated within thirty days after the filing of the request¹¹). Even without any request from the creditors, the court may call a special meeting of the creditors whenever such a meeting becomes necessary to carry out the purposes of the Bankruptcy Act, by reason of a vacancy in the office of trustee, or for any other reason¹²). When such a meeting is called by the court, the notice thereof should specify the purpose for which it is called¹³). Creditors' meetings, after the first, are usually the result of a report or petition filed, or motion made by the trustee, and such special meetings are usually called to consider proposed sales of property, or the compromises of controversies, or for the declaration and payment of dividends¹⁴).

F. Final Meeting. — A final meeting of the creditors must be ordered whenever the affairs of the estate are ready to be closed¹⁵). While the statute seems to imply that there need be no final meeting unless there is an estate, it is considered by high authority that the safer practice is to hold such a final meeting even where there are no assets¹⁶).

G. Voting at Meetings. — Only a creditor is entitled to vote at a creditors' meeting¹⁷), and the statute provides that the term creditor shall include anyone who owns a demand or claim provable in bankruptcy, and may include (as it assuredly must in this connection) his duly authorized agent, attorney, or proxy¹⁸). Creditors

¹) Collier on Bankr. (6th ed.) p. 421. —

²) Bankr. Act (1898) § 55, subd. a. If by any mischance the first meeting is not held within such time, the court must fix a date, as soon as may be thereafter, when such meeting shall be held. Bankr. Act (1898) § 55, subd. a. — ³) Bankr. Act (1898) § 55, subd. a.

— ⁴) Bankr. Act (1898) § 55, subd. b. — ⁵) Bankr. Act (1898) § 7. — ⁶) Bankr. Act (1898) § 55, subd. b. — ⁷) Bankr. Act (1898)

§ 44; 5 Cyc. 320. — ⁸) 5 Cyc. 320. — ⁹) Collier on Bankr. (6th ed.) p. 419. — ¹⁰) Bankr. Act (1898) § 55, subd. d. — ¹¹) Bankr. Act (1898) § 55, subd. e. — ¹²) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXV. — ¹³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXV. — ¹⁴) Collier on Bankr. (6th ed.) p. 421. — ¹⁵) Bankr. Act (1898) § 55, subd. f. — ¹⁶) Collier on Bankr. (6th ed.) p. 421. — ¹⁷) 5 Cyc. 321. — ¹⁸) Bankr. Act (1898) § 1, subd. 9.

pass upon matters submitted to them at their meetings by the vote of a majority in number and in amount of claims of all creditors whose claims have been allowed and who are present¹⁾, but creditors whose claims are secured or have priority are not, in respect to such claims, entitled to vote at creditors' meetings, nor are such claims to be counted in computing either the number of creditors or the amount of their claims, unless the amount of such claims exceeds the values of the securities or priorities, and then only for such excess²⁾. A secured or preferred creditor may, however, surrender his security or priority, and thus secure the right to vote upon the whole of his claim the same as any other creditor³⁾. Other creditors cannot prevent a bona fide claimant from voting by merely filing objections to his claim⁴⁾, but the referee has the power to determine the voting power of a claim which has been filed if the same is called into question⁵⁾, and where claims are objected to they should, as far as possible, be heard summarily on an oral motion to reject them, and their right to vote determined⁶⁾. Where a partnership is in bankruptcy a creditor of one of the partners cannot vote, and conversely, where the bankrupt is a member of a partnership, the creditors of the partnership have no right to vote⁷⁾. A creditor of the bankrupt may appear and vote personally⁸⁾, or an agent, attorney, or proxy may represent and vote for a creditor at creditors' meetings, although before doing so he must produce and file written authority from the creditor⁹⁾.

¹⁾ Bankr. Act (1898) § 56, subd. a. No creditor can vote until his claim has not only been "proved" which means the mere verification of it in accordance with the law and one of the forms prescribed by the supreme court, but also "allowed" which means the filing of such proved claim, without objection, with the proper referee. Collier on Bankr. (6th ed.) pp. 423, 424. —

²⁾ Bankr. Act (1898) § 56, subd. b. Where the security is upon exempt property of the bankrupt, the creditor is entitled to vote. 5 Cyc. 321. — ³⁾ 5 Cyc. 321. — ⁴⁾ 5 Cyc. 321. — ⁵⁾ Collier on Bankr. (6th ed.) p. 424. — ⁶⁾ Collier on Bankr. (6th ed.) p. 420. — ⁷⁾ 5 Cyc. 321. — ⁸⁾ Collier on Bankr. (6th ed.) p. 425. A member of a partnership or an officer of a corporation, presenting proof of a debt due to his firm or corporation, should be allowed to vote. Collier on Bankr. (6th ed.) p. 425.

⁹⁾ 5 Cyc. 321. The following forms should be used with such alterations as the circumstances render necessary, and such only:

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the District of

In the matter of
.....
Bankrupt. } In Bankruptcy.

To

I,, of, in the county of and State of, do hereby, authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or

meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 189...

..... [L. S.]
Signed, sealed, and delivered in presence of ...

.....
Acknowledged before me this day of, A. D. 189...

.....
[Official character.]
U. S. Supr. Ct. Forms in Bankr. No. 20.

SPECIAL LETTER OF ATTORNEY IN FACT.

In the District Court of the United States for the District of

In the matter of
.....
Bankrupt. } In Bankruptcy.

To

.....
I hereby authorize you, or any one of you, to attend the meeting of creditors in this

It is said by one standard authority that an attorney at law voting for the creditor at a creditors' meetings acts purely as his attorney in fact and must present the same papers duly qualifying him to represent the creditor in that capacity as if he were an agent¹); but another authority of high standing, while recognizing that a majority of the cases support this view, and that perhaps caution requires this course, suggests that letters of attorney need by filed only by agents or proxies, and that attorneys authorized to practice in the circuit or district court in which the proceeding is pending may represent claimants without a power of attorney²). The present writer is of the opinion that the first course mentioned above should be followed in all cases, as the giving of such a letter may in any case be held necessary, while if it be held unnecessary it is merely surplusage, in no way affecting the attorney's power to act.

XII. TRUSTEES. — A. Creation of Office. — The Bankruptcy Act provides for the appointment of a trustee or trustees to take charge of the estate of the bankrupt after the adjudication of bankruptcy and make distribution thereof among the creditors who are entitled to share therein³).

B. Appointment and Removal. — The creditors of the bankrupt estate have the right to appoint one trustee, or three trustees, of the estate. The appointment is to be made by the creditors at their first meeting after the adjudication of bankruptcy, or after the estate has been re-opened, or after a composition has been set aside, or a discharge revoked. If a vacancy occurs in the office of trustee, the creditors have the right to appoint a person to fill the vacancy at their first meeting after the occurrence of the vacancy⁴). The appointment of a trustee or trustees by the creditors is subject to approval or disapproval by the referee or by the judge⁵); and if the creditors do not exercise their right to appoint a trustee or trustees, the appointment may be made by the court⁶); but there must be a specific appointment in each case, as the court is forbidden to appoint an official trustee or any general trustee to act in classes of cases⁷). If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by an order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed if the court deems it desirable⁸). Any individual may be appointed a trustee if he is competent to perform the duties of the office, and resides or has his office for the transaction of business in the judicial district in which he is to be appointed; and the Bankruptcy Act also authorizes the appointment as trustees of corporations which are authorized by their charters or by law to act in such a capacity, and have an office in the judicial district in which they are to be appointed⁹). Trustees may be removed by the court, upon complaints of creditors, for cause, upon a hearing, and after notice to them¹⁰), but the term court in this connection does not include the referee, for the general orders in bankruptcy expressly provide that trustees shall be removable by the judge only¹¹).

C. Bond of Trustee. — Before entering upon the performance of his official duties and within ten days after his appointment, or within such further time, not

matter, advertised or directed to be holden at, on the day of, before, or any adjournment thereof, and then and there for and in name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 19

. [L. S.]

Signed, sealed, and delivered in presence of

.

Acknowledged before me this day of, A. D. 19

.
[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 21.

¹) 5 Cyc. 322. — ²) Collier on Bankr. (6th ed.) p. 426. — ³) Bankr. Act (1898) § 33. —

⁴) Bankr. Act (1898) § 44. — ⁵) U. S. Supr. Ct. Gen. Orders in Bankr. No. XIII. — ⁶) Bankr. Act (1898) §§ 2, 44. The creditors must be given an opportunity to appoint a trustee or trustees, and the court has power to make the appointment only when the creditors fail or neglect to do so. In re Lewensohn, 98 Fed. Rep. 576, 3 Am. Bankr. Rep. 299. The referee may appoint a trustee where the creditors fail to do so. In re Brooks, 100 Fed. Rep. 432, 4 Am. Bankr. Rep. 50. It is proper for the referee to appoint a trustee where the creditors have held two meetings, but have failed to agree upon a trustee, and there is an apparent need that a trustee should be appointed at once. In re Kuffler, 97 Fed. Rep. 187, 3 Am. Bankr. Rep. 162. — ⁷) U. S. Supr. Ct. Gen. Orders in Bankr. No. XIV. — ⁸) U. S. Supr. Ct. Gen. Orders in Bankr. No. XV. — ⁹) Bankr. Act (1898) § 45. — ¹⁰) Bankr. Act (1898) § 2, subd. (17). — ¹¹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XIII.

to exceed five days, as the court may permit, the trustee must enter into a bond to the United States with at least two sureties to be approved by the court, conditioned for the faithful performance of his official duties¹). The statute contains no limitation as to the amount of the bond of the trustee, but gives to the creditors of the bankrupt estate the right to fix the amount of such bond²) and to increase the amount thereof at any time. If the creditors do not exercise their right to fix the amount of the bond of the trustees, the amount may be fixed by the court³). The bond of the trustee must be filed in the office of the clerk of the court of bankruptcy, and may be sued on in the name of the United States for the use of any person injured by a breach of the conditions⁴), but a suit upon the bond must be brought within two years after the estate has been closed, and cannot be brought thereafter⁵); and the trustee is not liable, either personally or upon his bond, for any penalties incurred by the bankrupt under the statute⁶). If the trustee does not give bond within the time allowed he is deemed to have declined the appointment, and his office becomes vacant⁷).

D. Duties of Trustee. — It is the duty of the trustee to collect and reduce to money the property of the estate of the bankrupt under the direction of the court⁸); to prepare, immediately upon entering upon his duties, a complete inventory of all of the property of the bankrupt which comes into his possession⁹); to account for and pay over to the estate under his control all interest received by him upon the property of the estate; to deposit all money of the estate received by him in one of the depositories designated by the court, and to disburse money only by check or draft on the depository in which it has been deposited; to set apart the bankrupt's exemptions and report the items and the estimated value thereof to the court as soon as practicable after his appointment; to make a written report to the court of the condition of the estate, the amount of money on hand, and such other details as may be required within one month after his appointment and every two months thereafter unless the court orders otherwise; to keep regular accounts showing all amounts received by him, and from what sources such amounts were received, and all amounts expended by him, and on what accounts such expenditures were made; to furnish such information concerning the estate and his administration thereof as may be requested by the parties in interest; to pay dividends within ten days after they are declared by the referee; to close up the estate as expeditiously as is compatible with the best interests of the parties in interest¹⁰); to make a final report and file a final account with the court fifteen days before the day fixed for the final meeting of the creditors; and to lay before the final meeting of the creditors detailed statements of the administration of the estate¹¹). It is also the duty of the trustee, within thirty days after the adjudication of bankruptcy, to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution¹²). The accounts and papers of the trustee are required to be open to the inspection of officers and all parties in interest¹³), and in case the trustee neglects to file any report or statement which it is his duty to file or make, within

¹) Bankr. Act (1898) § 50, subds. b, e. The sureties must be the owners of property the actual value of which, over and above their liabilities and exemptions, is at least equal to the amount of the bond. Bankr. Act (1898) § 50, subd. f. Corporations organized for the purpose of becoming sureties on bonds, or authorized by law to do so, may be accepted as sureties on the bonds of trustees when the courts are satisfied that the rights of all parties in interest will thereby be amply protected. Bankr. Act (1898) § 50, subd. g. — ²) This may be done by the creditors at their first meeting after the adjudication of bankruptcy, or after a vacancy has occurred in the office of trustee, or after the estate has been reopened, or after a composition has been set aside, or a discharge revoked, if there is a vacancy in the office of trustee. Bankr. Act (1898) § 50, subd. c. — ³) Bankr. Act (1898) § 50, subd. c.

— ⁴) Bankr. Act (1898) § 50, subd. h. —

⁵) Bankr. Act (1898) § 50, subd. m. — ⁶) Bankr. Act (1898) § 50, subd. i. — ⁷) Bankr. Act (1898) § 50, subd. k. — ⁸) Bankr. Act (1898) § 47, subd. a. — ⁹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XVII. — [¹⁰] As to all property in the custody or coming into the custody of the bankruptcy court such trustees are deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and as to all property not in the custody of the bankruptcy court they are deemed vested with the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. Bankr. Act (1898) § 47, subd. a (2).] — ¹¹) Bankr. Act (1898) § 47, subd. a. — ¹²) Bankr. Act (1898) § 49. — ¹³) Bankr. Act (1898) § 49.

five days after the same is due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office, and to cause a copy of the order to be served on the trustee at least seven days before the time fixed for the hearing thereon¹).

E. Title of Trustee to Property of Bankrupt. — Upon the appointment and qualification of a trustee of the estate of a bankrupt, the trustee is vested, by operation of law, with the title of the bankrupt, as of the date when he was adjudged a bankrupt, to all property of the bankrupt which prior to the filing of the petition against him he could by any means have transferred, or which might have been levied upon and sold under judicial process against him, all property transferred by the bankrupt in fraud of his creditors, all rights of action arising upon contracts or from the unlawful taking or detention of or injury to the bankrupt's property, all interests of the bankrupt in patents, patent rights, copyrights, and trade-marks, all documents relating to the bankrupt's property, and all powers which the bankrupt might have exercised for his own benefit, but not with powers which he might have exercised for some other person²). The trustee takes the property of the bankrupt subject to all equities, liens, and incumbrances which existed against it in the hands of the bankrupt, and takes no greater interest in such property than the bankrupt himself had, except in the instances specified in the Bankruptcy Act, that is, where liens are void for want of record or otherwise, where liens are *ipso facto* dissolved by the adjudication of bankruptcy, and where transfers are fraudulent and voidable³). The bankrupt is required to execute and deliver such papers relating to this estate as shall be ordered by the court. It is his duty to deliver to the trustee all his assets which are subject to his debts, and upon his failure to make such delivery he may be ordered by the court to do so, and obedience to such order may be enforced by commitment as for contempt. But no valid order directing the delivery of the property to the trustee can be made before the issue is squarely raised between the trustee and the bankrupt as to whether or not the bankrupt has such property in his possession, and no such order should be made unless it appears beyond a reasonable doubt that the property is in the possession or under the control of the bankrupt⁴). A license to sell intoxicating liquor, a license to keep a city market stall, or a seat or membership in a stock exchange will pass to the trustee as a part of the assets, of the estate of the bankrupt⁵); and where a corporation becomes a bankrupt, the right to collect unpaid subscriptions to its capital stock vests in the trustee⁶). If the bankrupt has an insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives, he may pay or secure to the trustee the sum ascertained and stated as the cash value, within thirty days after it is ascertained and stated, and continue to hold, own, and carry the policy free from the claims of creditors participating in the distribution of his estate under the bankruptcy proceedings, but if he does not do this the policy passes to the trustee as assets of the estate⁷). This provision does not, however, apply to life insurance policies which are exempt under a State law, but as to such policies the State law controls regardless of whether or not they have a cash surrender value⁸). A policy of insurance payable to the wife, children, or other kin of the bankrupt is not a part of the assets of his estate and does not pass to the trustee⁹). The United States Bankruptcy Act is silent as to whether the trustee takes title to burdensome property, differing in this respect from the English law, which goes into the subject with considerable particularity and gives the trustee twelve months within which to elect to claim or to disclaim onerous property. But it is considered that the rules expressed in the English law also prevail in the United States, and that the trustee may disclaim burdensome property and has a reasonable time within which to do so¹⁰). So the trustee is not required to take charge of or sell any portion of the estate which is so heavily incumbered with valid liens that nothing can be realized therefrom for the unsecured creditors¹¹).

¹) U. S. Supr. Act. Gen. Orders in Bankr. No. XVII. — ²) Bankr. Act (1898) § 70, subd. a. It is not necessary that there should be any formal assignment of the bankrupt's property to the trustee, but by operation of law all the assets of the bankrupt at the time when the petition was filed pass to the trustee as of the date of

the adjudication of bankruptcy. Collier on Bankr. (6th ed.) pp. 115, 116. — ³) 5 Cyc. 342, note. — ⁴) 5 Cyc. 345. — ⁵) 5 Cyc. 351, 352. — ⁶) 5 Cyc. 345, 346. — ⁷) Bankr. Act (1898) § 70, subd. a. — ⁸) Collier on Bankr. (6th ed.) p. 605. — ⁹) 5 Cyc. 350. — ¹⁰) Collier on Bankr. (6th ed.) p. 604. — ¹¹) 5 Cyc. 383.

F. Avoidance of Transfers by Bankrupt. — The trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from any person to whom it was transferred, or who has received it, unless he was a bona fide holder for value prior to the date of the adjudication of bankruptcy¹).

G. Continuance by Trustee of Actions to which Bankrupt a Party. — The trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication of bankruptcy, with the same force and effect as though the suit had been commenced by the trustee²); and the court may order the trustee to enter his appearance and defend any pending suit against the bankrupt³). Only actions which are beneficial to the estate should be continued by the trustee⁴), and so, as a right of action for damages for a personal injury does not pass to the trustee, it has been held that he cannot, even with the consent of the court of bankruptcy, continue such an action commenced by the bankrupt prior to the adjudication of bankruptcy⁵). The trustee is not bound to defend a pending suit against the bankrupt unless ordered to do so by the court⁶).

H. Limitation of Actions by or against Trustee. — No suit can be brought by or against the trustee after the expiration of two years from the closing of the estate⁷). This limitation is independent of any State statute, and bars the commencement of a suit against the trustee although the period of limitation prescribed by the State statute has not elapsed⁸). It does not, however, affect the jurisdiction of the court in which such a suit may be brought, but it must be pleaded in order to be available⁹). The estate should probably be deemed closed within the meaning of this provision when the final account of the trustee is approved and he is discharged¹⁰). Where an estate has been declared closed, but is subsequently reopened, the two year period begins to run anew from the time of the subsequent closing of the estate¹¹).

I. Subrogation of Trustee to Rights of Creditor. — If a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, and the debtor afterwards becomes a bankrupt, the trustee of the estate of the bankrupt is subrogated to the rights of such creditor, and may enforce the same for the benefit of the estate¹²).

J. Compensation of Trustee. — The compensation of trustees is to be fixed by the court, subject to the limitation that it shall not exceed certain percentages fixed by the statute¹³); and the statute provides that trustees shall not in any form or guise receive, nor shall the court allow them, any further compensation for their services than that expressly authorized¹⁴). The court may, in its discretion, withhold all compensation from a trustee who has been removed for cause¹⁵).

XIII. ADMINISTRATION OF ESTATE OF BANKRUPT. — **A. Supervision of Judge or Referee.** — After a person has been adjudged to be a bankrupt, his estate may be administered under the direct supervision of the judge, without any order of reference; but the universal practice is to refer the case to a referee in bankruptcy before whom the subsequent proceeding are had¹⁶).

B. Concurrence of Trustees. — When three trustees are appointed the concurrence of at least two of them is necessary to the validity of any of their acts with reference to the administration of the bankrupt estate¹⁷).

C. Designation of Depositaries. — It is the duty of courts of bankruptcy to designate, as depositaries for the money of bankrupt estates, banking institutions as convenient as may be to the residences of trustees; and to require such banking

¹) Bankr. Act (1898) § 70, subd. e. For the purpose of such recovery, the courts of bankruptcy and the State courts which would have had jurisdiction if the bankruptcy had not intervened, have concurrent jurisdiction. Bankr. Act (1898) § 70, subd. e. — ²) Bankr. Act (1898) § 11, subd. c. — ³) Bankr. Act (1898) § 11, subd. b. — ⁴) Collier on Bankr. (6th ed.) p. 152. — ⁵) *In re Haense*, 91 Fed. Rep. 355, 1 Am. Bankr. Rep. 286. — ⁶) 5 Cyc. 378; Collier on Bankr. (6th ed.) p. 151. — ⁷) Bankr. Act (1898) § 11, subd. d. — ⁸) 5 Cyc. 378, note, citing *Freelander v. Holloman*, 9 Fed. Cas. No. 5081, 9 Nat. Bankr. Reg. 331. — ⁹) Collier on Bankr.

(6th ed.) p. 153. — ¹⁰) Collier on Bankr. (6th ed.) p. 154; 5 Cyc. 378, note. It has been suggested that where a trustee is appointed who does not report or seek a final discharge, the period will not begin to run until such discharge is granted. Collier on Bankr. (6th ed.) p. 154. — ¹¹) *Bilafsky v. Abraham*, 183 Mass. 401, 67 N. E. 318, cited in Collier on Bankr. (6th ed.) p. 154. — ¹²) Bankr. Act (1898) § 67, subd. b. — ¹³) Bankr. Act (1898) § 48. — ¹⁴) Bankr. Act (1903) § 18. — ¹⁵) Bankr. Act (1898) § 48, subd. c. — ¹⁶) See Collier on Bankr. (6th ed.) p. 227. — ¹⁷) Bankr. Act (1898) § 47, subd. b.

institutions to give bonds to the United States, subject to the approval of the courts; and the courts may from time to time, by order, change such depositaries or increase the number of depositaries or the amount of any bond¹).

D. Disbursement of Money on Deposit. — Money deposited by the trustee with one of the designated depositaries cannot be paid out except by check, draft, or warrant drawn on such depositary²), signed by the clerk of the court or by the trustee, and countersigned by the judge of the court or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge stating the date, the sum, and the account for which it is drawn. And an entry of every such check, draft, or warrant must be made in a book kept for that purpose³).

E. Redemption of Property. — Whenever it may be deemed for the benefit of the estate of the bankrupt to redeem or discharge any mortgage or pledge, or deposit or lien upon any property, real or personal, or to relieve such property from any conditional contract, and to tender performance of the conditions thereof, the trustee, or the bankrupt, or any creditor who has proved his debt may file a petition therefor, and thereupon the court must appoint a suitable time and place for the hearing thereof, notice of which must be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee⁴).

F. Appraisal of Property. — All the real and personal property belonging to the estate of the bankrupt must be appraised by three disinterested appraisers who are appointed by and report to the court⁵).

G. Sales of Property. — 1. **GENERAL CONSIDERATIONS.** — It is the duty of the trustee to reduce the property of the estate to money⁶). All sales must be by public auction unless otherwise ordered by the court; but upon application to the court, and for good cause shown the trustee may be authorized to sell any specified portion of the estate of the bankrupt at private sale, in which case he is required to keep an accurate account of each article sold and the price received therefor, and to at once file such account with the referee⁷). Sales of real or personal property must, when practicable, be made subject to the approval of the court, and property cannot be sold for less than seventy-five per cent of its appraised value except subject to such approval⁸). The court or the referee may authorize, under proper circumstances, the sale of incumbered property free and clear from mortgages or other liens, and preserve such liens by transferring them to the funds which are the proceeds of the sale⁹). The title to property of the bankrupt's estate which has been sold is to be transferred to the purchaser by the trustee¹⁰).

2. **NOTICE TO CREDITORS.** — The statute provides that creditors shall have at least ten days' notice by mail to their respective addresses, of all proposed sales of property of the bankrupt's estate¹¹), but the general orders in bankruptcy established by the Supreme Court provide that upon petition by the bankrupt, a creditor, the receiver, or the trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the property to be sold either with or without notice to the creditors, and the proceeds of the sale to be deposited in court¹²). As the requirement of the statute that notice of proposed sales of property shall be given to creditors has proved an unfortunate restriction of discretion, the provision of the general orders that such notice may be dispensed with in the case of perishable property has been construed with extreme liberality in deciding what property is perishable¹³).

H. Arbitration of Controversies. — Any controversy arising in the course of the settlement of the estate of a bankrupt may be submitted to arbitration by the trustee pursuant to the direction of the court¹⁴). The direction of the court must

¹) Bankr. Act (1898) § 61. — ²) Bankr. Act (1898) § 47, subd. a (4); U. S. Supr. Ct. Gen. Orders in Bankr. No. XXIX. — ³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXIX. — ⁴) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXVIII. — ⁵) Bankr. Act § 70, subd. b. — ⁶) Bankr. Act (1898) § 47, subd. a (2). — ⁷) U. S. Supr. Ct. Gen. Orders in Bankr.

No. XVIII, subds. 1, 2. — ⁸) Bankr. Act (1898) § 70, subd. b. — ⁹) 5 Cyc. 383. — ¹⁰) Bankr. Act (1898) § 70, subd. c. — ¹¹) Bankr. Act (1898) § 58, subd. a, (4). — ¹²) U. S. Supr. Ct. Gen. Orders in Bankr. No. XVIII, subd. 3. — ¹³) Collier on Bankr. (6th ed.) § 453. — ¹⁴) Bankr. Act (1898) § 26, subd. a.

first be obtained¹), and when the trustee applies to the court for such direction, his application must clearly and distinctly set forth the subject matter of the controversy, and the reasons why he thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration²). When an arbitration is agreed upon, three arbitrators are chosen or appointed and a written finding of these arbitrators or a majority of them, as to the issues presented, may be filed in court, and has the same force and effect as the verdict of a jury would have³), and is subject to be set aside or adjudged upon by the court in the same manner as a verdict of a jury⁴). If not set aside by the judge, or on appeal, the finding of the arbitrators is *res adjudicata* as to all parties to the proceeding⁵).

I. Compromise of Controversies or Compounding of Claims. — Any controversy arising in the course of the administration of the estate of the bankrupt may be compromised by the trustee with the approval of the court, upon such terms as he may consider to be for the best interests of the estate⁶). This power of compromise is most often used in connection with contests on claims filed against the estate, or the contested collection of claims due to the estate, and it cannot, of course, be resorted to where the matter in controversy is the right to a discharge⁷). When it is deemed for the benefit of the estate to compound and settle any debts or other claims due or belonging to the estate, the trustee, the bankrupt, or any creditor who has proved his claim may file a petition therefor⁸), clearly and distinctly setting forth the subject matter of the controversy and the reason why it is deemed proper and most for the interest of the estate that it should be settled⁹), and thereupon the court must appoint a suitable time and place for the hearing thereof, notice of which must be given as the court shall direct, so that creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee¹⁰).

J. Expenses of Administration of Estate, etc. — Except where other provisions are made for their payment, the actual and necessary expenses incurred by officers in the administration of bankrupt estates are to be reported in detail under oath, and approved or disapproved by the court; and if approved, they are to be paid or allowed out of the estates in which they were incurred¹¹). The expenses which may be allowed include such disbursements as for service of process, for advertising and giving notices, for perpetuating testimony, for the trustee's bond, for the rent, insurance, and other necessary expenses attending the closing out of a going business, for the fees of the appraisers, and for the compensation of attorneys employed by the trustee or receiver¹²). It is customary to allow compensation for the attorneys of the petitioning creditors in involuntary cases¹³), but allowances out of the estate should not be made for the attorneys of mere claimants or of creditors who object to the allowance of the claims of other creditors, or even for the attorneys of the petitioning creditors for services rendered after the appointment of the trustee, except that where the trustee has refused or neglected to recover assets or to resist a questionable claim, and individual creditors do this for the benefit of all, their attorneys will be allowed compensation for so doing¹⁴). With regard to the allowance of compensation for the attorney of the bankrupt in voluntary cases, the cases are not uniform, but it is asserted by high authority that the bankrupt's attorney is entitled to compensation out of the estate for such services only as are really in aid of the estate and its administration, although performed for the bankrupt, which excludes services in connection with the discharge, and, save in exceptional cases, everything done after the appointment of the trustee¹⁵).

XIV. PROOF, ALLOWANCE, AND PAYMENT OF CLAIMS. — **A. Proof of Claims.** — **1. GENERAL METHOD OF PROOF.** — Claims in bankruptcy must be proven in the manner prescribed by the Bankruptcy Act, as supplemented by

¹) Collier on Bankr. (6th ed.) p. 316. — ²) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXXIII. — ³) Bankr. Act (1898) § 26, subds. b, c. — ⁴) 5 Cyc. 379, note. — ⁵) Collier on Bankr. (6th ed.) p. 316. — ⁶) Bankr. Act (1898) § 23. — ⁷) Collier on Bankr. (6th ed.) p. 317. — ⁸) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXVIII. — ⁹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXXIII. — ¹⁰) U. S. Supr. Ct. Gen.

Orders in Bankr. No. XXVIII. — ¹¹) Bankr. Act (1898) § 62. — ¹²) Collier on Bankr. (6th ed.) pp. 497, 500, 501, 502. — ¹³) Collier on Bankr. (6th ed.) p. 499. An allowance will not be permitted for services rendered before proceedings were begun. Collier on Bankr. (6th ed.) p. 500. — ¹⁴) Collier on Bankr. (6th ed.) p. 499. — ¹⁵) Collier on Bankr. (6th ed.) p. 501.

the general orders and forms promulgated by the Supreme Court of the United States¹). Proof of a claim consists of a statement in writing, under oath, and signed by the creditor, setting forth the claim; the consideration on which it is founded; whether any payments have been made thereon, and if so what; whether any securities are held therefor by the creditor, and if so what; and that the sum claimed is justly owing from the bankrupt to the creditor²). A deposition to prove a claim against the estate of a bankrupt should be correctly entitled in the court and in the cause³). When the deposition is made by an agent, the reason why the deposition is not made by the claimant in person must be stated⁴). When the deposition is made to

¹) Collier on Bankr. (6th ed.) pp. 431, 432. — Affidavits used in insolvency or general assignment proceedings under state laws are not enough, although where the facts and amounts stated are those required by the statute, and tally with the schedule, such statements will usually be accepted and filed, provided there is no objection. Collier on Bankr. (6th ed.) p. 432. — ²) Bankr. Act (1898) § 57, subd. a. The following forms should be used in making proof of claims, with such changes as the circumstances render necessary, and such only.

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the District of

In the matter of <i>Bankrupt.</i>	In Bankruptcy.
---	----------------

At, in said district of, on the day of, A. D. 189...., came, of, in the county of, in said district of, and made oath, and says that, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of dollars; that the consideration of said debt is as follows:..... that no part of said debt has been paid [except]; that there are no set-offs or counterclaims to the same [except]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

....., Creditor.

Subscribed and sworn to before me this day of, A. D. 18....

....., [Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 31.

PROOF OF SECURED DEBT.

In the District Court of the United States for the District of

In the matter of <i>Bankrupt.</i>	In Bankruptcy.
---	----------------

At, in said district of, on the day of, A. D. 19...., came, of, in the county of, in said district of, and made oath, and says that, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly, indebted to said deponent, in the sum of dollars; that the consideration of said debt is as follows; that no part of said debt has been paid [except]; that there are no set-offs or counterclaims to the same [except]; and that the only securities held by this deponent for said debt are the following:.....

....., Creditor.

Subscribed and sworn to before me this day of, A. D. 19....

....., [Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 32.

³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. — ⁴) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. — The following forms should be used with such changes as the circumstances render necessary, and such only.

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the District of

In the matter of <i>Bankruptcy.</i>	In Bankruptcy.
---	----------------

At in said district of on the day of, A. D. 189...., came, of, in the county of, and State of, attorney [or authorized agent] of, in the county of, and State of, and made oath and says that, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said in the sum of dollars; that the consideration of said debt is as follows:; that no part of said debt has been paid [except]; and that this deponent has not, nor has any

prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership¹). The deposition to prove a debt due to a corporation must be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer²). The statement of the claim should be itemized, and should set forth the dates of the several items where

person by his order or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because

....., and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such, debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to before me this day of, A. D. 18....

[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 35.

PROOF OF SECURED DEBT.

In the District Court of the United States for the District of

In the matter of } In Bankruptcy.
Bankrupt.

At, in said district of, on the day of, A. D. 19..., came and State of, attorney [or authorized agent] of, in the county of, and State of, and made oath, and says that, the person by [or against] whom, of, in the county of, been filed was, at and before the filing of said petition, and still is, justly and truly indebted to the said in the sum of dollars; that the consideration of said debt is as follows:; that no part of said debt has been paid [except]; that there are no set-offs or counterclaims to the same [except]; and that the only securities held by said for said debt are the following; and this deponent further says that this deposition cannot be made by the claimant in person because, and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

Subscribed and sworn to before me this day of, A. D. 19....

[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 36.

B

¹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. The following form should be used with such changes as the circumstances render necessary, and such only. In the District Court of the United States for the District of

In the matter of } In Bankruptcy.
Bankrupt.

At, in said district of, on the day of, A. D. 19..., came, of, in the county of, in said district of, and made oath and says that he is one of the firm of, consisting of himself and, of in the county of and State of; that the said, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of dollars; that the consideration of said debt is a follows: that no part of said debt has been paid [except]; that there are no set-offs or counterclaims to the same [except]; and that this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received and manner of security for said debt whatever.

Creditor.

Subscribed and sworn to before me this day of, A. D. 19....

[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 34.

²) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. The following form should be used, with such changes as the circumstances render necessary, and such only. In the District Court of the United States for the District of

In the matter of } In Bankruptcy.
Bankrupt.

At, in said district of, on the day of, A. D. 189..., came, of, in the county of and State of, and made oath and says that he is of the, a corporation incorporated by and under the laws of the State of, and carrying on business at, in the county of and State of, and that he is duly authorized to make this proof, and says that

this is possible¹). A deposition to prove a debt existing in open account must state when the debt became or will become due; and if it consists of items maturing at different dates, the average date must be stated, in default of which it is not necessary to compute interest upon the debt²). All such depositions must contain an averment that no note has been received for such account, nor any judgment rendered thereon³). A claim so proven should be received and filed by the referee, and amounts to a prima facie case; thus proving the debt for all purposes in the bankruptcy proceedings, unless objected to or continued for consideration⁴).

2. TIME FOR PROVING CLAIMS. — Claims against a bankrupt estate cannot be proved after the expiration of one year from the adjudication of bankruptcy⁵), except where a claim is liquidated by litigation, and final judgment therein is rendered within thirty days before or after the expiration of the year, in which case the claim may be proved within sixty days after the rendition of such judgment⁶).

3. PROOF OF CLAIM FOUNDED ON WRITTEN INSTRUMENT. — Where a claim is founded upon an instrument in writing, such instrument must be filed with the proof of the claim⁷), unless it is lost or destroyed, in which case a statement under oath of such fact and of the circumstances of the loss or destruction must be filed with the claim⁸).

the said , the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of dollars; that the consideration of said debt is as follows: ; that no part of said debt has been paid [except.....]; that there are no set-offs or counterclaims to the same [except.....]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

..... of said Corporation.

Subscribed and sworn to before me this day of , A. D. 18....

[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 33.

1) Collier on Bankr. (6th ed.) p. 432. — 2) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. d. — 3) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. — 4) Collier on Bankr. (6th ed.) p. 432. — 5) Bankr. Act (1898) § 57, subd. n. The rights of infants and insane persons without guardians, without notice of the proceedings, may continue for six months longer. Bankr. Act (1898) § 57, subd. n. The fact that the creditor did not receive the required notice, and had no knowledge of the bankruptcy within the period of one year does not authorize proof of his claim after the expiration of such period. Collier on Bankr. (6th ed.) p. 449. — 6) Bankr. Act (1898) § 57, subd. n. — 7) Bankr. Act (1898) § 57, subd. b. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. Bankr. Act (1898) § 57, subd. b. The usual practice is to attach both the original note and a copy thereof to the proof of the debt, and

request the referee to return the original. Collier on Bankr. (6th ed.) p. 345. — 8) Bankr. Act (1898) § 57, subd. b. The following form should be used for an affidavit of a lost bill or note, with such changes as the circumstances render necessary, and such only.

In the District Court of the United States for the District of

In the matter of Bankrupt.	In Bankruptcy.
--	----------------

On this day of , A. D. 18 ... at , came of in the county of , and State of and makes oath and says that the bill of exchange [or note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said , or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [or note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this day of , A. D. 18....

[Official character.]

U. S. Supr. Ct. Forms in Bankr. No. 37.

4. PROOF OF ASSIGNED CLAIM. — A claim which has been assigned before proof must be supported by a deposition of the owner of the claim at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or, if it is secured, the security therefor, as is required in proving secured claims¹). Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee must immediately give notice by mail to the original claimant of the filing of such proof of assignment²). If no objection is entered within ten days, or within such further time as may be allowed by the referee, he must make an order subrogating the assignee to the rights of the original claimant; while if objection is made, he must proceed to hear and determine the matter³).

5. ATTACHING STATEMENTS AND TRANSCRIPTS. — The practice of attaching statements of accounts to claims is general and should be followed⁴). So also, when the claim rests on a judgment, a transcript of the judgment should be annexed to the proof as an exhibit; but the proof itself should show the consideration of the debt so resting in judgment⁵).

6. AMENDMENT OF PROOF OF CLAIM. — The referee will usually allow such amendments to proofs of debts as justice requires, and claims which are objected to are often expunged or allowed to be withdrawn with leave to amend and refile⁶). But if the omission or defect was fraudulently effected, and has operated to the advantage of the creditor so that the estate of the bankrupt would be injured by the amendment it should not be allowed⁷), and an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed⁸).

7. FILING CLAIMS. — After being proved, claims may be filed for the purpose of allowance, in the court in which the proceedings are pending, or before the referee, if the case has been referred⁹). Proofs of debt received by a trustee must be delivered to the referee to whom the cause has been referred¹⁰).

8. SUBROGATION TO RIGHTS OF CREDITOR. — Where a creditor fails to prove a claim against the bankrupt estate which is secured by the individual undertaking of another person, such person may prove the claim in the creditor's name; and if he discharges his undertaking in whole or in part, he is to that extent subrogated to the rights of the creditor¹¹).

B. Allowance of Claims. — 1. ALLOWANCE AS OF COURSE. — Claims which have been duly proved are to be allowed upon their receipt by or presentation to the court, unless some parties in interest object to their allowance, or the court, upon its own motion, continues their consideration for some cause¹²).

2. HEARING ON OBJECTIONS. — Objections to claims must be heard as soon as the convenience of the court and the best interests of the estate and the claimants will permit¹³).

3. RECONSIDERATION OF CLAIMS. — At any time before the estate is closed, a claim which has been allowed may be reconsidered for cause, and reallocated or rejected in whole or in part, according to the equities of the case; but this cannot be done after the estate has been closed¹⁴). The re-examination of a claim may be had upon the application of the trustee or of any creditor by petition to the referee to whom the cause is referred for an order for such re-examination and thereupon the referee must make an order fixing the time for hearing the petition, of which due notice must be given to the creditor by mail. At the time appointed the referee must take the examination of the creditor and of any witnesses who may be called by either party, and if it appears from such examination that the claim ought to be expunged or diminished, the referee may order accordingly¹⁵). If, upon a reconsideration, a claim upon which a dividend has been paid is rejected in whole or in part, the trustee can recover from the amount of the dividend so paid, if the claim

¹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 3. — ²) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 3. — ³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 3. — ⁴) Collier on Bankr. (6th ed.) p. 435. — ⁵) Collier on Bankr. (6th ed.) p. 435. — ⁶) Collier on Bankr. (6th ed.) p. 435. — ⁷) 5 Cyc. 332, 333. — ⁸) Collier on Bankr. (6th ed.)

p. 435. — ⁹) Bankr. Act (1898) § 57, subd. b. — ¹⁰) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 1. — ¹¹) Bankr. Act (1898) § 57, subd. i. — ¹²) Bankr. Act (1898) § 57, subd. d. — ¹³) Bankr. Act (1898) § 57, subd. f. — ¹⁴) Bankr. Act (1898) § 57, subd. k. — ¹⁵) 5 Cyc. 333, 334; U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. f.

is rejected in whole, or a proportional part of such dividend if the claim is rejected in part only¹⁾, and it is his duty to do so²⁾).

C. Debts which may be Proved or Allowed. — 1. **GENERAL CONSIDERATIONS.** — Every debt which may be recovered either at law or in equity may, generally speaking, be proved in bankruptcy³⁾, but the term "provable debt" is not limited in its meaning to a debt against the allowance of which no defense can be successfully interposed, and therefore it does not follow from the fact that a particular debt can be proved against the estate that it should be allowed⁴⁾.

2. **DEBTS FOUNDED ON CONTRACT.** — Any debt founded upon a contract whether express or implied, may be proved and allowed against the estate of a bankrupt⁵⁾, and so damages arising from a breach of a contract prior to the adjudication of bankruptcy constitute a provable claim. But contracts which are void because of an illegal consideration, or because they are against public policy cannot be the basis of provable debts⁶⁾. There is no provable debt on account of a covenant contained in a continuing contract until such covenant has been broken⁷⁾.

3. **LIABILITIES EVIDENCED BY WRITTEN INSTRUMENTS.** — A debt of the bankrupt evidenced by an instrument in writing, and absolutely owing at the time of the filing of the petition against him, may be proved and allowed, whether then payable or not, with any interest thereon which would have been recoverable at the date of the filing of the petition, or with a rebate of interest in case it was not then due and did not bear interest⁸⁾.

4. **DEBTS FOUNDED ON OPEN ACCOUNTS.** — A debt founded upon an open account may be proved and allowed against the estate of the bankrupt⁹⁾.

5. **JUDGMENTS.** — A debt of the bankrupt which is evidenced by a judgment against him may be proved and allowed¹⁰⁾, and a claim founded upon a provable debt reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, may be proved and allowed, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of the judgment¹¹⁾.

6. **CONTINGENT CLAIMS.** — The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor, when known to the person contingently liable. When the name of the creditor is unknown, such claims may be proved in the name of the person contingently liable. But no dividend is to be paid on such a claim except upon satisfactory proof being furnished that such payment will diminish pro tanto the original debt¹²⁾. Where a claim is founded upon a contingency which may never arise and there is no means of ascertaining the amount of the claim at the time of the filing of the petition it is not provable¹³⁾. But if a liability under a contingent contractual obligation matures by the happening of the contingent event upon which it depends after the filing of the petition and in time to admit of proof, it becomes a provable debt¹⁴⁾.

7. **UNLIQUIDATED CLAIMS.** — Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as the court may direct, and may thereafter be proved and allowed against the estate¹⁵⁾. The liquidation is usually accomplished by a suit in the proper State court, but it can be in the court of bankruptcy where all of the facts are admitted. The proof of the claim, though unliquidated, may be filed, and thereupon the claim is before the court to be dealt with as the interests of the parties may require, and if it seems best the referee may withhold action on the claim or postpone the dividend thereon until the status of the claim is fully determined¹⁶⁾.

8. **CORPORATE BONDS.** — Corporate bonds issued under proper statutory authority to secure the payment of money borrowed for the transaction of the business of the corporation are valid claims¹⁷⁾.

9. **COSTS.** — An amount due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him the plaintiff in a cause

¹⁾ Bankr. Act (1898) § 57, subd. l. — ²⁾ Collier on Bankr. (6th ed.) p. 447. — ³⁾ 5 Cyc. 323. — ⁴⁾ Collier on Bankr. (6th ed.) p. 506. — ⁵⁾ Bankr. Act (1898) § 63, subd. a, (4). — ⁶⁾ 5 Cyc. 325. — ⁷⁾ 5 Cyc. 326. — ⁸⁾ Bankr. Act (1898) § 63, subd. a, (1). — ⁹⁾ Bankr. Act (1898) § 63, subd. a, (4). — ¹⁰⁾ Bankr. Act (1898) § 63, subd. a, (1). — ¹¹⁾ Bankr. Act (1903) § 63, subd. a, (5). — ¹²⁾ U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 4. — ¹³⁾ 5 Cyc. 324, note. — ¹⁴⁾ Collier on Bankr. (6th ed.) pp. 514, 515. — ¹⁵⁾ Bankr. Act (1903) § 63, subd. b. — ¹⁶⁾ Collier on Bankr. (6th ed.) p. 518. — ¹⁷⁾ Collier on Bankr. (6th ed.) pp. 513, 514.

of action which would pass to the trustee and which the trustee declines to prosecute after notice, or founded upon or a debt founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt, may be proved and allowed against the estate of the bankrupt¹).

10. RENT. — A claim for rent due at the time of the filing of the petition in bankruptcy is provable; but where, at the time of the adjudication, the bankrupt is the lessee of certain property for a term of years, at a rent payable in monthly instalments, the landlord cannot prove a claim against the bankrupt for rent which would accrue subsequent to the date of the adjudication²).

11. CLAIMS FOUNDED IN TORT. — Whether liabilities *ex delicto* may be liquidated and thus become provable is not settled, although a leading text writer advocates the theory that they may. Certainly judgments founded in tort are provable³).

12. CLAIMS BARRED BY STATUTE OF LIMITATIONS. — A claim which is barred by the statute of limitations of the State in which an action thereon could have been brought is not provable against the estate of the bankrupt⁴).

13. CLAIMS OF ONE BANKRUPT ESTATE AGAINST ANOTHER. — A claim of an estate being administered in bankruptcy against another estate being so administered, may be proved by the trustee and allowed by the court, in the same manner and upon like terms as the claims of other creditors are allowed⁵).

14. DEBTS OWING TO UNITED STATES, STATES, COUNTIES, ETC. — A debt owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture is not to be allowed, except for the amount of the pecuniary loss which was sustained by reason of the act, transaction, or proceeding out of which the penalty of forfeiture arose, with interest, and the reasonable and actual costs occasioned thereby⁶).

15. ALIMONY. — A claim for alimony, whether due at the time of bankruptcy or accrued or to accrue thereafter, is not a provable debt against the estate of the bankrupt⁷).

16. DEBTS BINDING MORE THAN ONE PERSON. — Where an obligation is that of a maker and indorser the holder has a provable debt against both, and the same is true where several debtors are jointly liable; the test in such cases being whether the claimant could have maintained an action against the bankrupt⁸).

17. CLAIMS OF SECURED OR PREFERRED CREDITORS. — Secured⁹) or preferred claims may be allowed in order to enable the creditors holding such claims to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities; but such claims are to be allowed for such sums only as seem to the court to be owing over and above the value of the security or priority¹⁰). A secured creditor may surrender his security or not as he chooses. If he does so, the security inures to the benefit of all the creditors, and his claim, if otherwise unobjectionable, is allowed to the full amount. If he elects to retain his security he may prove for the amount of his claim after deducting the amount of the security¹¹). If the creditor, in proving his debt, fails to mention his security, he will, as a general rule, be deemed to have elected to prove his claim as unsecured and to waive his security¹²), unless he was ignorant of his legal rights and acted without any fraudulent intent¹³). If a bankrupt has given a preference, and the person receiving it, or to be benefited thereby, or his

¹) Bankr. Act (1898) § 63, subd. a, (2), (3).

²) 5 Cyc. 328. — ³) Collier on Bankr. (6th ed.) p. 506. — ⁴) 5 Cyc. 323. — ⁵) Bankr. Act (1898) § 57, subd. m. — ⁶) Bankr. Act (1898) § 57, subd. j. — ⁷) Collier on Bankr. (6th ed.) p. 520. — ⁸) Collier on Bankr. (6th ed.) p. 508. — ⁹) The term "secured creditor" as used in the bankruptcy law, includes a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under the bankruptcy law, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's estate. Bankr. Act (1898) § 1, subd. 23. — ¹⁰) Bankr.

Act (1898) § 57, subd. e. — The value of the securities held by secured creditors is to be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by agreement, arbitration, compromise, or litigation between the creditors and the trustee, as the court may direct, and the amount of such value is to be credited on the claims, and a dividend paid only on the unpaid balance. Bankr. Act (1898) § 57, subd. h. — ¹¹) Collier on Bankr. (6th ed.) p. 437. — ¹²) 5 Cyc. 332; Collier on Bankr. (6th ed.) p. 439. — ¹³) Collier on Bankr. (6th ed.) p. 439.

agent acting in the matter, had reasonable cause to believe that it was intended thereby to give a preference, the claim of such creditor cannot be allowed unless he surrenders such preference¹). With reference to the surrender of such preferences, it is laid down as the rule that a creditor who has received a voidable preference and retained the same until deprived thereof by a judgment of the court, may surrender the preference and thereafter prove his claim against the estate; the reason given being that a creditor should not be punished for submitting to the court the question as to whether or not the alleged preference is voidable²).

18. CLAIMS OF CREDITORS WHO HAVE RECEIVED ILLEGAL CONVEYANCES, TRANSFERS, ETC. — If a bankrupt has made a conveyance, transfer, assignment, or incumbrance of his property, or any part thereof, within four months prior to the filing of the petition in bankruptcy, with the intent and purpose to hinder, delay, or defraud his creditors or any of them, the claim of the creditor to whom such conveyance, transfer, assignment, or incumbrance was given cannot be allowed unless he surrenders the same³).

19. TIME OF INCEPTION OF CLAIM. — The provability of a claim depends upon its status at the time when the petition for the adjudication of bankruptcy is filed⁴), and therefore only such debts as were in existence at that time may be proved⁵). But all that is necessary is that there should be a fixed liability absolutely owing at the time when the petition is filed, and it is not necessary that the time of payment should have then arrived⁶).

20. PROVABILITY OF CLAIM AS AFFECTED BY PERSON PROVING. — The assignee of a creditor has a provable debt if his assignor had, even though the assignment may have been made after the bankruptcy. But where the creditor is a debtor of the bankrupt in a sum larger than the amount claimed such claim is not provable. An executor may prove a debt against the bankrupt although the will contains a provision for a deduction of any debt due the testator from the bankrupt. An alien creditor may prove his claim⁷).

D. Set-Offs and Counterclaims. — In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account must be stated and one debt set off against the other, and only the balance in favor of the creditor, if any, is to be allowed or paid⁸); but in ascertaining the balance no account can be taken of claims which are not provable against the estate, or were purchased by or transferred to the holder after the filing of the petition, or within four months prior to such filing, with a view to such use, and with knowledge that the bankrupt was insolvent or had committed an act of bankruptcy⁹). With respect to the right to set off debts, it makes no difference whether they are payable *in praesenti* or *in futuro*, and unliquidated claims may be set off against liquidated, and even, it is thought, liabilities founded in tort against those based purely on contract. It is not necessary that the debts or credits should be of the same character or that they should have arisen out of the same transaction. But it is essential that the debts should be in the same right, and so there can be no set-off between a debt due to one as executor and a debt due from him individually, or between a debt due from a corporation and a liability for an unpaid subscription to its capital stock. But the trustee in bankruptcy may set off claims which have vested in him though they never vested in the bankrupt, and a surety who by paying his principal's debt, has become subrogated to the latter's rights, may avail himself of a set-off in favor of the latter¹⁰).

E. Debts having Priority. — Before any dividends are paid to creditors, it is the duty of the trustee to pay all taxes legally due and owing by the bankrupt to the United States, or a State, county, district, or municipality¹¹), and also any other

¹) Bankr. Act (1898) § 57, subd. g. —

²) Collier on Bankr. (6th ed.) p. 444, where it is said that upon determining that the preference is voidable, the court should fix a reasonable time within which the creditor may surrender it and have his claim allowed. — ³) Bankr. Act (1898) § 57, subd. g. — ⁴) Collier on Bankr. (6th ed.) p. 507. — ⁵) 5 Cyc. 323. — ⁶) Collier on Bankr. (6th ed.) 510, 511. — ⁷) Collier on Bankr. (6th ed.) pp. 508, 509. — ⁸) Bankr. Act (1898) § 68, subd. a. —

⁹) Bankr. Act (1898) § 68, subd. b. — ¹⁰) Collier on Bankr. (6th ed.) pp. 575, 576, 577. —

¹¹) Bankr. Act (1898) § 64, subd. a. Upon filing receipts of the proper public officers for such payments, the trustee is to be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same is to be heard and determined by the court. Bankr. Act (1898) § 64, subd. a. One who purchases land on which taxes are unpaid, and subsequently

debts due to the United States¹). There are five classes of debts which have priority, and are to be paid in full out of the estate of the bankrupt in the order of such priority. These are: 1. The actual and necessary cost of preserving the estate of the bankrupt after the filing of the petition²); 2. The filing fees paid by creditors in involuntary cases, and where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition has been recovered for the benefit of the estate by the efforts and at the expense or one of more of the creditors, the reasonable expenses of such recovery³); 3. The cost of the administration of the estate⁴); 4. Wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months prior to the date of the commencement of the bankruptcy proceedings, not to exceed three hundred dollars to each claimant⁵); and 5. Debts owing to any person who by the laws of the State or of the United States is entitled to priority⁶). It may well happen that a debt which falls within the fifth class by reason of a State statute may also fall within one of the other classes having priority under the bankruptcy law, and as to this it has been laid down that "when both a State law and the Bankruptcy Act give priority to the same class of debts, the Bankruptcy Act not only controls the State law in case of absolute conflict between the two, but, by its express regulation of these priorities, excludes the State law altogether"⁷). In order to obtain priority in the payment of a debt, such priority should be specifically claimed, which is usually done by inserting in the proof of the debt a statement that it is entitled to priority and giving the grounds of the claim. If priority is not claimed, it will be deemed waived, although an amendment setting up the claim to priority will usually be allowed, and the priority is not lost even if it is not claimed until after the first dividend⁸). Each class of claims entitled to priority is to be paid in full, in the order stated above, so far as the estate is sufficient to pay them and if all cannot be paid in full the classes abate in the inverse order of their priority⁹). It must be borne in mind that liens are not priorities, but must stand or fall as liens¹⁰). So also, if property held by the bankrupt in trust passes to the trustee in bankruptcy, it will be subject to the interests of the beneficiaries of the trust, but they are not entitled to priority of payment unless they can trace the trust property in its original or some substituted form, in the estate which comes to the hands of the trustee¹¹).

F. Declaration and Payment of Dividends. — The term dividend, as used in the Bankruptcy Act, means a division among the creditors of a bankrupt of the fund arising from the assets of the estate of the bankrupt¹²). The statute provides that dividends of an equal per centum shall be declared and paid on all claims which are allowed, except such as have priority, and are hence entitled to be paid in full, or are secured, and hence share in the general distribution only to the extent, if any, to which they exceed the value of the security¹³), and no creditor is entitled to collect from the estate of a bankrupt any amount greater than accrues to him pursuant to the provisions of the Bankruptcy Act¹⁴). Dividends are declared by the referee, whose duty it is to prepare, and deliver to the trustee or trustees, dividend sheets showing the dividends declared and to whom they are payable¹⁵). If the money of the estate of the bankrupt, in excess of the amount necessary to pay claims which are entitled to priority of payment, equals or exceeds five per cent. of the claims

pays a judgment for such taxes, is not subrogated to the rights of the municipality, and cannot claim priority of payment upon the grantor of the lands being adjudged a bankrupt, but the judgment becomes in his hands merely an unsecured claim and is entitled to no priority. Collier on Bankr. (6th ed.) p. 529.

¹) See U. S. Rev. Stat. § 3466; Collier on Bankr. (6th ed.) p. 525. — ²) Bankr. Act (1898) § 64, subd. b, (1). — ³) Bankr. Act (1898) § 64, subd. b, (2). — ⁴) Bankr. Act (1898) § 64, subd. b, (3). The cost of administration as the term is here used includes the fees and mileage payable to witnesses, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys actually employed, to the peti-

tioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed by the statute, and to the bankrupt in voluntary cases as the court may allow. Bankr. Act (1898) § 64, subd. b, (3). — ⁵) Bankr. Act (1898) § 64, subd. b, (4). — ⁶) Bankr. Act (1898) § 64, subd. b, (5). — ⁷) Opinion of Judge Lowell in *In Re Lewis*, 99 Fed. Rep. 935, 4 Am. Bankr. Rep. 51, quoted with approval in Collier on Bankr. (6th ed.) p. 526. — ⁸) Collier on Bankr. (6th ed.) p. 527. — ⁹) Collier on Bankr. (6th ed.) p. 526. — ¹⁰) Collier on Bankr. (6th ed.) p. 536. — ¹¹) Collier on Bankr. (6th ed.) p. 526. — ¹²) 5 Cyc. 387. — ¹³) Bankr. Act (1898) § 65, subd. a. — ¹⁴) Bankr. Act (1898) § 65, subd. e. — ¹⁵) Bankr. Act (1898) § 39, subd. a, (1).

which have been allowed and those which, although not yet allowed, will probably be allowed, the first dividend must be declared within thirty days after the adjudication of bankruptcy¹); but the amount of the first dividend cannot exceed fifty per cent. of the cash on hand after deducting the money reserved for or paid out on debts entitled to priority, or held out for claims which have not yet been proven but will probably be allowed²). Dividends subsequent to the first are to be declared by the referee upon like terms as the first, as often as the amount applicable to claims equals ten per cent. thereof or more, and upon closing the estate; and such dividends may be declared oftener and in smaller proportions if the judge so orders³). The final dividend must be declared within three months after the first dividend was declared⁴). It is the duty of the trustee or trustees to pay dividends to the persons entitled thereto within ten days after such dividends are declared by the referee⁵). If a dividend payable to any creditor remains unclaimed for six months after the final dividend has been declared, the trustee must pay it into court, and if it remains unclaimed for a year it must be distributed, under the direction of the court, to the creditors whose claims have been allowed but have not been paid in full, and if any balance remains after paying such claims in full, it must be paid over to the bankrupt⁶). When creditors have received dividends, or final dividends have been declared in their favor, their rights are not affected by the subsequent proof and allowance of other claims, but the creditors proving and securing the allowance of such claims are entitled to be paid dividends equal in amount to those already received by the other creditors, if the estate is sufficient to pay such dividends, before such other creditors are paid any further dividends⁷). Where a person is adjudged to be a bankrupt by a court outside of the United States, and also by a court of bankruptcy in the United States, creditors who reside in the United States are entitled to be paid a dividend equal to that which was received in the court outside of the United States by the other creditors, before such other creditors are paid any amounts under the bankruptcy proceedings in the United States court⁸). Claims enjoying and sharing in the first dividend are not allowed to share in the second distribution until those claims which were credited with no part of the first dividend are paid a sum proportionate to that received by the others; but the holding back of any amount by the referee from distribution gives to claimants whose debts are not properly proven no lien of any kind upon such amount⁹). An order entered by consent of all the known creditors in proceedings against an insolvent corporation for the settlement of the estate and the distribution of the proceeds as therein provided, but not in accordance with any express provision of the bankruptcy law, is subject to the rights of any unknown creditors who may appear within the time allowed by law and present their claims¹⁰).

XV. LIENS. — A. General Considerations. — Where a lien does not contravene the Bankruptcy Act, and is recognized by the law of the State, it will be preserved notwithstanding the bankruptcy¹¹), as the Bankruptcy Act expressly provides that it shall not, [to the extent of the present consideration given] affect liens given or accepted in good faith and not in contemplation of or in fraud upon the Bankruptcy Act, and which are based upon a present consideration, and have been recorded according to law if record thereof is necessary to impart notice¹²). So, an equitable lien will be recognized and preserved in bankruptcy unless there is some prohibition in the State law which renders it invalid¹³). A mechanic's lien also, if valid under the State law, and perfected at the time of the filing of the petition in bankruptcy, must be recognized as valid and binding in the court of bankruptcy¹⁴). Mortgages which are valid under the laws of the State in which they are created and not within the prohibitions and limitations of the Bankruptcy Act, are valid and must be recognized in a court of bankruptcy¹⁵), and the same is true of deeds of trust and

¹) Bankr. Act (1898) § 65, subd. b. —

²) Bankr. Act (1898) § 65, subd. b. Collier on Bankr. (6th ed.) p. 543. — ³) Bankr. Act (1898) § 65, subd. b. — ⁴) Bankr. Act (1898) § 65, subd. b. — ⁵) Bankr. Act (1898) § 47, subd. a, (9). — ⁶) Bankr. Act (1898) § 66. If an unclaimed dividend belongs to a minor, the minor has one year after attaining his majority within which he may claim and receive the dividend. Bankr. Act (1898) § 66,

subd. b. — ⁷) Bankr. Act (1898) § 65, subd. c. —

⁸) Bankr. Act (1898) § 65, subd. d. — ⁹) 5 Cyc. 388, note. — ¹⁰) 5 Cyc. 388, note. — ¹¹) Collier on Bankr. (6th ed.) p. 558. — ¹²) Bankr. Act (1898) § 67, subd. d. — ¹³) 5 Cyc. 365. — ¹⁴) 5 Cyc. 366. — ¹⁵) 5 Cyc. 366. Mortgages given in good faith by way of continuing collateral are valid to the amount advanced before the petition is filed, and the same is thought to be true of mortgages purporting to

other transfers made in good faith to secure present loans and protected under the State statutes¹).

B. Claims Not Constituting Valid Liens. — Claims which because of the want of record or for any other reason would not have been valid liens as against the claims of the creditors of the bankrupt, are not liens against his estate²). In determining whether or not there is a valid lien within the meaning of this provision the statute or the judicially established rule of the State where the property is located govern³).

C. Liens obtained through Legal Proceedings. — Liens obtained by judgment or execution more than four months prior to the filing of a petition in bankruptcy by or against the judgment debtor are valid and remain in full force notwithstanding the bankruptcy, but liens obtained through legal proceedings within such four months stand on a different footing⁴). One section of the Bankruptcy Act provides that a lien which has been created or obtained in or pursuant to any action or proceeding at law or in equity⁵), which was begun against a person within four months before the filing of a petition in bankruptcy by or against him, shall be dissolved by an adjudication that such person is a bankrupt, if it appears that the lien was obtained or permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or that the party or parties to be benefited thereby had reasonable cause to believe that the defendant was insolvent and in contemplation of bankruptcy, or that the lien was sought and permitted in fraud of the provisions of the Bankruptcy Act; but that where it appears that the dissolution of the lien would militate against the best interests of the estate of the bankrupt, the lien shall not be dissolved, but the trustee of the bankrupt's estate shall be subrogated to the rights of the holder of the lien, for the benefit of the estate, and shall be empowered to perfect and enforce the lien in his own name as trustee with the same force and effect as the holder might have done if the bankruptcy proceedings had not intervened⁶). A subsequent section provides that all judgments, levies, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall, in case he is adjudged to be a bankrupt, to be deemed null and void, except as against bona fide purchasers without notice, and that the property affected by the lien shall be wholly discharged and released from the same and pass to the trustee as a part of the estate of the bankrupt; but that the court may on due notice, order that the right under such judgment, levy, attachment, or other lien shall be preserved for the benefit of the estate; and in such case it shall pass to the trustee and must be preserved by him for the benefit of the estate⁷). The courts were at first much confused by these two sections with apparently the same purpose, and yet, while inconsistent in part, at the same time overlapping. But this confusion is not now important. The latter section seems to cover in general terms almost every lien specifically declared voidable in the former section, as well as many more. Besides it occurs later in the law, and having been inserted while the bill was in conference committee of the two houses of congress, thus represents, as it were, the last word of the framers of the statute. It is therefore now usually relied on, and the former section is important only in those rare instances to which the latter section does not apply⁸).

D. Fraudulent Transfers and Liens. — All conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged to be a bankrupt within four months prior to the filing of the petition in bankruptcy, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, or which are held null and void as against creditors

cover property to be acquired. A chattel mortgage, covering after acquired property in the possession of the mortgagor, valid under the laws of the state where given, is effectual as against the mortgagor's trustee in bankruptcy, and the taking possession of the property by the mortgagee after condition broken within the period of four months before the filing of the petition in bankruptcy against the mortgagor is not a preference. Collier on Bankr. (6th ed.) pp. 559, 560.

¹) Collier on Bankr. (6th ed.) p. 561.

— ²) Bankr. Act (1898) § 67, subd. a. —

³) Collier on Bankr. (6th ed.) p. 553. —

⁴) 5 Cyc. 365, 366. — ⁵) Including an attachment upon mesne process or a judgment by confession. Bankr. Act (1898) § 67, subd. c.

— ⁶) Bankr. Act (1898) § 67, subd. c. —

⁷) Bankr. Act (1898) § 67, subd. f. The court may order such conveyances as are necessary to carry the purposes of these provisions into effect. Bankr. Act (1898) § 67, subd. f. — ⁸) Collier on Bankr. (6th ed.) p. 567.

by the laws of the State, Territory, or District in which the property is situated, are null and void as against the creditors of the bankrupt, except as to purchasers in good faith and for a present consideration, and the property so conveyed, transferred, assigned, or incumbered remains a part of the assets of the bankrupt and passes to the trustee of his estate¹), and it is the duty of the trustee to recover and reclaim such property by legal proceedings or otherwise for the benefit of the creditors²). Under this provision, mortgages made within the prohibited period to secure antecedent debts are void. And while, if the mortgage is made in good faith and part of the consideration is present, it will be valid to that extent, where there is an entire absence of good faith, the fresh consideration does not save the mortgage, but it is void even as to that³). Voluntary settlements by an insolvent husband upon his wife are void, and voluntary general assignments, whether with or without preferences, are legal frauds, and therefore voidable⁴).

XVI. PREFERENCES. — A. Voidable Under Statute. — If a bankrupt has [procured or suffered a judgment to be entered against him in favor of any person or has made a transfer of any of his property, and if at the time of the transfer or of the entry of the judgment or of the recording or registry of the transfer, when recording or registering thereof is required by law and being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference,] and the person receiving it, or to be benefited thereby, or his agent acting in the matter, had reasonable cause to believe that the bankrupt intended to give a preference, such preference is voidable by the trustee, and he may recover the property transferred, or its value, from the person to whom the preference was given⁵). The question of fraud does not enter in determining whether a preferential transfer is voidable and the property recoverable by the trustee, for it is the resulting effect of the act done which the statute declares against, and not the method by which it is done⁶). A creditor may be held to have had reasonable cause to believe that a preference was intended when the surrounding circumstances were such as would have led an ordinarily prudent business man to such a conclusion, and it is not necessary that he should have had either actual knowledge or even actual belief on the subject⁷).

B. What Constitutes a Preference. — A bankrupt is deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition⁸), or after the filing of the petition and before the adjudication of bankruptcy, made a transfer of any of his property or procured or suffered a judgment to be entered against himself in favor of any person, and the effect of the enforcement of such transfer or judgment would be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class⁹). It is the result of the debtor's act, and not his intent, which determines whether a preference is given, within the meaning of the statute, and hence, if an inequality results from what has been done it is immaterial that the debtor acted in good faith¹⁰). The word "transfer" as used in the statute includes every mode of disposing of or parting with property, even the payment of money, and it makes no difference whether or not the transfer was the result of coercion. But a fictitious transaction not affecting the estate of the debtor or the rights of the creditors cannot be deemed a transfer although it may assume the form of one, nor does any preference result

¹) Unless such property is exempt from execution and liability for debts by the law of the domicile of the bankrupt. Bankr. Act (1898) § 67, subd. e. — ²) Bankr. Act (1898) § 67, subd. e. For the purpose of such a recovery, the courts of bankruptcy and the State courts which would have had jurisdiction if the bankruptcy proceedings had not intervened, are given concurrent jurisdiction. Bankr. Act (1898) § 67, subd. e. — ³) Collier on Bankr. (6th ed.) p. 564. — ⁴) Collier on Bankr. (6th ed.) pp. 565, 566. — ⁵) Bankr. Act (1898) § 60, subd. b, as amended by Bankr. Act (1903) § 13. Any court of bankruptcy or any State court which would have had jurisdiction if bankruptcy had not intervened has jurisdiction for the purpose

of such recovery. Bankr. Act (1898) § 60, subd. b. — ⁶) 5 Cyc. 371, note. — ⁷) Collier on Bankr. (6th ed.) p. 485. — ⁸) Bankr. Act (1898) § 60. The four months' period ordinarily begins to run from the moment the transfer or judgment takes effect. Collier on Bankr. (6th ed.) p. 477. But where the preference consists in a transfer of property which is required by law to be recorded or registered, the four months' period does not expire until four months after the recording or registering of the transfer. Bankr. Act (1898) § 60, subd. a. — ⁹) Bankr. Act (1898) § 60, subd. a. — ¹⁰) 5 Cyc. 369; Collier on Bankr. (6th ed.) pp. 474, 480, 482 486.

where the transfer does not diminish the general fund, as where fair security is given for a present loan, or there is a substitution of securities pledged for an old loan, or a pledge is given or a payment made for a consideration given in the present or to be given in the future¹).

C. Payments to Attorneys, etc. — If, in contemplation of the filing of a petition in bankruptcy by or against him, a debtor directly or indirectly pays money or transfers property to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction may be re-examined by the court on the petition of the trustee, and is to be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate²).

D. Subsequent Extension of Credit to Bankrupt. — If, after receiving a preference, the creditor in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication of bankruptcy may be set off against the amount which would otherwise be recoverable from the creditor³). Under this provision, if the creditor acted in good faith, extended the credit without security, and the money or property actually passed into the debtor's possession, the creditor is entitled to the set-off, and it is not necessary for him to show that the money or property remained in the debtor's possession until his bankruptcy⁴).

XVII. COMPOSITIONS. — A. What Are. — A composition in bankruptcy is an arrangement between a bankrupt and his creditors whereby the amount which he can be expected to pay is liquidated, and he is allowed to retain his assets upon condition of his making the payments agreed upon⁵).

B. Time for Offering. — Under the statute a bankrupt may offer terms of composition to his creditors, [either before or after adjudication,] after, but not before, he has been examined in open court or at a meeting of his creditors and has filed in court the schedule of his property and the list of his creditors which the statute requires⁶). [In compositions before adjudication the bankrupt must file the required schedules, and thereupon the court must call a meeting of creditors for the allowance of claims, examination of the bankrupt, and the preservation and conduct of the estate. Action on petition for adjudication is delayed until it has been determined whether the composition shall be confirmed⁷).] As a practical matter the offer of a composition is never made until at or after the first meeting of creditors⁸).

C. Acceptance by Creditors. — The acceptances of the creditors may be obtained at any time after the petition in bankruptcy is filed⁹), and the statute makes no special provision as to the manner in which the consent of creditors is to be obtained¹⁰). The usual method is to send printed forms of acceptance to the creditors, but any paper containing an unqualified acceptance of the bankrupt's offer, and signed by the creditor or his duly authorized proxy is sufficient¹¹). A creditor who has once accepted the bankrupt's offer cannot withdraw his acceptance unless it was procured by fraud or misrepresentation¹²). In determining whether the required number of creditors, representing the required proportion of the claims have accepted the offer, only creditors who would be entitled to vote for a trustee can be counted¹³). Claims entitled to priority should not be counted, as a deposit of the amount required to pay them is a condition precedent to the application for confirmation. Secured claims should be counted only to the extent of the amount unsecured, and mortgagees whose claims against the estate are contingent upon there being a deficiency after foreclosure are not necessary or proper parties to a proposed composition¹⁴). Preferred creditors should also be excluded in the count, for the reason that their claims, if presented, will not be allowed unless accompanied by a surrender of the preference¹⁵).

¹) Collier on Bankr. (6th ed.) pp. 481, 482. — ²) Bankr. Act (1898) § 60, subd. d. — ³) Bankr. Act (1898) § 60, subd. c. — ⁴) Collier on Bankr. (6th ed.) pp. 491, 492. — ⁵) Black's Law Dict. — ⁶) Bankr. Act (1898) § 12, subd. a. — ⁷) Bankr. Act (1898) § 11, subd. a. — ⁸) Collier on Bankr. (6th ed.) p. 161. —

⁹) Collier on Bankr. (6th ed.) p. 162. — ¹⁰) 5 Cyc. 357, note. — ¹¹) Collier on Bankr. (6th ed.) p. 162. — ¹²) In re Levy, 110 Fed. 744, 6 Am. Bankr. Rep. 178. — ¹³) Collier on Bankr. (6th ed.) p. 162. — ¹⁴) Collier on Bankr. (6th ed.) p. 162. — ¹⁵) Collier on Bankr. (6th ed.) p. 166.

D. Deposit of Consideration. — The deposit required of bankrupts in composition cases must be sufficient to cover, in addition to costs, prior claims, and expenses, the named percentage not only on all claims filed before composition, but also on all other claims listed by the bankrupt in his original schedule¹). Secured claims, not liquidated should not be considered in determining the amount; but while the statute makes no reference to taxes, it seems reasonable to require the deposit of a sum sufficient to pay taxes, which are made preferred claims by the statute²).

E. Application for Confirmation. — An application for the confirmation of a composition may be filed in the court of bankruptcy only after it has been accepted in writing by creditors forming a majority in number of all creditors whose claims have been allowed, and representing a majority in amount of all such claims, and after the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings has been deposited in a place designated by the judge, subject to his order³). As claims can be allowed only in the manner prescribed by the statute, an application for confirmation of a composition cannot be made until after there has been an adjudication of bankruptcy, for until such adjudication there can be no allowed claims⁴). The application for confirmation must set forth that the bankrupt has been examined in open court or at a meeting of his creditors, that he has filed in court a schedule of his property and a list of his creditors, that he offered terms of composition to his creditors, which have been accepted in writing by the creditors, and that the consideration and the money required to be deposited have been duly deposited, wherefore the bankrupt asks that the composition be confirmed⁵).

F. Hearing upon Application. — When an application for confirmation of a composition is properly filed a date and place is fixed, with reference to the convenience of the parties in interest, for the hearing upon such application, and of such objections as may be made to the confirmation⁶). The creditors are entitled to ten days' notice by mail of the hearing⁷).

G. Confirmation of Composition. — **1. NATURE AND EFFECT.** — Confirmation is by a formal order reciting the application for confirmation, the acceptance by the creditors, the deposit of the consideration and the money required by law to be deposited, and that it appears that confirmation is for the best interest of the creditors, that the bankrupt has not been guilty of any acts or omissions which would bar a discharge, and that the offer and its acceptance are in good faith, wherefore the court orders that the composition be confirmed⁸). Upon the confirmation of a composition offered by a bankrupt, the title to his property reverts in him⁹). The confirmation of a composition discharges the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge¹⁰).

2. CONSIDERATIONS GOVERNING CONFIRMATION. — *a) Best Interest of Creditors.* — In order to warrant the confirmation of a composition offered by a bankrupt, the judge must be satisfied that it is for the best interest of the creditors¹¹). Whether it is to the best interest of the creditors to confirm the composition is a question of fact to be determined by the court after ascertaining from all material circumstances the reasonableness and good faith of the offer¹²). The decision of the creditors, in accepting the offer, is not final or binding upon the judge, but he himself must be satisfied that confirmation is for their best interest¹³). Where the only ground of opposition to the composition is that it is not for the best interest of the creditors the burden of proof rests upon those who oppose confirmation¹⁴). A gross discrepancy between the amount offered by the bankrupt and the probable value of the assets makes it the duty of the court to refuse to confirm the composition¹⁵), but where the discrepancy is slight, the composition may be confirmed notwithstanding¹⁶).

¹) 5 Cyc. 357, note. — ²) Collier on Bankr. (6th ed.) pp. 163, 164. — ³) Bankr. Act (1898) § 12, subd. b. — ⁴) Collier on Bankr. (6th ed.) pp. 161, 162. — ⁵) U. S. Supr. Ct. Forms in Bankr. No. 61. — ⁶) Bankr. Act (1898) § 12, subd. c. — ⁷) Bankr. Act (1898) § 58, subd. a (2). — ⁸) U. S. Supr. Ct. Forms in Bankr. No. 62. — ⁹) Bankr. Act (1898) § 70, subd. f. —

¹⁰) Bankr. Act (1898) § 14, subd. c. — ¹¹) Bankr. Act (1898) § 12, subd. d (1). — ¹²) 5 Cyc. 358, note. — ¹³) Collier on Bankr. (6th ed.) p. 167. — ¹⁴) 5 Cyc. 358, note. — ¹⁵) In re Whipple, 29 Fed. Cas. No. 17 513; 2 Lowell (U. S.) 404; 11 Nat. Bankr. Rep. 524. — ¹⁶) 5 Cyc. 358, note. Collier on Bankr. (6th ed.) p. 167.

b) *Acts or Omissions Barring Discharge.* — Where the bankrupt has been guilty of any of the acts or omissions which would be a bar to his discharge, this will prevent the confirmation of a composition offered by him¹). The question as to what acts or omissions on the part of the bankrupt will operate as a bar to his discharge, will be discussed in another part of this article²).

c) *Good Faith.* — In order to warrant the confirmation of a composition offered by the bankrupt, the judge must be satisfied that the offer and its acceptance are in good faith and have not been made or procured except as provided by the statute, or by any means, promises, or acts forbidden by the statute³). Confirmation may be refused where either the debtor or any of the creditors has been guilty of any act of fraud connected with the offer or acceptance of the composition⁴), such as a secret advantage given to one creditor for the purpose of inducing him to accept the composition⁵), or improperly inducing a creditor to withdraw⁶). And so also, if the offer of a composition is extorted from the debtor by any improper means confirmation will be refused⁷). While the purchasing of claims for the purpose of using them to accomplish a composition is not necessarily fraudulent, it will be held to be so unless an honest motive appears⁸).

3. *APPEAL FROM ORDER REFUSING CONFIRMATION.* — While it has been held that an appeal will lie to the Circuit Court of Appeals from an order of the court of bankruptcy refusing to confirm a composition⁹), this view has been disapproved by a leading text writer on the subject of bankruptcy¹⁰).

H. *Distribution.* — Upon the confirmation of a composition the consideration is to be distributed as the judge shall direct and the case dismissed¹¹). The order of distribution sets forth that the composition offered by the bankrupt having been confirmed, it is ordered that the deposit shall be distributed by the clerk of the court as follows. 1st, to pay the several claims which have priority; 2nd, to pay the costs of the proceedings; 3rd, to pay, according to the terms of the composition, the claims of general creditors which have been allowed and appear on the list of allowed claims¹²). The statute does not prescribe the method of distribution on a composition, but as it requires the consideration to be deposited in such place as shall be designated by the judge, such deposit is subject to the provision of the general orders in bankruptcy of the Supreme Court of the United States that "No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn"¹³). The generally adopted practice is to have the distribution made by the clerk of the court, and a convenient method is to make the referee in charge a distributing agent to the extent of performing the clerical work required, the checks, however, being signed by the clerk¹⁴). If the composition is not confirmed the estate is to be administered in bankruptcy as provided by the statute¹⁵).

I. *Setting Aside Compositions.* — The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it is made to appear upon a trial that fraud was practised in procuring the composition, and that knowledge thereof has come to the petitioners since the confirmation¹⁶). All these matters should be made to appear in the petition for the setting aside of the composition; and notice should be given to all creditors¹⁷). Fraud is the only ground upon which a composition can be set aside after confirmation¹⁸). When a composition is set aside, the trustee is, upon his appointment and qualification,

¹) Bankr. Act (1898) § 12, subd. d (2). — ²) See *infra*, XXI, F. — ³) Bankr. Act (1898) § 12, subd. d (3). — ⁴) 5 Cyc. 358, note; Collier on Bankr. (6th ed.) p. 168. — ⁵) *Bean v. Brookmire*, 2 Fed. Cas. 1170; 2 Dill. (U. S.) 108; 2 Am. L. Rec. 222, 6 Am. L. J. Rep. 418, 5 Chic. Leg. N. 314; 7 Nat. Bankr. Reg. 568; 7 West. Jur. 324. — ⁶) Collier on Bankr. (6th ed.) p. 168. — ⁷) Collier on Bankr. (6th ed.) p. 168. — ⁸) Collier on Bankr. (6th ed.) p. 168. — ⁹) U. S. v. Hammond, 104 Fed. Rep. 862; 44 C. C. A. 229;

4 Am. Bankr. Rep. 736 [reversing *In Re Adler*, 103 Fed. Rep. 444; 4 Am. Bankr. Rep. 583]. — ¹⁰) Collier on Bankr. (6th ed.) p. 171. — ¹¹) Bankr. Act (1898) § 12, subd. e. — ¹²) U. S. Supr. Ct. Forms in Bankr. No. 63. — ¹³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXIX. — ¹⁴) Collier on Bankr. (6th ed.) p. 169. — ¹⁵) Bankr. Act (1898) § 12, subd. e. — ¹⁶) Bankr. Act (1898) § 13. — ¹⁷) Collier on Bankr. (6th ed.) p. 174. — ¹⁸) 5 Cyc. 358—359, note.

vested with the title to all of the property of the bankrupt as of the date of the final order setting aside the composition¹), and the property acquired by the bankrupt in addition to his estate at the time when the composition was confirmed, is to be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition was in force, and the residue, if any, is to be applied to the payment of the debts which were owing at the time of the adjudication²). But it seems that payments made under the composition are not affected. The case proceeds as though there had been no composition, and every one is restored, as far as possible, to the rights and remedies existent at the time when the composition was confirmed³).

XVIII. CLOSING AND REOPENING ESTATES. — The estate can be closed only when it appears to have been fully administered; but the general policy of the law requires that this shall be done speedily⁴), and hence it frequently happens that after the estate has been closed additional assets are discovered, or it is found that a transfer of property by the bankrupt is probably fraudulent. In such case it is necessary to reopen the estate, which the statute expressly gives the court power to do⁵). Creditors who have not proved their claims cannot apply for a reopening of the estate, and where the time to file claims has expired, a reopening of the estate will be for the benefit of those creditors only whose claims have been allowed in the original proceeding⁶).

XIX. EXEMPTION OF BANKRUPT FROM ARREST. — A bankrupt is exempt from arrest upon civil process except where such process is issued from a court of bankruptcy for contempt or disobedience of its lawful orders⁷), and where such process is issued from a State court having jurisdiction, upon a debt or claim from which his discharge in bankruptcy would not be a release, and such process is served in the State where it is issued⁸). The question of what constitutes a dischargeable debt is to be determined by the court of bankruptcy upon the face of the papers used in the proceedings in the State court⁹). It has been held, that a debtor who has been arrested prior to the filing of the petition in bankruptcy, is not entitled to be released by virtue of this provision of the statute¹⁰), and the right to exemption terminates, of course, when the bankrupt is discharged¹¹). A debtor who is arrested in violation of this provision is entitled to be released on habeas corpus¹²). Where the bankrupt desires protection against arrest generally, the proper method to secure it is to apply for an order of protection, which is a matter of right and can be granted by the referee¹³).

¹) Bankr. Act (1898) § 70, subd. d. —

²) Bankr. Act (1898) § 64, subd. c. — ³) Collier on Bankr. (6th ed.) pp. 173, 174. — ⁴) Collier on Bankr. (6th ed.) p. 29. — ⁵) Bankr. Act (1898) § 2 (8). It is the duty of the court to reopen the estate when it appears that then are assets of the bankrupt which have not been administered. In re Newton, 107 Fed. Rep. 429, 6 Am. Bankr. Rep. 52. — ⁶) Collier on Bankr. (6th ed.) p. 29. — ⁷) Bankr. Act (1898) § 9, subd. a (1). — ⁸) Bankr. Act (1898) § 9, subd. a (2). The bankrupt is exempt from arrest even on such process when he is in attendance on a court of bankruptcy or engaged in the performance of a duty imposed by the Bankruptcy Act. Bankr. Act (1898) § 9, subd. a (2). — ⁹) 5 Cyc. 376, note. — ¹⁰) Collier on Bankr. (6th ed.) p. 134. — ¹¹) Collier on Bankr. (6th ed.) p. 133. — ¹²) If the petitioner, during the pendency of the proceedings in bankruptcy is arrested or imprisoned upon process in any civil action, the district court of the United States may, upon his application, issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if the claim is so provable he must be discharged, while if it is not so

provable he is to be remitted to the custody in which he may lawfully be. But before granting the order of discharge the court must cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order. U. S. Supr. Ct. Gen. Orders in Bankr. No. XXX. — *To what court application made* — If the bankrupt has already been arrested, and he applies for release on the ground that the debt is dischargeable in bankruptcy, comity suggests an application in the first instance to the state court, but such an application can be made in the first instance to a federal court having jurisdiction, if that course is preferred. Collier on Bankr. (6th ed.) p. 135. — ¹³) Collier on Bankr. (6th ed.) p. 135. The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt is subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by the court. U. S. Supr. Ct. Gen. Orders in Bankr. No. XII.

XX. DETENTION OF BANKRUPT. — At any time after the filing of a petition in bankruptcy, whether voluntary or involuntary, and before the expiration of one month after the qualification of the trustee in bankruptcy, upon satisfactory proof being furnished by the affidavits of at least two persons that the bankrupt is about to leave the district in which he resides or has his principal place of business in order to avoid examination and that his departure will defeat the proceedings in bankruptcy the judge may issue a warrant to the marshal, directing him to bring the bankrupt forthwith before the court for examination. And if upon hearing the evidence of the parties, it shall appear to the court or a judge thereof that such allegations are true and that such a course is necessary, he must order the marshal to keep the bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released, or shall give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto¹). As soon as the ten days have elapsed the bankrupt must be released, and while there seems to be no prohibition against successive applications for the detention of the bankrupt, the court will not permit the use of this process to become persecution²). This provision for the detention of the bankrupt does not limit the power of the court to issue a writ of *ne exeat*³).

XXI. DISCHARGE. — **A. Right to Discharge.** — A bankrupt is entitled to a discharge as a matter of right, unless one or more of the reasons for refusing a discharge set forth in the statute exists⁴).

B. Application for Discharge. — An application for a discharge may be made to the court of bankruptcy in which the proceedings are pending at any time after the expiration of one month from, and within twelve months after the adjudication of bankruptcy, and it is made to appear that the bankrupt was unavoidably prevented from filing his application within such time, it may be filed within the next six months, but not thereafter⁵). The application for a discharge must be by a petition⁶) which must state concisely, in accordance with the provisions of the Bankruptcy Act and the orders of the court, the proceedings in the case and the acts of the bankrupt⁷). This petition should be addressed to the judge⁸), but it should be filed with the clerk and not sent to the judge⁹).

C. Notice to Creditors. — The creditors are entitled to [thirty] days' notice by mail of the hearing on the application for a discharge¹⁰). The practice with reference to the giving of notice to the creditors is not uniform throughout the country but is governed by local rules¹¹).

D. Opposition to Discharge. — Any party or parties in interest may appear and oppose the discharge of the bankrupt¹²); but a creditor who desires to oppose the application for a discharge must enter his appearance in opposition thereto on the day when the creditors are required to show cause why the discharge should not be granted¹³); and a failure to appear on the return day will ordinarily preclude a creditor from subsequently filing specifications of objections to the discharge¹⁴). A creditor opposing the discharge must file a specification in writing of the grounds of his opposition within ten days after the day on which the creditors are required to show cause against the discharge unless the time for so doing is enlarged by special

¹) Bankr. Act (1898) § 9, subd. b. — ²) Collier on Bankr. (6th ed.) p. 137. — ³) In re Lipke, 98 Fed. 970, 3 Am. Bankr. Rep. 569, cited in 5 Cyc. 375, note. — ⁴) Bankr. Act (1898) § 14, subd. b; 5 Cyc. 390, 393. A discharge may not be refused because the bankrupt has been dilatory in bringing the matter to a hearing, nor does the insanity of the bankrupt affect his right to a discharge. Collier on Bankr. (6th ed.) pp. 187—188. — ⁵) Bankr. Act (1898) § 14, subd. a. — ⁶) Collier on Bankr. (6th ed.) p. 182. — ⁷) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXXI. — The form of the petition is prescribed by U. S. Supr. Ct. Forms in Bankr. No. 57. — ⁸) Collier on Bankr. (6th ed.) p. 182. — ⁹) 5 Cyc. 390, note. — ¹⁰) Bankr. Act (1898) § 58, subd. a (2). — ¹¹) Collier on Bankr. (6th ed.) p. 183. — ¹²) 5 Cyc. 391. Objections to the

discharge may be filed by any person having a pecuniary interest in resisting the discharge of the bankrupt, as one owning an unliquidated claim, even though such person has not proved a debt or his debt is no longer provable. But a creditor having a claim which is not dischargeable may not be heard in opposition. If a member of a firm files objections, he must show that he is acting with the consent of the other members. A trustee is a party in interest and may file objections when it appears that he is seeking to recover from the bankrupt property alleged to belong to the estate. Collier on Bankr. (6th ed.) p. 184. — ¹³) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXXII. — ¹⁴) Collier on Bankr. (6th ed.) p. 183.

order of the judge¹). The specification must be clear, positive, direct, and unequivocal, must contain specific averments of facts, and must distinctly allege one or more of the statutory grounds for refusing a discharge²). The bankrupt is not required to answer the specification³), as an issue is formed by the petition for the discharge and the specification of objections thereto, but he has the right to file objections to the specification on the ground of insufficiency, or to answer or demur; and all objections to the sufficiency of the specification (save that it is fatally defective by reason of the failure to show some jurisdictional requirement) are waived unless made before trial⁴).

E. Hearing on Application. — The judge of the court of bankruptcy must hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by [the trustee or] parties in interest, at such time as will give [the trustee or other] parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the bankrupt unless some of the statutory reasons for refusing such discharge are made to appear⁵). The hearing on an application for a discharge is in effect a trial in equity⁶); and the bankrupt should be ordered to attend upon the hearing if this is requested by the creditors⁷). Those who oppose the discharge have the burden of proving the facts necessary to constitute a ground of refusal⁸); and while proof beyond a reasonable doubt is not required to sustain specifications of opposition to the discharge, the proof should be clear and satisfying where the commission of an offense punishable by imprisonment is charged⁹). The evidence should be confined to the specifications of opposition¹⁰). References to the referee as a special master in chancery to hear and report on the facts are quite universal; and when such a reference is ordered the special master sets a time and place for the hearing, which goes on before him as if before the judge¹¹). If the court overrules the specifications of opposition, an order of discharge follows¹²). The court of bankruptcy has inherent power to award costs against a creditor who files specifications against the discharge of the bankrupt and fails to sustain them¹³). Unless some creditor appears and objects and files his grounds of objection to the discharge, the prayer of the petition for a discharge is granted as of course¹⁴) and the judge does not, as a rule, make any further investigation¹⁵).

F. Reasons for Refusing Discharge. — 1. COMMISSION OF OFFENSE PUNISHABLE BY IMPRISONMENT UNDER THE BANKRUPTCY ACT. — A discharge is properly refused where the bankrupt has committed an offense punishable by imprisonment under the Bankruptcy Act¹⁶). The offenses punishable by imprisonment under the Bankruptcy Act, and the commission of which may warrant a refusal to discharge the bankrupt are knowingly and fraudulently concealing, while a bankrupt, or after his discharge, from the trustee, any of the property belonging to the estate in bankruptcy, and making a false oath or account in, or in relation to, any proceeding in bankruptcy¹⁷). A mere failure to schedule property or to surrender it to the trustee is not ipso facto a knowing and fraudulent concealment of the same¹⁸), for the fraudulent intent is a necessary ingredient of the offense of concealing property so as to bar a discharge¹⁹), and so an omission, through an honest mistake of law or of fact, to include certain property in the schedules will not bar a discharge²⁰). But, according to the better opinion, an omission to schedule property fraudulently conveyed is such a concealment as will bar a discharge²¹). It is not necessary that the concealment should be effective, for a discharge may be withheld although the fraudulent concealment has proved unavailing²²). A fair

¹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXXII. — ²) See *In re Quackenbush*, 102 Fed. Rep. 282, 4 Am. Bankr. Rep. 274.

— ³) *In re Logan*, 102 Fed. 876; 4 Am. Bankr. Rep. 525. — ⁴) *Collier on Bankr.* (6th ed.) p. 185. — ⁵) Bankr. Act (1898) § 14, subd. b. — ⁶) *Collier on Bankr.* (6th ed.) p. 186. — ⁷) *Collier on Bankr.* (6th ed.) p. 183.

— ⁸) *In re Phillips*, 98 Fed. Rep. 844; 3 Am. Bankr. Rep. 542. — ⁹) 5 Cyc. 392. — ¹⁰) *Collier on Bankr.* (6th ed.) p. 186. — ¹¹) *Collier on Bankr.* (6th ed.) pp. 185, 186. The disbursements of the special master, as for a stenographer, are allowed out of the estate.

Collier on Bankr. (6th ed.) p. 187. — ¹²) *Collier on Bankr.* (6th ed.) p. 187. — ¹³) 5 Cyc. 392. — ¹⁴) 5 Cyc. 391. — ¹⁵) *Collier on Bankr.* (6th ed.) p. 183. — ¹⁶) Bankr. Act (1898) § 14, subd. b. — ¹⁷) Bankr. Act (1898) § 29, subd. b (1), (2). — ¹⁸) 5 Cyc. 394, note. — ¹⁹) *In re Conn*, 108 Fed. Rep. 525; 6 Am. Bankr. Rep. 217; *In re Bryant*, 104 Fed. Rep. 789; 5 Am. Bankr. Rep. 114. — ²⁰) *Collier on Bankr.* (6th ed.) p. 190. The fact that assets were omitted from the schedule on the advice of counsel, honestly given, is at least a presumptive excuse. *Collier on Bankr.* (6th ed.) p. 190. — ²¹) *Collier on Bankr.* (6th ed.) p. 190. — ²²) 5 Cyc. 393, note.

preponderance of credible evidence tending to show that there has been a wilful and fraudulent concealment of assets by the bankrupt is sufficient to warrant the refusal of a discharge¹). In the case of a false oath, as in the case of a concealment of property, the intent is material, and the making of an oath which is in fact false does not bar a discharge unless it was known to be so and there was a fraudulent intent²). The false oath must also have been in regard to a matter material to the inquiry, and it has been held that it must have been made in the proceedings in which the bankruptcy of the petitioner was to be adjudicated and his estate administered³).

2. DESTRUCTION OR CONCEALMENT OF OR FAILURE TO KEEP BOOKS AND RECORDS. — It is proper to refuse a discharge where the bankrupt has destroyed, concealed, or failed to keep books of account or records from which his financial condition might be ascertained, with the intent of concealing such condition⁴). In order to sustain an objection to the discharge of a bankrupt on this ground the proof must show that the act complained of was done after the passage of the Bankruptcy Act, by the bankrupt or some one acting under his direction, with the intent of concealing his financial condition⁵). In this connection it is to be noted that by the express terms of the Bankruptcy Act concealment includes secreting, falsifying, and mutilating⁶), and so any act or series of acts with relation to books of account or business records which may reasonably be held to be within the meaning of "destruction," "concealment," "secreting," "falsifying," "mutilation," or "failure to keep" is within the interdiction of the law⁷). All books and records which are material to a proper understanding of the financial condition of the bankrupt are within the meaning of this provision of the statute, and the destruction of vouchers or other business papers is as effectual to prevent a discharge as the destruction of books⁸). The intent to conceal the bankrupt's financial condition is essential, and a mere failure to keep books and records is not of itself sufficient to prevent a discharge⁹). So, the law does not apply where the bankrupt has not, for a long time prior to his bankruptcy, been engaged in a business requiring the keeping of books of account¹⁰). The failure of an agent to keep books of account from which the true financial condition of his principal can be discovered, even though intentional and fraudulent, will not preclude the discharge of the principal unless it is made to appear that the principal had knowledge of such failure on the part of his agent¹¹). The burden of proving the existence of this ground of objection to a discharge is upon the objecting creditor, and the act or omission must be shown by a clear preponderance of evidence, though not necessarily, in the opinion of a leading authority on the subject, with the same degree of certainty as would be required in the case on an objection based on the commission by the bankrupt of an offense punishable by imprisonment under the bankruptcy law¹²).

3. OBTAINING PROPERTY ON CREDIT BY FALSE STATEMENT OF FINANCIAL CONDITION. — A discharge is properly refused where the bankrupt has obtained property from any person upon a materially false statement in writing made to such person, [or his representative], for the purpose of obtaining such property on credit¹³). In order to prevent a discharge upon this ground the objecting creditor must show that the bankrupt obtained property on credit by means of a statement as to his financial condition, made by him or some one duly authorized by him, which statement was materially false, made in writing for the purpose of obtaining such property from such creditor, and relied on by the creditor in extending the credit. And it would also seem necessary to show that such act was committed since the amendment of 1903 to the Bankruptcy Act went into effect¹⁴). [Under the Bankruptcy Act in its present amended form the statement may be made to a representative of the creditor.] It has been suggested that it is not necessary that the false statement relied on should have been made directly to

¹) Collier on Bankr. (6th ed.) p. 191. If the bankrupt fails to account for a large sum of money shown to have been in his possession immediately prior to his bankruptcy, and is unable to satisfactorily explain the discrepancy, the offense of concealment is established, and the discharge should be refused. 5 Cyc. 394, note. — ²) In re Eaton, 110 Fed. Rep. 731, 6 Am. Bankr. Rep. 531. — ³) Collier on Bankr. (6th ed.) p. 193. —

⁴) Bankr. Act (1898) § 14, subd. b. — ⁵) Collier on Bankr. (6th ed.) pp. 194, 195. — ⁶) Bankr. Act (1898) § 1, subd. 22. — ⁷) Collier on Bankr. (6th ed.) p. 195. — ⁸) Collier on Bankr. (6th ed.) p. 196. — ⁹) Collier on Bankr. (6th ed.) pp. 195, 196. — ¹⁰) 5 Cyc. 396, note. — ¹¹) 5 Cyc. 395, note. — ¹²) Collier on Bankr. (6th ed.) p. 195. — ¹³) Bankr. Act (1898) § 14, b. — ¹⁴) Collier on Bankr. (6th ed.) p. 197.

the person defrauded, but a leading authority is of the opinion that since the statute requires the statement to have been made "for the purpose of obtaining such property" statements made to mercantile agencies will be of no value as objections to discharges, unless, perhaps, when they are made in the form of special reports, the giving of which by the purchaser can be proved to have been for the purpose of obtaining the identical credit in question¹). A false statement made by one partner in the course of the partnership business is that of the firm, and will be a bar to the discharge of a partner who did not participate therein, even though he had no knowledge thereof²). How far a statement by an employe will avail to prevent the discharge of his employer depends upon the authority given to him by the employer, and the acquiescence of the latter in the employe's statement³). Where a creditor has been defrauded in a particular sale on credit by the purchaser's material misstatements as to his financial condition, made for the purpose of accomplishing such purchase, the creditor has the option of interposing a bar to a discharge affecting all debts, or of permitting the discharge to be granted and then asserting his claim on after acquired property, on the ground that his claim is not affected by the discharge⁴).

4. FRAUDULENT TRANSFER, REMOVAL, DESTRUCTION, OR CONCEALMENT OF PROPERTY. — It is proper to refuse to grant a discharge where the bankrupt has transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed, any of his property, [at any time subsequent to the first day of the] four months immediately preceding the filing of the petition, with the intent to hinder, delay, or defraud his creditors⁵). The conveyance, transfer, concealment, or removal of property with the intent to hinder, delay, or defraud creditors, has already been discussed this being one of the statutory acts of bankruptcy⁶), and much that has been said there is applicable here. In order to bar a discharge the transfer, removal, destruction, or concealment must have been within the four months' period immediately preceding the filing of the petition. If made or done prior to that time, it will not bar a discharge although the purpose of the debtor was to defeat a just claim. A preferential transfer consisting of a payment of money on account of an existing indebtedness will not bar a discharge in the absence of evidence that such payment was made in fraud of creditors⁷).

5. PREVIOUS DISCHARGE WITHIN SIX YEARS. — A discharge is properly refused where it is shown that the bankrupt has been granted a discharge in bankruptcy, in voluntary proceedings, within the previous six years⁸). Such previous discharge is a sufficient objection to a discharge in subsequent proceedings whether the latter be voluntary or involuntary. The six years' period commences to run from the date of the former order granting the discharge, and the time is to be measured from that date to the date of the granting of the second discharge, so that a discharge may be granted after the six years have expired, although such period had not expired when the second petition in bankruptcy was filed⁹).

6. REFUSAL TO OBEY ORDER OF COURT OR TO ANSWER MATERIAL QUESTION. — The fact that the bankrupt has refused to obey any lawful order of the court, or to answer any material question approved by the court, in the course of the bankruptcy proceedings, is a sufficient ground for a refusal to grant him a discharge¹⁰). In cases where the discharge of a bankrupt is opposed because of his refusal to obey an order of the court the question whether or not the order was lawful will often be the only one involved. If the order is authorized by the words of or by implication from the statute it will be lawful. It has been suggested that mere neglect, not amounting to a refusal to obey, would not be sufficient. The provision for withholding a discharge where the bankrupt has refused to answer any material question approved by the court was inserted in order to compel the bankrupt to answer where he asserted his privilege, and has been held not in violation of the federal constitution¹¹). [A trustee may not interpose objections to a discharge, unless authorized so to do at a meeting of creditors called for that purpose.]

¹) Collier on Bankr. (6th ed.) p. 199. —

²) Collier on Bankr. (6th ed.) p. 199. — ³) Collier on Bankr. (6th ed.) p. 198. — ⁴) Collier on Bankr. (6th ed.) p. 197. — ⁵) Bankr. Act (1898) § 14, subd. b. — ⁶) See supra, V, D. —

⁷) Collier on Bankr. (6th ed.) p. 200. —

⁸) Bankr. Act (1898) § 14, subd. b. — ⁹) Collier on Bankr. (6th ed.) p. 202. — ¹⁰) Bankr. Act (1898) § 14, subd. b. — ¹¹) Collier on Bankr. (6th ed.) pp. 202, 203.

G. Effect of Discharge. — 1. **GENERAL CONSIDERATIONS.** — A discharge in bankruptcy does not cancel the debt but goes merely to the remedy¹). It releases the bankrupt from all legal obligation to pay the debt but his moral obligation to pay still continues, and this moral obligation, united with a subsequent promise of the bankrupt to pay the debt is sufficient to constitute a perfect right of action against him²). Hence the discharge must be pleaded in order to be effectual as a bar to an action upon a provable debt³). The discharge is personal to the bankrupt, and hence a lien in good faith is not affected thereby⁴). A discharge granted by a court having jurisdiction is, until set aside or reversed in a direct proceeding, conclusive upon all the parties to the proceeding; and it is not subject to be collaterally attacked⁵). The discharge of a bankrupt does not alter the liability of a person who is a co-debtor with such bankrupt or a guarantor of or in any manner a surety for him⁶). So the discharge of the maker of a promissory note does not affect the liability of an indorser; an obligor on a bond remains liable although the principal or a co-obligor is discharged; and the discharge of a corporation does not release its directors from any liability to its creditors to which the law subjects them⁷).

2. **DEBTS AND OBLIGATIONS DISCHARGED.** — A discharge in bankruptcy releases the bankrupt from all of his provable debts, except such as: 1. Are due as a tax levied by the United States, or the state, county, district, or municipality in which he resides; 2. Are liabilities for obtaining property by false pretenses or representations, for wilful and malicious injuries to the person or property of another, for alimony due or to become due, for the maintenance or support of his wife or child, for the seduction of an unmarried female, or for criminal conversation; 3. Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless the creditor had notice or actual knowledge of the bankruptcy proceedings; or 4. Arose out of his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity⁸). The question of what debts are provable against the estate of a bankrupt is discussed elsewhere⁹); and it is to be borne in mind that the discharge releases the bankrupt from his provable debts only. Among debts which are released by the discharge may be mentioned a claim against the bankrupt as indorser or surety¹⁰), and a liability arising out of the conversion of property¹¹) or a breach of a promise of marriage¹²). As a debt evidenced by a judgment is provable in bankruptcy, it follows that judgments against the bankrupt are released by the discharge, unless they are based upon liabilities as to which the statute provides that the discharge shall not be effectual¹³). A discharge obtained by a joint debtor is a bar to an action by his co-debtor for contribution; and it has also been held that an indorser for, or a surety of, a bankrupt can assert no claim against the bankrupt after his discharge, if the debt paid by such indorser or surety was provable against the estate of the bankrupt¹⁴). If, by the law of the State, the bankrupt is liable for his wife's debts, the discharge will release them¹⁵). A discharge will release a shareholder of a national bank from his statutory liability to creditors of the bank, where the claims of such creditors were provable at the time of his discharge¹⁶). A provable debt of an alien, whether resident or not, is discharged, although the discharge cannot be pleaded in a foreign court¹⁷). Contingent liabilities of the bankrupt may or may not be affected by the discharge, according to whether or not they are provable against his estate¹⁸), and so the obligation of the bankrupt upon a covenant of warranty made prior to his bankruptcy is released or not according to whether the breach was prior or subsequent to the discharge¹⁹). But it has been held that if there are covenants in

¹) Collier on Bankr. (6th ed.) p. 203. — ²) 5 Cyc. 407. The new promise must be clear express, distinct, and unequivocal and without qualification or condition; but it need not be in writing unless a statute so requires, nor need it be made to the creditor himself. 5 Cyc. 408, 409. — ³) 5 Cyc. 405. A pleading which sets up a discharge in bankruptcy as a defense or bar to an action must allege facts sufficient to show that the proceedings were regular and that the discharge was actually granted. A plea of a discharge in bankruptcy should be filed in due order of pleading and

within the time prescribed by rule of court. 5 Cyc. 406. — ⁴) Collier on Bankr. (6th ed.) p. 203. — ⁵) 5 Cyc. 411. — ⁶) Bankr. Act (1898) § 16. — ⁷) Collier on Bankr. (6th ed.) pp. 213—215. — ⁸) Bankr. Act (1898) § 17. — ⁹) See supra, XIV, C. — ¹⁰) 5 Cyc. 398. — ¹¹) Collier on Bankr. (6th ed.) pp. 221, 222. — ¹²) Collier on Bankr. (6th ed.) p. 222. — ¹³) 5 Cyc. 401, 402. — ¹⁴) 5 Cyc. 400, 401. — ¹⁵) Collier on Bankr. (6th ed.) p. 220. — ¹⁶) 5 Cyc. 397, note. — ¹⁷) Collier on Bankr. (6th ed.) p. 220. — ¹⁸) 5 Cyc. 397. — ¹⁹) 5 Cyc. 398.

a contract of a continuing nature, the bankrupt remains liable for the fulfilment of such covenants notwithstanding his discharge in bankruptcy¹). The discharge of the bankrupt does not affect valid liens on his property²), or release him from his obligation to obey an order of a State court requiring him to pay a certain sum periodically for the support of his minor children³). The discharge of a corporation will not bar its creditors from recovering against it a judgment which will afford a basis for the enforcement of the individual liability of its directors and shareholders⁴). It is expressly provided that the discharge does not release debts due for taxes; and it has been settled by a decision of the Supreme Court of the United States that debts due to the United States or to a State on other grounds are not affected by the discharge⁵). Liabilities for obtaining property by false pretenses or representations are not discharged, but in order to save a claim on the ground that the liability thus arose it must appear that the representations were knowingly and fraudulently made, and that they were relied on by the other party, although it is not necessary that the representations should have been made in writing⁶). The provision that the discharge shall not release liabilities for wilful and malicious injuries to the person or property of another applies to all intentional injuries, and the malice intended is nothing more than the disregard of duty which is involved in the intentional doing of any wilful act to the injury of another. So a judgment or liability for alienation of the affections of a husband or wife, malpractice, assault, malicious prosecution, slander, or libel is not released by the discharge⁷). Under the provision that debts not duly scheduled shall not be released unless the creditor had notice or knowledge of the proceedings, a statement in the schedule that the residence of a creditor is unknown when it could have been ascertained by the exercise of reasonable diligence will prevent a discharge of the debt, and a failure to schedule the actual owner of a debt will prevent the discharge thereof⁸). In order that a claim omitted from the schedule may be discharged on the ground that the creditor had notice or knowledge of the proceeding, such notice or knowledge must be shown by a fair preponderance of evidence⁹). In order to prevent the release of a debt on the ground that it arose out of the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity, the fraud relied on must be a positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not an implied fraud or fraud in law, and must have existed at the time of the creation of the debt¹⁰). The term "officer" probably means any public official who from the nature of his duties may be guilty of embezzlement, misappropriation, or defalcation in office; and the term "fiduciary capacity" refers to attorneys, executors, guardians, and trustees generally, but not to agents, bankers, commission men, factors, or partners¹¹).

H. Revocation of Discharge. — Upon the application of any parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge in bankruptcy has been granted, such discharge may be revoked upon a trial if it is made to appear that it was obtained through fraud on the part of the bankrupt, and that knowledge of such fraud has come to the petitioners since the discharge was granted, and that the actual facts did not warrant the discharge¹²). The phrase "parties in interest" includes only those persons whose rights would be barred by the discharge, and no others can apply for a revocation¹³). The application must be made within one year from the date of the order of discharge, but the right to apply may be barred within a shorter time if the applicant has been guilty of laches¹⁴). The application should be made to the judge by petition, showing that the petitioner had provable claims against the bankrupt, and the grounds on which the application rests should be strictly pleaded. Reasonable notice should be given to the bankrupt, and also, it would seem, to the other creditors¹⁵). The hearing upon the application to revoke may be before the judge or a special master, and the

¹) 5 Cyc. 325, 326. — ²) 5 Cyc. 403. — ³) 5 Cyc. 397, note. — ⁴) 5 Cyc. 398, note. — ⁵) *United States v. Herron*, 20 Wall. (U. S.) 251. — ⁶) *Collier on Bankr.* (6th ed.) p. 225. In the case of a partnership, a fraudulent representation made by one partner will be imputed to the others, and therefore the debt so contracted will not be discharged as to the latter. *Collier on Bankr.*

(6th ed.) p. 225. — ⁷) *Collier on Bankr.* (6th ed.) pp. 225, 228. — ⁸) *Collier on Bankr.* (6th ed.) p. 229. — ⁹) 5 Cyc. 404, note. — ¹⁰) 5 Cyc. 398. — ¹¹) *Collier on Bankr.* (6th ed.) pp. 230, 231. — ¹²) *Bankr. Act* (1898) § 15. — ¹³) *Collier on Bankr.* (6th ed.) p. 207. — ¹⁴) *Collier on Bankr.* (6th ed.) p. 208. — ¹⁵) *Collier on Bankr.* (6th ed.) p. 210.

referee, as such, cannot hear such an application¹), although the matter may be referred to him as special master²). The fraud which will warrant the revocation of a discharge must have been connected with the application therefor, and fraud in respect to some transaction unconnected with such application and occurring a long time prior to the adjudication is not sufficient to warrant a revocation³). The fraud must also have been a fraud in fact, such as the intentional omission of assets or of a creditor from the schedules; and a discharge will not be revoked because of a matter due to a mistake of law⁴). And it is absolutely essential that the fraud shall have been discovered by the petitioner for revocation since the discharge was granted, so that if either the petitioner or his attorney knew of the matters relied on prior to that time the discharge will not be revoked⁵). That the bankrupt bought off the opposition of a creditor to his discharge is in itself *prima facie* evidence that the facts did not warrant a discharge, and upon such a showing a revocation of the discharge is proper⁶). The revocation of the discharge makes it a nullity except as to those persons who have acted and acquired rights on the faith of it while it was in force⁷); and upon such revocation the trustee, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt as of the date of the final decree revoking the discharge⁸), and the property acquired by the bankrupt in addition to his estate at the time the adjudication was made, is to be applied to the payment in full of the claims of creditors for property sold to the bankrupt on credit, in good faith, while the discharge was in force, and the residue, if any, is to be applied to the payment of the debts which were owing at the time of the adjudication⁹).

XXII. BANKRUPTCY OF PARTNERSHIP. — A. Partnership may become Bankrupt. — A partnership may become either a voluntary or involuntary bankrupt; for not only does the Bankruptcy Act provide that the term "person" shall include partnerships¹⁰), but it also expressly provides that a partnership may be adjudged a bankrupt either during the continuance of the partnership business, or after the partnership has been dissolved and before the final settlement of its affairs¹¹). The wording of the Bankruptcy Act has led to the adoption of the doctrine that in bankruptcy, the partnership is a legal entity, distinct from the individuals who compose it, and hence the firm, as such, must petition or be petitioned against, and in case of involuntary bankruptcy, the firm, or a member of it acting within the scope of the partnership must have committed the act of bankruptcy, and if an adjudication of bankruptcy follows, it must be as to the firm, *eo nomine*¹²). An act of bankruptcy as to the partnership property by any of the partners amounts to an act of bankruptcy by the firm, and warrants an adjudication of bankruptcy, but the fact that one of the partners has committed an act of bankruptcy with reference to his individual property will not warrant bankruptcy proceedings against the firm¹³). It seems that in involuntary proceedings an individual partner cannot be adjudged to be a bankrupt unless it is shown that he has individually committed an act of bankruptcy¹⁴) and it may be doubted whether in voluntary proceedings by less than all of the partners, the court has jurisdiction to adjudge the non-consenting insolvent partner a bankrupt individually unless the prayer of the petition asks individual adjudications¹⁵), but this would seem immaterial, as the partnership adjudication draws to itself, of necessity, the administration of the individual estates as well¹⁶). There can be no adjudication of bankruptcy against a firm, of which one of the members is dead or insane¹⁷).

B. What Court has Jurisdiction. — A court of bankruptcy which has the jurisdiction of one of the partners may under the statute have jurisdiction of all of the partners and of the administration of the partnership and individual property¹⁸).

¹) Collier on Bankr. (6th ed.) p. 208. —

²) See 5 Cyc. 411, note. — ³) 5 Cyc. 411, note.

— ⁴) Collier on Bankr. (6th ed.) pp. 208, 209.

— ⁵) Collier on Bankr. (6th ed.) p. 209. —

⁶) 5 Cyc. 411, note. — ⁷) Collier on Bankr.

(6th ed.) p. 210. — ⁸) Bankr. Act (1898)

§ 70, subd. d. — ⁹) Bankr. Act (1898) § 64,

subd. c. — ¹⁰) Bankr. Act (1898) § 1, subd.

19. — ¹¹) Bankr. Act (1898) § 5, subd. a.

— ¹²) Collier on Bankr. (6th ed.) pp. 75,

76, where it is pointed out that in this

respect the American doctrine is essentially different from that prevailing in England.

See also 5 Cyc. 413, 414. — ¹³) Collier on

Bankr. (6th ed.) p. 79. — ¹⁴) 5 Cyc. 414, cit-

ing *In re Hale*, 107 Fed. 432, 6 Am. Bankr.

Rep. 35. — ¹⁵) Collier on Bankr. (6th ed.) p. 80,

citing *In re Meyer*, 98 Fed. Rep. 976, 3 Am.

Bankr. Rep. 559. — ¹⁶) Collier on Bankr.

(6th ed.) p. 80. — ¹⁷) Collier on Bankr.

(6th ed.) pp. 78—79. — ¹⁸) Bankr. Act (1898)

§ 5, subd. c.

C. Appointment of Trustee and Administration of Estate. — The creditors of the partnership are given the right to appoint the trustee¹), and the creditors of the individual members of the firm have no right to vote in the election of a trustee of the partnership estate²), although the creditors of the firm have the right to vote for the trustees of the individual estates of the partners³). It is provided that in other respects, so far as possible, the estates shall be administered in the manner provided by the statute for other estates⁴), but the trustee is required to keep separate accounts of the partnership property and of the property belonging to the individual partners⁵).

D. Administration by Solvent Partner. — In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property is not to be administered in bankruptcy unless by the consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt are to settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt⁶).

E. Proof of Claims and Marshaling Assets. — The court may permit the proof of a claim of the partnership estate against the individual estates of the partners, and vice versa⁷), but a solvent partner cannot prove his claim against the separate estate of his bankrupt partner until all the partnership creditors have been paid in full⁸), nor, where all the partners are bankrupt, can the claim of one of them against the partnership be proved in competition with other creditors of the partnership unless there is a surplus of the firm property after the payment of all the partnership debts⁹). The court may marshal the assets of the partnership estate and of the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates¹⁰).

F. Appropriation to Individual and to Partnership Debts. — The net proceeds of the partnership property must be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner must be appropriated to the payment of his individual debts; but in case after paying the individual debts of any partner any surplus of his property remains, such surplus must be added to the assets of the partnership and applied to the payment of the debts of the partnership, and on the other hand, if any surplus of the partnership property remains after payment of the debts of the partnership, such surplus must be added to the assets of the individual partners in the proportion which their respective interests in the partnership bear to each other¹¹). The partnership assets consist of property which has been purchased with firm moneys, or otherwise belongs to the firm as such, the debts owing to the firm, and the goodwill of the business of the firm¹²), while the individual assets of the partners consist of the estate of each partner in which he is separately interested to the exclusion of his copartners¹³). The partnership debts are those contracted by the partnership in the ordinary course of its business¹⁴), while the individual debts of the partners are those contracted by them for their own purposes without regard to the business of the firm, and also such liabilities as they are required by law to liquidate¹⁵). The tendency of judicial opinion appears to be towards the view that the rule that firm creditors may participate in individual assets of the partners only after the payment of the individual debts of the partners is applicable although there are no firm assets, and none of the partners are solvent¹⁶). Where the same debt is an obligation both of the firm as such, and of one or more of the partners individually, the creditor is entitled to prove the debt against, and receive dividends from, both the partnership and the individual

¹) Bankr. Act (1898) § 5, subd. b. — ²) 5 Cyc. 414, note. — ³) Collier on Bankr. (6th ed.) p. 83. — ⁴) Bankr. Act (1898) § 5, subd. b. — ⁵) Bankr. Act (1898) § 5, subd. d. — ⁶) Bankr. Act (1898) § 5, subd. h. — ⁷) Bankr. Act (1898) § 5, subd. g. — ⁸) *Emery v. Canal Nat. Bank*, 3 Cliff. (U. S.) 507, 8 Fed. Cas. No. 4, 446, 7 Nat. Bankr. Reg. 217. — ⁹) 5 Cyc. 415, note. — ¹⁰) Bankr. Act (1898) § 5, subd. g. — ¹¹) Bankr. Act (1898) § 5, subd. f. — ¹²) 5 Cyc. 416, note. Generally speaking, the partnership property consists of its money, its stock in trade,

its outstanding accounts, and all other property purchased with the firm's money. Collier on Bankr. (6th ed.) p. 86. — ¹³) 5 Cyc. 416, note. — ¹⁴) 5 Cyc. 415, note. If the debt is contracted by an individual member of the firm, the question as to whether it is a firm or an individual debt depends upon the character of the debt itself and also upon the scope of the authority delegated to such member of the firm to incur liability. 5 Cyc. 415, note. — ¹⁵) 5 Cyc. 415, 416, note. — ¹⁶) Collier on Bankr. (6th ed.) p. 85.

estates, although he cannot, of course, receive in the aggregate more than the amount of his claim¹).

G. Apportionment of Expenses. — The expenses incident to the bankruptcy are to be paid from the partnership property and the property of the individual partners in such proportions as the court shall determine²).

H. Effect of Discharge. — Where the adjudication is as to the firm only the discharge following it will be a bar to firm debts only and will not affect the individual debts of the partners³). As to whether, when the application is for individual adjudications as to the partners only, and the firm as such is not brought into bankruptcy, the individual discharges operate to release the discharged partners from further liability for firm debts the decisions of the courts are not in accord⁴), but the leading American text writer on the subject of bankruptcy approves of the view that a discharge resting on an individual application will be an available bar to suits on the partnership liabilities of the bankrupt, provided there be no firm assets, and the creditors of the firm are scheduled and receive notice⁵).

XXIII. EFFECT OF DEATH OR INSANITY OF BANKRUPT. — The death or insanity of a bankrupt does not abate the bankruptcy proceedings, but they are to be conducted and concluded in the same manner, as far as possible, as though such death or insanity had not occurred, save that in case of the death of the bankrupt his widow and children are entitled to all rights of dower and allowance fixed by the laws of the State where the bankrupt resides⁶). As the present statute requires no oath from the bankrupt on his discharge, such discharge may be granted even after his death⁷).

XXIV. NOTICES TO CREDITORS. — A. General Considerations. — The statute requires notice to the creditors of every important step in the bankruptcy proceeding⁸) it being provided that, unless they waive notice in writing, creditors are entitled to at least ten days' [or thirty days', in the case of applications for discharge] notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, of all meetings of creditors⁹), all examinations of the bankrupt; all hearings upon applications for the confirmation of compositions or the discharge of the bankrupt; the proposed compromise of any controversy; all proposed sales of property of the estate of the bankrupt¹⁰); the declaration of dividends and the time of payment thereof; the filing of the final accounts of the trustee and the time when and the place where they are to be examined and passed upon; and the proposed dismissal of the proceedings¹¹). It is not necessary that a separate notice should be given of each proposed step; but where it is practicable notices of two or more steps to be taken may properly be, and in practice frequently are, combined¹²). All notices are to be given by the referee unless the judge orders otherwise¹³), and notices other than that of the first meeting of the creditors may be published as the court shall direct¹⁴). Whether or not such notices shall be published depends on the standing rules of the district, or the order of the court in each particular case. Such publication is customary in the case of notices of proposed sales of property, and notices of hearings on applications for discharge¹⁵).

B. Designation of Address by Creditor. — Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, which he may

¹) In re Bigelow, 3 Ben. (U. S.) 146, 3 Fed. Cas. No. 1, 397, 3 Nat. Bankr. Reg. 371; Emery v. Canal Nat. Bank, 3 Cliff. (U. S.) 507, 8 Fed. Cas. No. 4, 446, 7 Nat. Bankr. Reg. 217. — ²) Bankr. Act (1898) § 5, subd. e. — ³) Collier on Bankr. (6th ed.) p. 81. — ⁴) 5 Cyc. 405. — ⁵) Collier on Bankr. (6th ed.) p. 81. The edition referred to is edited by Frank B. Gilbert, who is also one of the joint authors of the article on Bankruptcy in the Cyclopaedia of Law and Procedure, cited as Cyc. — ⁶) Bankr. Act (1898) § 8. — ⁷) Collier on Bankr. (6th ed.) pp. 129, 130. — ⁸) Collier on Bankr. (6th ed.) p. 451. — ⁹) Bankr. Act (1898) § 58, subd. a.

Notice of the first meeting of the creditors is required to be published. See supra, XI, B. — ¹⁰) Bankr. Act (1898) § 58, subd. a. If an order of sale lapses for any cause, and a subsequent order of sale is made, notice should be given of the new order. Collier on Bankr. (6th ed.) pp. 453, 454. Perishable property may be sold without notice to the creditors, see supra, XIII, G, 2. — ¹¹) Bankr. Act (1898) § 58, subd. a. — ¹²) See Collier on Bankr. (6th ed.) pp. 455, 456. — ¹³) Bankr. Act (1898) § 58, subd. c. — ¹⁴) Bankr. Act (1898) § 58, subd. b. — ¹⁵) Collier on Bankr. (6th ed.) p. 456.

appoint; and thereafter, and until some other designation is made by the creditor, all notices must be so addressed¹).

C. Designation of Newspaper for Publication of Notices. — It is the duty of the court to designate, by order, a newspaper in the district and in the county in which the bankrupt resides or in which the greater part of his property is situated, in which newspaper are to be inserted all notices which the law requires to be published and all orders which the court directs to be published²). As a general rule, there is a standing order in each district designating a newspaper in each county in which bankruptcy notices are required to be published³).

XXV. COMPELLING ATTENDANCE AND EXAMINATION OF WITNESSES. —

Upon the application of any officer, bankrupt, or creditor, a court of bankruptcy may order any person⁴), to appear in court, or before a referee, or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is being administered under the Bankruptcy Act⁵). As a rule, great latitude is allowed in the examination of witnesses, but when a witness has clearly indicated that the matter inquired into has nothing to do with the acts, conduct, or property of the bankrupt, his examination as to that matter should be stopped⁶). The witness may refuse to testify on the ground that his answer would tend to incriminate him, and it is thought that in the examination of such witnesses the state law as to privileged communications would also be followed⁷), except as to communications between husband and wife⁸). A witness who is ordered to attend for examination in bankruptcy proceedings is not entitled to counsel as a matter of right, but in practice the attendance and assistance of counsel will usually be permitted⁹).

XXVI. OATHS AND AFFIRMATIONS. — Any oath required by the Bankruptcy Act, except upon hearings in court, may be administered, in the United States, by a referee or an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken. Outside of the United States, the oath may be administered by a diplomatic or consular officer of the United States in the country where the oath is taken¹⁰), but an oath before a foreign local magistrate will not be sufficient¹¹). If the officer before whom the oath is taken has an official seal, he should impress it upon the paper¹²). The statute permits any person who is conscientiously opposed to taking an oath to affirm in lieu thereof¹³), and expressly provides that whenever used in the Bankruptcy Act or in proceedings pursuant thereto, the word "oath" shall include affirmation¹⁴). It is provided, however, that any person who shall falsely affirm shall be punished therefor as for the making of a false oath¹⁵).

XXVII. DEPOSITIONS. — Except as otherwise provided in the Bankruptcy Act, the right to take depositions in bankruptcy proceedings is determined and enjoyed according to the existing statutes of the United States with reference to depositions¹⁶). Notice of the taking of depositions must be filed with the referee; and such notice must also be served upon the claimant where such depositions are to be taken in opposition to the allowance of his claim, and upon the bankrupt where depositions are to be taken in opposition to his discharge¹⁷).

XXVIII. COMPUTATION OF TIME. — Whenever time is enumerated by days in the Bankruptcy Act or in any proceeding in bankruptcy, the number of days is to be computed by excluding the first day and including the last day, unless the last day falls on a Sunday or legal holiday, in which case the last day included must

¹) U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 2. Unless the creditors have designated different addresses, the notices to which they are entitled are to be addressed as specified in the proof of their debts. U. S. Supr. Ct. Gen. Orders in Bankr. No. XXI, subd. 2. — ²) Bankr. Act (1898) § 28. — ³) Collier on Bankr. (6th ed.) p. 320. — ⁴) Including the bankrupt and his wife. Bankr. Act (1898) § 21, subd. a. — ⁵) Bankr. Act (1898) § 21, subd. a. The wife of the bankrupt may be examined only as to business transacted by her or to which she was a party, and to determine whether she has transacted

or been a party to any of the business of the bankrupt. Bankr. Act (1898) § 21, subd. a. — ⁶) Collier on Bankr. (6th ed.) p. 270. — ⁷) Collier on Bankr. (6th ed.) p. 271. — ⁸) Collier on Bankr. (6th ed.) p. 269. — ⁹) Collier on Bankr. (6th ed.) p. 270. — ¹⁰) Bankr. Act (1898) § 20, subd. a. — ¹¹) Collier on Bankr. (6th ed.) p. 263. — ¹²) Collier on Bankr. (6th ed.) p. 263. — ¹³) Bankr. Act (1898) § 20, subd. b. — ¹⁴) Bankr. Act (1898) § 1, subd. a (17). — ¹⁵) Bankr. Act (1898) § 20, subd. b. — ¹⁶) Bankr. Act (1898) § 21, subd. b. — ¹⁷) Bankr. Act (1898) § 21, subd. c.

be the next day thereafter which is not a Sunday or legal holiday¹). It would seem that fractions of a day are to be disregarded²).

XXIX. EFFECT OF CERTIFIED COPIES OF PROCEEDINGS AND ORDERS.

— The Bankruptcy Act requires that certified copies of proceedings before a referee, or of papers, when issued by the referee or the clerk, shall be admitted as evidence, and shall be given the same force and affect as certified copies of the records of the United States district courts³), and provides that a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt⁴), that a certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, and not revoked, shall be evidence of the fact that the order was made, of the jurisdiction of the court, and of the regularity of the proceedings⁵), and that a certified copy of an order confirming a composition shall constitute evidence of the revesting in the bankrupt of the title to his property⁶).

XXX. OFFENSES AGAINST THE BANKRUPTCY ACT. — A. By Trustee. —

A trustee who knowingly and fraudulently appropriates to his own use, embezzles, spends, or unlawfully transfers any property, or secretes or destroys any document, belonging to a bankrupt estate, which came into his hands as trustee, is punishable by imprisonment for a period not to exceed five years⁷); and a trustee who refuses, when directed by the court so to do, to allow parties in interest a reasonable opportunity to inspect the accounts relating to the affairs of, or the papers and records of, an estate in his charge, is punishable by fine not to exceed five hundred dollars and forfeits his office⁸).

B. Referee. — A referee who acts as such in a case in which he is directly or indirectly interested, purchases, directly or indirectly, any property of an estate in bankruptcy of which he is the referee, or refuses to allow parties in interest a reasonable opportunity to inspect the accounts relating to the affairs of, or the papers and records of, an estate in his charge, when directed by the court to do so, is punishable by a fine not exceeding five hundred dollars, and forfeits his office⁹).

C. By Bankrupt. — A bankrupt who knowingly and fraudulently makes a false oath or account in or in relation to any proceeding in bankruptcy, or conceals from his trustee any property belonging to his estate in bankruptcy, either while he is a bankrupt or after his discharge, is punishable by imprisonment for a period not exceeding two years¹⁰).

D. By Any Person. — Any person who knowingly and fraudulently makes a false oath or account in or in relation to any proceeding in bankruptcy, presents under oath any false claim for proof against the estate of a bankrupt or uses any such claim in a composition, receives any material amount of property from a bankrupt after the filing of a petition in bankruptcy with the intent to defeat the operation of the Bankruptcy Act, or extorts or attempts to extort any money or property from any person as a consideration for acting or for forbearing to act in bankruptcy proceedings, is punishable by imprisonment for a period not exceeding two years¹¹).

E. Limitation of Prosecutions. — A person cannot be prosecuted for any offense arising under the Bankruptcy Act unless the indictment is found or the information is filed within one year after the commission of such offense¹²).

¹) Bankr. Act (1898) § 31. — ²) Collier on Bankr. (6th ed.) p. 332. — ³) Bankr. Act (1898) § 21, subd. d. — ⁴) Bankr. Act (1898) § 21, subd. e. If a certified copy of such order is recorded, it imparts the same notice that would have been imparted by a recorded deed from the bankrupt to the trustee if the bankruptcy proceedings had not intervened. Bankr. Act (1898) § 21, subd. e. — ⁵) Bankr. Act (1898) § 21, subd. f. — ⁶) Bankr.

Act (1898) § 21, subd. g. If a certified copy of such order is recorded, it imparts the same notice as would be imparted by a recorded deed from the trustee to the bankrupt. Bankr. Act (1898) § 21, subd. g. — ⁷) Bankr. Act (1898) § 29, subd. a. — ⁸) Bankr. Act (1898) § 29, subd. c. — ⁹) Bankr. Act (1898) § 29, subd. c. — ¹⁰) Bankr. Act (1898) § 29, subd. b. — ¹¹) Bankr. Act (1898) § 29, subd. b. — ¹²) Bankr. Act (1898) § 29, subd. d.

Statutes on Bankruptcy.

1. Federal Statutes.

An Act to establish a Uniform System of Bankruptcy throughout the United States. (30 Stat. L. 544.)¹

Chapter I. Definitions.

Sec. 1. Meaning of words and phrases. a) The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: 1. "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; 2. "Adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; 3. "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the territories and the supreme court of the United States; 4. "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; 5. "Clerk" shall mean the clerk of a court of bankruptcy; 6. "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; 7. "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; 8. "Courts of bankruptcy" shall include the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; 9. "Creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; 10. "Date of bankruptcy", or "time of bankruptcy", or "commencement of proceedings", or "bankruptcy", with reference to time, shall mean the date when the petition was filed; 11. "Debt" shall include any debt, demand, or claim provable in bankruptcy; 12. "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; 13. "Document" shall include any book, deed, or instrument in writing; 14. "Holiday" shall include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanks-giving; 15. A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; 16. "Judge" shall mean a judge of a court of bankruptcy, not including the referee; 17. "Oath" shall include affirmation; 18. "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; 19. "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; 20. "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; 21. "Referee" shall mean the referee who has jurisdiction or the case of to whom the case has been referred, or

¹ Incorporating the amendments effected June 15, 1906, (34 Stat. L. 207), and June 25, by the acts of Feb. 5, 1903, (32 Stat. L. 797), 1910, (61 st Cong. Sess. II. c. 412).

anyone acting in his stead; 22. "Conceal" shall include secrete, falsify, and mutilate; 23. "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; 24. "States" shall include the territories, the Indian Territory, Alaska, and the District of Columbia; 25. "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; 26. "Trustee" shall include all of the trustees of an estate; 27. "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; 28. Words importing the masculine gender may be applied to and include corporations, partnerships, and women; 29. Words importing the plural number may be applied to and mean only a single person or thing; 30. Words importing the singular number may be applied to and mean several persons or things.

Chapter II. Creation of courts of bankruptcy and their jurisdiction.

Sec. 2. Powers of bankruptcy courts. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory, and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to: 1. Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdiction for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; 2. Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; 3. Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; 4. Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; 5. Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act. 6. Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; 7. Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; 8. Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them; whenever it appears they were closed before being fully administered; 9. Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; 10. Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; 11. Determine all claims of bankrupts to their exemptions; 12. Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; 13. Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; 14. Extradite bankrupts from their respective districts to other districts; 15. Make such orders, issue such process, and enter such judgments in

addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; 16. Punish persons for contempts committed before referees; 17. Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; 18. Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; 19. Transfer cases to other courts of bankruptcy, and 20. Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Chapter III. Bankrupts.

Sec. 3. Acts of bankruptcy. a) Acts of bankruptcy by a person shall consist of his having: 1. Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or 2. Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or 3. Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or 4. made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or 5. Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after: 1. The date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment. c) It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. d) Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Sec. 4. Who may become bankrupts. a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt. b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States.

Sec. 5. Partners. a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. b) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates. c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners. e) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine. f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Sec. 6. Exemptions of bankrupts. a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Sec. 7. Duties of bankrupts. a) The bankrupt shall: 1. Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; 2. Comply with all lawful orders of the court; 3. Examine the correctness of all proofs of claims filed against his estate; 4. Execute and deliver such papers as shall be ordered by the court; 5. Execute to his trustee transfers of all his property in foreign countries; 6. Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; 7. In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; 8. Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown,

that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and 9. When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and, whereabouts of his property, and, in addition all matters which may effect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, that he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Sec. 8. Death or insanity of bankrupts. a) The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence.

Sec. 9. Protection and detention of bankrupts. a) A bankrupt shall be exempt from arrest upon civil process except in the following cases: 1. When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; 2. When issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act. b) The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof, that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Sec. 10. Extradition of bankrupts. a) Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Sec. 11. Suits by and against bankrupts. a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Sec. 12. Compositions, when confirmed. a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed. b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. d) The judge shall confirm a composition if satisfied that: 1. It is for the best interests of the creditors; 2. The bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and 3. The offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Sec. 13. Compositions, when set aside. a) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Sec. 14. Discharges, when granted. a) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months. b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has: 1. Committed an offense punishable by imprisonment as herein provided; or 2. With intent to conceal his true financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained or 3. Obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or 4. At any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or 5. In voluntary proceedings been granted a discharge in bankruptcy within six years; or 6. In the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose. c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Sec. 15. Discharges, when revoked. a) The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time

within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge.

Sec. 16. Co-debtors of bankrupts. a) The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Sec. 17. Debts not affected by a discharge. a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as: 1. Are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; 2. Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; 3. Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or 4. Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

Chapter IV. Courts and procedure therein.¹⁾

Sec. 18. Process, pleadings, and adjudications. a) Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time. b) The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. c) All pleadings setting up matters of fact shall be verified under oath. d) If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition. e) If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. f) If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee. g) Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Sec. 19. Jury trials. a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived. b) If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may

¹⁾ As to the changes in the jurisdiction of the federal courts, effective January 1, 1912, see, article on Courts and Procedure, *supra*.

be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. c) The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Sec. 20. Oaths, affirmations. a) Oaths required by this act, except upon hearings in court, may be administered by: 1. Referees; 2. Officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; and 3. Diplomatic or consular officers of the United States in any foreign country. b) Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Sec. 21. Evidence. a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court, or before a referee, or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt. b) The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. c) Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt. d) Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence. e) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. f) A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. g) A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Sec. 22. Reference of cases after adjudication. a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it: 1. Generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or 2. To any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district. b) The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Sec. 23. Jurisdiction of United States and state courts. a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. c) The United States circuit courts shall have

concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

After January 1, 1912, the jurisdiction of the circuit courts is transferred to the district courts.

Sec. 24. Jurisdiction of appellate courts. a) The supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia. b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

The appellate jurisdiction of the circuit courts of appeals is vested, after January 1, 1912, in the circuit courts.

Sec. 25. Appeals and writs of error. a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories in the following cases, to wit: 1. From a judgment adjudging or refusing to adjudge, the defendant a bankrupt; 2. From a judgment granting or denying a discharge; and 3. From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. b) From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States, in the following cases and no other: 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States; or 2. Where some Justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States. c) Trustees shall not be required to give bond when they take appeals or sue out writs of error. d) Controversies may be certified to the supreme court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 26. Arbitration of controversies. a) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator. c) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Sec. 27. Compromises. a) The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Sec. 28. Designation of newspapers. a) Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Sec. 29. Offenses. a) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and

fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently: 1. Concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or 2. Made a false oath or account in, or in relation to, any proceeding in bankruptcy; or 3. Presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or 4. Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or 5. Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly: 1. Acted as a referee in a case in which he is directly or indirectly interested; or 2. Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or 3. Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the account relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. d) A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Sec. 30. Rules, forms, and orders. a) All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the supreme court of the United States.

Sec. 31. Computation of time. a) Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Sec. 32. Transfer of cases. a) In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Chapter V. Officers, their duties and compensation.

Sec. 33. Creation of two offices. a) The offices of referee and trustee are hereby created.

Sec. 34. Appointment, removal, and districts of referees. a) Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction: 1. Appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and 2. Designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Sec. 35. Qualifications of referees. a) Individuals shall not be eligible to appointment as referees unless they are respectively: 1. Competent to perform the duties of that office; 2. Not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; 3. Not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and 4. Residents of, or have their offices in, the territorial districts for which they are to be appointed.

Sec. 36. Oaths of office of referees. a) Referees shall take the same oath of office as that prescribed for judges of United States courts.

Sec. 37. Number of referees. a) Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Sec. 38. Jurisdiction of referees. a) Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to: 1. Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; 2. Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; 3. Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of district, or his sickness, or inability to act; 4. Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and 5. Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Sec. 39. Duties of referees. a) Referees shall: 1. Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; 2. Examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended; 3. Furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; 4. Give notices to creditors as herein provided; 5. Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; 6. Prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; 7. Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; 8. Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; 9. Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and 10. Whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. b) Referees shall not: 1. Act in cases in which they are directly or indirectly interested; 2. Practice as attorneys and counselors at law in any bankruptcy proceedings; or 3. Purchase, directly or indirectly, any property of an estate in bankruptcy.

Sec. 40. Compensation of referees. a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided the referees. c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Sec. 41. Contempts before referees. a) A person shall not, in proceedings before a referee: 1. Disobey or resist any lawful order, process, or writ; 2. Misbehave during a hearing or so near the place thereof as to obstruct the same; 3. Neglect to produce, after having been ordered to do so, any pertinent document; or 4. Refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the

oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. b) The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Sec. 42. Records of referees. a) The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States. b) A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case. c) The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Sec. 43. Referee's absence or disability. a) Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Sec. 44. Appointment of trustees. a) The creditors of a bankrupt estate shall at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Sec. 45. Qualifications of trustees. a) Trustees may be: 1. Individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or 2. Corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Sec. 46. Death or removal of trustees. a) The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Sec. 47. Duties of trustees. a) Trustees shall respectively: 1. Account for and pay over to the estates under their control all interest received by them upon property of such estates; 2. Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; 3. Deposit all money received by them in one of the designated depositories; 4. Disburse money only by check or draft on the depositories in which it has been deposited; 5. Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; 6. Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; 7. Lay before the final meeting of the creditors detailed statements of the administration of the estates; 8. Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; 9. Pay dividends within ten days after they are declared by the referees; 10. Report to the courts, in writing, the condition of the estates and

the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and 11. Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment. b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c) The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.

Sec. 48. Compensation of trustees. a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition; b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to; c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause; d) Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, that in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, that when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act; e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars

and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, that in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

Sec. 49. Accounts and papers of trustees. a) The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest:

Sec. 50. Bonds of referees and trustees. a) Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties. b) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. c) The creditors of a bankrupt estate, at their first meeting, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. d) The court shall require evidence as to the actual value of the property of sureties. e) There shall be at least two sureties upon each bond. f) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. g) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. h) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions. i) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees. j) Joint trustees may give joint or several bonds. k) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office. l) Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond. m) Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Sec. 51. Duties of clerks. a) Clerks shall respectively: 1. Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; 2. Collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; 3. Deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they had been used; 4. And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Sec. 52. Compensation of clerks and marshals. a) Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt. b) Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are

entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Sec. 53. Duties of attorney-general. a) The attorney-general shall annually lay before congress statistical tables showing for the whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Sec. 54. Statistics of bankruptcy proceedings. a) Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.

Chapter VI. Creditors.

Sec. 55. Meetings of creditors. a) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. c) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act. d) A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. e) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. f) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Sec. 56. Voters at meetings of creditors. a) Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. b) Creditors holding claims which are secured or have priority shall not, in respect of such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Sec. 57. Proof and allowance of claims. a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. c) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred. d) Claims which have been

duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. e) Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities. f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit. g) The claims of creditors who have received preferences, avoidable under section sixty, subdivision b), or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e), have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. i) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. j) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. k) Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Sec. 58. Notice to creditors. a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of: 1. All examinations of the bankrupt; 2) All hearings upon applications for the confirmation of compositions; 3. All meetings of creditors; 4. All proposed sales of property; 5. The declaration and time of payment of dividends; 6. The filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; 7. The proposed compromise of any controversy; 8. The proposed dismissal of the proceedings, and 9. There shall be thirty days' notice of all applications for the discharge of bankrupts. b) Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. c) All notices shall be given by the referee, unless otherwise ordered by the judge.

Sec. 59. Who may file and dismiss petitions. a) Any qualified person may file a petition to be adjudged a voluntary bankrupt. b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over;

or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt. c) Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt. d) If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. e) In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition shall not be counted. f) Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. g) A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.

Sec. 60. Preferred creditors. a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as herein-before defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. c) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

Chapter VII. Estates.

Sec. 61. Depositories for money. a) Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Sec. 62. Expenses of administering estates. a) The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Sec. 63. Debts which may be proved. a) Debts of the bankrupt may be proved and allowed against his estate which are: 1. A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; 2. Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; 3. Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; 4. Founded upon an open account, or upon a contract express or implied; and 5. Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Sec. 64. Debts which have priority. a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: 1. The actual and necessary cost of preserving the estate subsequent to filing the petition; 2. The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; 3. The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; 4. Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and 5. Debts owing to any person who by the laws of the states or the United States is entitled to priority. c) In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Sec. 65. Declaration and payment of dividends. a) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority

or are secured. b) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, that the final dividend shall not be declared within three months after the first dividends shall be declared. c) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. d) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts. e) A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

Sec. 66. Unclaimed dividends. a) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. b) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Sec. 67. Liens. a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights or such creditor for the benefit of the estate. c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if: 1. It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference; or 2. The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy; or 3. That such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened. d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act. e) That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of

the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court, which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. f) That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Sec. 68. Set-offs and counterclaims. a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which: 1. Is not provable against the estate; or 2. Was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Sec. 69. Possession of property. a) A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Sec. 70. Title to property. a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all: 1. Documents relating to his property; 2. Interests in patents, patent rights, copyrights, and trade-marks; 3. Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; 4. Property transferred by him in fraud of his creditors; 5. Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any

bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and 6. Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property. b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee. d) Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. f) Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

The time when this act shall go into effect.

a) This act shall go into full force and effect upon its passage: Provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. b) Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

Sec. 71. Duties of clerks of court. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Sec. 72. Prohibition against additional fees. That neither the referees, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.

Approved, July 1, 1898. Amended Feb. 5, 1903, June 15, 1906, and June 25, 1910.

General Orders in Bankruptcy.

(Adopted by the Supreme Court of the United States, at the October Term, 1898.)

1. Docket. The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of

all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

2. Filing of papers. The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

3. Process. All process, summons, and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

4. Conduct of proceedings. Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit court or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

5. Frame of petitions. All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

6. Petitions in different districts. In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

7. Priority of petitions. Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

8. Proceedings in partnership cases. Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time

fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

9. Schedule in involuntary bankruptcy. In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

10. Indemnity for expenses. Before incurring any expense in publishing or mailing notices or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

11. Amendments. The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed, and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

12. Duties of referee. 1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee. 2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee: and at such times and places the referees may perform the duties which they are empowered by the act to perform. 3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officers of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

13. Appointment and removal of trustee. The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

14. No official or general trustee. No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

15. Trustee not appointed in certain cases. If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

16. Notice to trustee of his appointment. It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

17. Duties of trustee. The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes

into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

18. Sale of property. 1. All sales shall be by public auction unless otherwise ordered by the court. 2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at one with the referee. 3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, it satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

19. Accounts of marshal. The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

20. Papers filed after reference. Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the reference or with the clerk.

21. Proof of debts. 1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. 2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt. 3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear

and determine the matter. 4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt. 5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof. 6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

22. Taking of testimony. The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

23. Orders of referee. In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

24. Transmission of proved claims to clerk. The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

25. Special meeting of creditors. Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

26. Accounts of referee. Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

27. Review by judge. When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

28. Redemption of property and compounding of claims. Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons inter-

ested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

29. Payment of moneys deposited. No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

30. Imprisoned debtor. If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a right of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so payable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

31. Petition for discharge. The petition of a bankrupt for a discharge shall state consisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

32. Opposition to discharge or composition. A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing on the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

33. Arbitration. Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

34. Costs in contested adjudications. In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

35. Compensation of clerks, referees, and trustees. 1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers. 2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed

by special order of the judge. 3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts. 4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

Amendment to general orders in bankruptcy No. 35. It is ordered by the court that general order in bankruptcy No. 35 be amended by adding the following sentence to subdivision 4: He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

36. Appeals. 1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States. 2. Appeals under the act of the supreme court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the supreme court of the United States. 3. In every case in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

37. General provisions. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

38. Forms. The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

Philippines.

No. 1956. An Act providing for the Suspension of Payments, the Relief of Insolvent Debtors, the Protection of Creditors, and the Punishment of Fraudulent Debtors.

Chapter I. Title and general subject of the act.

Sec. 1. This act shall be known and may be cited as The Insolvency Law, and in accordance with its provisions every insolvent debtor may be permitted to suspend payments or be discharged from his debts and liabilities.

Chapter II. Suspension of payments.

Sec. 2. The debtor who, possessing sufficient property to cover all his debts, be it an individual person, be it a *sociedad* or corporation, foresees the impossibility of meeting them when they respectively fall due, may petition that he be declared

in the state of suspension of payments by the court, or the judge thereof in vacation, of the province or of the city in which he has resided for six months next preceding the filing of his petition.

He shall necessarily annex to his petition a schedule and inventory in the form provided in sections fifteen, sixteen, and seventeen of this act, in addition to the statement of his assets and liabilities and the proposed agreement he requests of his creditors.

Sec. 3. Upon receiving and filing the petition with the schedule and documents mentioned in the next preceding section, the court, or the judge thereof in vacation, shall make an order calling a meeting of creditors to take place in not less than two weeks nor more than eight weeks from the date of such order. Said order shall designate the day, hour, and place of meeting of said creditors as well as a newspaper of general circulation published in the province or city in which the petition is filed, if there be one, and if there be none, in a newspaper which, in the judgment of the judge, will best give notice to the creditors of the said debtor, and in the newspaper so designated said order shall be published as often as may be prescribed by the court or the judge thereof.

Said order shall further contain an absolute injunction forbidding the petitioning debtor from disposing in any manner of his property, except in so far as concerns the ordinary operations of commerce or of industry in which the petitioner is engaged, and, furthermore, from making any payments outside of the necessary or legitimate expenses of his business or industry, so long as the proceedings relative to the suspension of payments are pending, and said proceedings for the purposes of this act shall be considered to have been instituted from the date of the filing of the petition.

Sec. 4. A copy of said order shall immediately be published by the clerk of said court, in the newspaper designated therein, for the number of times and in the form prescribed by the court or the judge thereof, and the clerk of said court shall cause a copy of said order to be delivered personally or to be sent forthwith by registered mail, postage prepaid, to all creditors named in the schedule. There shall be deposited in addition to the sum of twenty-four Philippine pesos, which shall be paid to the clerk for the filing and registration of the petition, including all proceedings until the *expediente* is completed, an amount sufficient to defray all expense of publication ordered by the court, necessary postage, and ten centavos for each copy, to be delivered personally or mailed to the creditors, which last-named sum is hereby constituted the legal fee of the clerk for the personal delivery or mailing required by this section.

Sec. 5. Only creditors included in the schedule filed by the debtor shall be cited to appear and take part in the meeting mentioned in section three, and they shall be notified upon delivery or transmission to them of a copy of the order calling the meeting to appear at same with the written evidences of their respective claims, without which they shall not be admitted.

Sec. 6. If any execution be pending against the debtor it shall not be consolidated with this proceeding, but the course thereof shall be suspended before sale of property is made thereunder, provided the debtor makes a request therefor to the court before which the proceeding for suspension of payments is pending, unless the execution be against property especially mortgaged which is hereby exempted from the provisions of this section. The suspension ordered by virtue of this section shall lapse when three months shall have passed without the proposed agreement being accepted by the creditors or as soon as it is denied. No creditor other than those mentioned in section nine shall sue or institute proceedings to collect his claim from the debtor from the moment that suspension of payments is applied for and while the proceedings are pending.

Sec. 7. Creditors may be represented at the meeting by one or more lawyers or by any person duly authorized by power of attorney, which document shall be presented and be attached to the record.

Persons appearing for more than one creditor shall have only one personal vote, but the claims presented by them shall be taken into consideration for the purpose of arriving at the majority of the amount represented.

Sec. 8. The presence of the creditors representing at least three-fifths of the liabilities shall be necessary for holding a meeting. The meeting shall be held on the day and at the hour and place designated, the judge, or commissioner deputized

by him when he is absent from the province where the meeting is held, acting as president and the clerk as secretary thereof, subject to the following rules: a) The clerk shall prepare for insertion in the minutes of the meeting a statement of the persons present and their claims; the judge, or, in default thereof, the commissioner, shall examine the written evidences of the claims and the powers of attorney, if any. If the persons present who have complied with the foregoing rules represent at least three-fifths of the liabilities, the judge or commissioner shall declare the meeting open for business; b) The petition of the debtor, the schedule of debts and of property, the statement of assets and liabilities, and the proposed agreement filed therewith shall be read forthwith by the clerk, and the discussion shall be opened. c) The debtor may modify his proposition or propositions in view of the result of the debate, or insist upon the ones already made, and the judge or commissioner, without further discussion, shall clearly and succinctly place these several propositions before the meeting for a vote thereupon; d) The vote shall be taken by a call of names and shall be inserted in the minutes; a majority vote shall rule; e) To form a majority it is necessary: 1. That two-thirds of the creditors voting unite upon the same proposition; 2. That the claims represented by said majority vote amount to at least three-fifths of the total liabilities of the debtor mentioned in the petition; f) After the result of the voting has been announced, all protests made against the majority vote shall be admitted and stated in the record, and the meeting shall be closed; g) The minutes of the meeting, containing a succinct statement of all proceedings had therein, shall be drawn up, and there shall be inserted therein the proposition or propositions voted upon, which, after having been read and approved, shall be signed by the judge or commissioner together with all persons taking part in the voting; if any such persons shall be unable to write, any person present shall sign, at their request, and the clerk shall certify to all of the above.

Sec. 9. Persons having claims for personal labor, maintenance, expenses of last illness and funeral of the wife or children of the debtor, incurred in the sixty days immediately preceding the filing of the petition, and persons having legal or contractual mortgages, may refrain from attending the meeting and from voting therein. Such persons shall not be bound by any agreement determined upon at such meeting, but if they should join in the voting they shall be bound in the same manner as are the other creditors.

Sec. 10. The proposed agreement shall be deemed rejected if the number of creditors required for holding a meeting do not attend thereat, or if the two majorities mentioned in rule (e) of section eight are not in favor thereof, even if the negative vote itself does not receive such majorities.

Sec. 11. If the decision of the meeting be negative as regards the proposed agreement or if no decision is had in default of such number or of such majorities, the proceeding shall be terminated without recourse and the parties concerned shall be at liberty to enforce the rights which may correspond to them. If the decision is favorable to the debtor it may be objected to within ten days following the date of the meeting by any creditor who attended the meeting and who dissented from and protested against the vote of the majority. The opposition or objection to the decision of the majority favorable to the debtor shall be proceeded with as in any other incidental motion, the debtor and the creditors who shall appear declaring their purpose to sustain the decision of the meeting being the defendants. The court shall hear and pass upon such objection as soon as possible and in a summary manner, and in its order, which shall be final, it shall declare whether or not the decision of the meeting is valid. In case that the decision of the meeting is held to be null, the court shall declare the proceeding terminated and the parties concerned at liberty to exercise the rights which may correspond to them; and in case the decision of the meeting is declared valid, or when no opposition or objection to said decision has been presented, the court shall order that the agreement be carried out and the persons concerned shall be bound by the decision of the meeting. The court may also issue all orders which may be proper to enforce the agreement on motion of any of the parties litigant. The order directing the agreement to be made effective shall be binding upon all creditors included in the schedule of the debtor who may have been properly summoned, but not upon creditors mentioned in section nine who failed to attend the meeting or refrained from voting therein, and their rights shall not be affected by the agreement unless they may have expressly or impliedly consented thereto.

Sec. 12. The causes for which objection may be made to the decision of the meeting shall be: a) Defects in the call for the meeting, in the holding thereof, and in the deliberations had thereat which prejudice the rights of the creditors; b) Fraudulent connivance between one or more creditors and the debtor to vote in favor of the proposed agreement; c) Fraudulent conveyance of claims for the purpose of obtaining a majority.

Sec. 13. If the debtor fails wholly or in part to perform the agreement decided upon at the meeting of the creditors, all the rights which the creditors had against the debtor before the agreement shall revest in them. In such case the debtor may be made subject to the bankruptcy and insolvency proceedings in the manner established by the following chapters of this act:

Chapter III. Voluntary insolvency.

Sec. 14. An insolvent debtor, owing debts exceeding in amount the sum of one thousand pesos, may apply to be discharged from his debts and liabilities by petition to the court of first instance of the province or city in which he has resided for six months next preceding the filing of such petition. In his petition he shall set forth his place of residence, the period of his residence therein immediately prior to filing said petition, his inability to pay all his debts in full, his willingness to surrender all his property, estate, and effects not exempt from execution for the benefit of his creditors, and an application to be adjudged an insolvent. He shall annex to his petition a schedule and inventory in the form hereinafter provided. The filing of such petition shall be an act of insolvency.

Sec. 15. Said schedule must contain a full and true statement of all his debts and liabilities, together with a list of all those to whom, to the best of his knowledge and belief, said debts or liabilities are due, the place of residence of his creditors and the sum due each, the nature of the indebtedness or liability and whether founded on written security, obligation, contract or otherwise, the true cause and consideration thereof, the time and place when and where such indebtedness or liability accrued, a declaration of any existing pledge, lien, mortgage, judgment, or other security for the payment of the debt or liability, and an outline of the facts giving rise or which might give rise to a cause of action against such insolvent debtor.

Sec. 16. Said inventory must contain, besides the creditors, an accurate description of all the real and personal property, estate, and effects of the petitioner, including his homestead, if any, together with a statement of the value of each item of said property, estate, and effects and its location, and a statement of the incumbrances thereon. All property exempt by law from execution shall be set out in said inventory with a statement of its valuation, location, and the incumbrances thereon, if any. The inventory shall contain an outline of the facts giving rise, or which might give rise, to a right of action in favor of the insolvent debtor.

Sec. 17. The petition, schedule, and inventory must be verified by the affidavit of the petitioner, annexed thereto, and shall be in form substantially as follows: "I,, do solemnly swear that the schedule and inventory now delivered by me contain a full, correct, and true discovery of all my debts and liabilities and of all goods, effects, estate, and property of whatever kind or class to me in any way belonging. The inventory also contains a full, true and correct statement of all debts owing or due to me, or to any person or persons in trust for me and of all securities and contracts whereby any money may hereafter become due or payable to me or by or through which any benefit or advantage whatever may accrue to me or to my use, or to any other person or persons in trust for me. The schedule contains a clear outline of the facts giving rise, or which might give rise, to a cause of action against me, and the inventory contains an outline of the facts giving rise, or which might give rise, to any cause of action in my favor. I have no lands, money, stock, or estate, reversion, or expectancy, or property of any kind, except that set forth in said inventory. I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owe. I have not, directly or indirectly, concealed, fraudulently sold, or otherwise fraudulently disposed of, any part of my real or personal property, estate, effects, or rights of action, and I have not in any way compounded with any of my creditors in order to secure such creditors, or to receive or to accept any profit or advantage therefrom, or to defraud or deceive in any manner any creditor to whom I am indebted. So help me God."

Sec. 18. Upon receiving and filing said petition, schedule, and inventory, the court, or the judge thereof in vacation, shall make an order declaring the petitioner insolvent, and directing the sheriff of the province or city in which the petition is filed to take possession of, and safely keep, until the appointment of a receiver or assignee, all the deeds, vouchers, books of account, papers, notes, bonds, bills, and securities of the debtor, and all his real and personal property, estate, and effects, except such as may be by law exempt from execution. Said order shall further forbid the payment to the debtor of any debts due to him and the delivery to the debtor, or to any person for him, of any property belonging to him, and the transfer of any property by him, and shall further appoint a time and place for a meeting of the creditors to choose an assignee of the estate. Said order shall designate a newspaper of general circulation published in the province or city in which the petition is filed, if there be one, and if there be none, in a newspaper which, in the opinion of the judge, will best give notice to the creditors of the said insolvent, and in the newspaper so designated said order shall be published as often as may be prescribed by the court or the judge thereof. The time appointed for the election of an assignee shall not be less than two, nor more than eight, weeks from the date of the order of adjudication. Upon the granting of said order all civil proceedings pending against the said insolvent shall be stayed. When a receiver is appointed, or an assignee chosen, as provided in this act, the sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property, assets, and belongings of the insolvent which have come into his possession, and he shall be allowed and paid as compensation for his services the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

Sec. 19. A copy of said order shall immediately be published by the clerk of said court, in the newspaper designated therein, for the number of times and as prescribed by the court or the judge thereof, and a copy of said order shall be delivered personally or sent by the clerk forthwith by registered mail, postage prepaid, to all creditors named in the schedule. There shall be deposited, in addition to twenty-four pesos, which shall be received by the clerk on commencing such proceedings, a sum of money sufficient to defray the expense of the publication ordered by the court, necessary postage, and ten centavos for each copy, to be delivered personally or mailed to the creditors, which last-named sum is hereby constituted the legal fee of the clerk for the personal delivery or mailing required by this section.

Chapter IV. Involuntary insolvency.

Sec. 20. An adjudication of insolvency may be made on the petition of three or more creditors, residents of the Philippine Islands, whose credits or demands accrued in the Philippine Islands, and the amount of which credits or demands are in the aggregate not less than one thousand pesos: Provided, that none of said creditors has become a creditor by assignment, however made, within thirty days prior to the filing of said petition. Such petition must be filed in the Court of First Instance of the province or city in which the debtor resides or has his principal place of business, and must be verified by at least three of the petitioners. The following shall be considered acts of insolvency, and the petition for insolvency shall set forth one or more of such acts: 1. That such person is about to depart or has departed from the Philippine Islands, with intent to defraud his creditors; 2. That being absent from the Philippine Islands, with intent to defraud his creditors, he remains absent; 3. That he conceals himself to avoid the service of legal process for the purpose of hindering or delaying or defrauding his creditors; 4. That he conceals, or is removing, any of his property to avoid its being attached or taken on legal process; 5. That he has suffered his property to remain under attachment or legal process for three days for the purpose of hindering or delaying or defrauding his creditors; 6. That he has confessed or offered to allow judgment in favor of any creditor or claimant for the purpose of hindering or delaying or defrauding any creditor or claimant; 7. That he has willfully suffered judgment to be taken against him by default for the purpose of hindering or delaying or defrauding his creditors; 8. That he has suffered or procured his property to be taken on legal process with intent to give a preference to one or more of his creditors and thereby hinder, delay, or defraud any one of his creditors; 9. That he has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits with intent

to delay, defraud, or hinder his creditors; 10. That he has, in contemplation of insolvency, made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits; 11. That being a merchant or tradesman he has generally defaulted in the payment of his current obligations for a period of thirty days; 12. That for a period of thirty days he has failed, after demand, to pay any moneys deposited with him or received by him in a fiduciary capacity; and 13. That an execution having been issued against him on final judgment for money, he shall have been found to be without sufficient property subject to execution to satisfy the judgment. The petitioners may, from time to time, by leave of the court, amend and correct the petition, so that the same shall conform to the facts, such amendment or amendments to relate back to and be received as embraced in the original petition. The said petition shall be accompanied by a bond, approved by the court, with at least two sureties, in such penal sum as the court shall direct, conditioned that if the petition in insolvency be dismissed by the court, or withdrawn by the petitioner, or if the debtor shall not be declared an insolvent, the petitioners will pay to the debtor alleged in the petition to be insolvent all costs, expenses, and damages occasioned by the proceedings in insolvency, together with a reasonable counsel fee to be fixed by the court. The court may, upon motion, direct the filing of an additional bond, with different sureties, when deemed necessary.

Sec. 21. Upon the filing of such creditors' petition, the court or a judge thereof shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court or judge, why he should not be adjudged an insolvent debtor; and at the same time, or thereafter, upon good cause shown therefor, said court or judge may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or to any other person for his use or benefit or the transfer of any property by him.

Sec. 22. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of summons in civil actions, but such service shall be made at least five days before the time fixed for the hearing: Provided, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed by supplemental order of the court. Whenever the debtor on whom service is to be made resides out of the Philippine Islands; or has departed from the Philippine Islands; or can not, after due diligence, be found within the Philippine Islands; or conceals himself to avoid the service of the order to show cause, or any other process or orders in the matter; or is a foreign corporation having no managing or business agent, cashier, or secretary within the Philippine Islands upon whom service can be made, and such facts are shown to the court or a judge thereof, by affidavit, such court or judge thereof shall make an order that the service of such order, or other process, be made by publication, in the same manner, and with the same effect, as service of summons by publication in ordinary civil actions.

Sec. 23. At the time fixed for the hearing of said order to show cause, or at another time to which such hearing may be adjourned, the debtor must answer the petition, or may demur for the same causes as are provided for demurrer in other cases by the code of civil procedure. If he demur and the demurrer be overruled, the debtor shall immediately answer the petition. Such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be sworn to; and the issues raised thereon shall be promptly tried and disposed of. If, upon such trial, the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall be allowed all costs, counsel fees, expenses, and damages sustained by reason of the proceedings therein. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court.

Sec. 24. If the respondent shall make default, or if, after trial, the issues are found in favor of the petitioners, the court shall make an order adjudging that said respondent is and was, at the time of filing the petition, an insolvent debtor and that the debtor was guilty of the acts and things charged in the petition, or such of them as the court may find to be true; and shall require said debtor, within such time as the court may designate, not to exceed three days, to file in court the schedule and inventory provided for in sections fifteen and sixteen of this act, duly verified as required of a petitioning debtor: Provided, that in the affidavit of the insolvent, touching his property and its disposition, he shall not be required to swear that he has not made any fraudulent preference or committed any other

act in conflict with the provisions of this act; but he may do so if he desires. Said order shall further direct the sheriff of the province or city where the insolvency petition is filed, or the receiver, if one has been theretofore appointed, to take possession of and safely keep, until the appointment of an assignee, all the deeds, vouchers, books of account, papers, notes, bills, bonds, and securities of the debtor, and all his real and personal property, estate and effects, except such as may be by law exempt from execution. Said order shall further forbid the payment to the debtor of any debts due to him, and the delivery to the debtor, or to any person for him, of any property belonging to him, and the transfer of any property by him, and shall further appoint a time and place for a meeting of the creditors to choose an assignee of the estate. Said order shall designate a newspaper of general circulation published in the province or city in which the petition is filed, if there be one, and if there be none, in a newspaper which, in the opinion of the judge, will best give notice to the creditors of the said insolvent, and in the newspaper so designated said order shall be published as often as may be prescribed by the court or the judge thereof. The time appointed for the election of an assignee shall not be less than two nor more than eight weeks from the date of the order of adjudication. Upon the granting of said order, all civil proceedings pending against the said insolvent shall be stayed. When an assignee is chosen as provided in this act, the sheriff or receiver, if there be one, shall thereupon deliver to such assignee all the property, estate, and belongings of the insolvent, which have come into his possession, and he shall be allowed and paid as compensation for his services the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

Sec. 25. A copy of the order provided for in the last preceding section of this act shall immediately be published by the clerk of said court in the newspaper designated therein for the number of times and as prescribed by the court or the judge thereof, and upon the filing, at any time before the date set for such meeting, of the schedule required by said last preceding section, a copy of said order shall be delivered personally or sent by the clerk forthwith by registered mail, postage prepaid, to all creditors named in said schedule. If said schedule is not filed prior to the day fixed for the election of an assignee, publication of said order as herein required shall be of itself sufficient notice to the creditors of the time and place appointed for the election of an assignee. No order of adjudication upon creditors' petition shall be entered unless there be first deposited, in addition to the cost of commencing said proceedings, a sum of money sufficient to defray the expense of the publication ordered by the court, necessary postage, and ten centavos for each copy to be delivered personally or mailed to the creditors, which last-named sum is hereby constituted the legal fee of the clerk for the personal delivery or mailing required by this section.

Sec. 26. In all cases where the debtor resides out of the Philippine Islands; or has departed from the Philippine Islands; or can not, after due diligence, be found within the Philippine Islands; or conceals himself to avoid service of the order to show cause, or any other preliminary process or orders in the matter; or is a foreign corporation having no managing or business agent, cashier, or secretary within the Philippine Islands upon whom service or orders or process can be made, and it therefore becomes necessary to obtain service of process and order to show cause, as provided in section twenty-two of this act, then the petitioning creditors, upon submitting the affidavits requisite to procure an order of publication, and presenting a bond in double the amount of the aggregate sum of their claims against the debtor, shall be entitled to an order of the court directing the sheriff of the province or city in which the matter is pending to take into his custody a sufficient amount of property of the debtor to satisfy the demands of the petitioning creditors and the costs of the proceedings. Upon receiving such order of the court to take into custody property of the debtor, it shall be the duty of the sheriff to take possession of the property and effects of the debtor, not exempt from execution, to an extent sufficient to cover the amount provided for, and to prepare, within three days from the time of taking such possession, a complete inventory of all the property so taken, and to return it to the court as soon as completed. The time for taking the inventory and making return thereof may be extended for good cause shown to the court or a judge thereof. The sheriff shall also prepare a schedule of the names and residences of the creditors, and the amount due each,

from the books of the debtor, or from such other papers or data of the debtor available as may come to his possession, and shall file such schedule list of creditors and inventory with the clerk of the court.

Sec. 27. In all cases where property is taken into custody by the sheriff, as provided in the preceding section, if it does not embrace all the property and effects of the debtor not exempt from execution, any other creditor or creditors of the debtor, upon giving bond to be approved by the court in double the amount of their claims, singly or jointly, shall be entitled to similar orders, and to like action, by the sheriff, until all claims be provided for, if there be sufficient property or effects. All property taken into custody by the sheriff by virtue of the giving of any such bonds shall be held by him for the benefit of all creditors of the debtor whose claims shall be duly proved, and as provided in this act. The bonds provided for in this and the preceding section to procure the order for custody of the property and effects of the debtor, shall be conditioned that if, upon final hearing of the petition in insolvency, the court shall find in favor of the petitioners, such bonds and all of them shall be void; if the decision be in favor of the debtor, the proceedings shall be dismissed, and the debtor, his heirs, administrators, executors, or assigns, shall be entitled to recover such sum of money as shall be sufficient to cover the damages sustained by him, not to exceed the amount of the respective bonds. Such damages shall be fixed and allowed by the court. If either the petitioners or the debtor shall appeal from the decision of the court, upon final hearing of the petition the appellant shall be required to give bond to the successful party in a sum double the amount of the value of the property in controversy, and for the costs of the proceedings. Such bond shall be approved by the court.

Any person interested in the estate may except to the sufficiency of the sureties on such bond or bonds. When excepted to, the petitioner's sureties, upon notice to the person excepting of not less than two nor more than five days, must justify as to their sufficiency; and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the judge shall issue an order vacating the order to take the property of the debtor into the custody of the sheriff, or denying the appeal, as the case may be.

Sec. 28. If, in any case, proper affidavits and bonds are presented to the court or a judge thereof, asking for and obtaining an order of publication and an order for the custody of the property of the debtor, as provided in sections twenty-six and twenty-seven of this act, and thereafter the petitioners shall make it appear satisfactorily to the court or a judge thereof that the interest of the parties to the proceedings will be subserved by a sale thereof, the court may order such property to be sold in the same manner as property is sold under execution, the proceeds to be deposited in the court to abide the result of the proceedings.

Chapter V. Assignees.

Sec. 29. No creditor shall be entitled to vote for the election of an assignee unless he shall have filed his claim in the office of the clerk of the court in which the proceedings are pending at least two days prior to the time appointed for such election. All claims shall contain a statement showing the amount and nature of the claim and security, if any. The claim shall be verified by the claimant, or his duly authorized agent or attorney. No claim barred by the statute of limitations shall be proved or allowed against the estate of an insolvent debtor for any purpose. Any person interested in the estate of the insolvent may file exceptions to the legality or good faith of any claim, by setting forth specifically in writing his interest in the estate, and the grounds of his objection to such claim. Such exceptions shall be verified by the affidavit of the party objecting, or his duly authorized agent or attorney, and the affidavit shall set out that such exceptions are not made for the purpose of delay and are made in good faith in the best interests of said estate. Exceptions to any claim must be filed with the clerk of the court at least one day before the time appointed for the election of an assignee, and such exceptions shall be heard and disposed of by the court, on affidavit or other evidence, in a summary manner, before the election of an assignee. No creditor or claimant who holds any mortgage, pledge, or lien of any kind whatever as security for the payment of his claim or attachment or execution on property of the debtor duly recorded and not dissolved under this act shall be permitted to vote at the election of the assignee any part of his secured claim unless he shall first have the value of such

security fixed as provided in section fifty-nine of this act, or shall surrender to the sheriff or receiver of the estate of the insolvent, if there be a receiver, all such property, or assign such lien to such sheriff or receiver. The surrender or assignment of such security or lien shall be for the benefit of all creditors of the estate of the insolvent. The value of such security, if fixed by the court, shall be so fixed at least one day before the day appointed for the election of an assignee, in which event the claimant may prove his demand as provided in this section for any unsecured balance, subject to the filing of exceptions as in all other claims.

Sec. 30. At a meeting of the creditors in open court or, if the court is not in session, in the presence of the judge or the clerk of the court, those being entitled to vote, as provided by section twenty-nine, shall proceed to the election of an assignee. The majority of the creditors who have proven their claims, such majority being both in number and amount, must concur for the election of an assignee. The clerk of the court shall keep a minute of the deliberations of said creditors, and of the election and appointment of the assignee, and enter the same upon the records of the court, and, in the absence of the judge, shall send a copy of such record to him at the place where he may be found. The assignee shall file, within five days, unless the time be extended by the court, with the clerk, a bond, in an amount to be fixed by the court, to the Government of the Philippine Islands, with two or more sufficient sureties, approved by the court, and conditioned upon the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any person aggrieved, in his own name, until the whole penalty be exhausted. The sureties on such bond may be required to justify as to their sufficiency upon the application of any party interested.

Sec. 31. If, on the day appointed for the meeting, creditors do not attend, or fail or refuse to elect an assignee, or if, after election, the assignee shall fail to qualify within the proper time, or if a vacancy occurs by death or otherwise, the court shall appoint an assignee and fix the amount of his bond.

Sec. 32. As soon as an assignee is elected or appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the real and personal property, estate, and effects of the debtor with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property, estate, and effects in the assignee, although the same is then attached on mesne process, as the property of the debtor. Such assignment shall operate to vest in the assignee all of the estate of the insolvent debtor not exempt by law from execution. It shall also dissolve any attachment levied within one month next preceding the commencement of the insolvency proceedings and vacate and set aside any judgment entered in any action commenced within thirty days immediately prior to the commencement of insolvency proceedings and shall vacate and set aside any execution issued thereon and shall vacate and set aside any judgment entered by default or consent of the debtor within thirty days immediately prior to the commencement of the insolvency proceedings.

Sec. 33. The assignee shall have the right to recover all the estate, debts, and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency, an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action, in like manner and with like effect as if it had been originally commenced by him. If there are any rights of action in favor of the insolvent for damages, on any account, for which an action is not pending, the assignee shall have the right to prosecute the same with the same effect as the insolvent might have done himself if no proceedings in insolvency had been instituted. If any action or proceeding in which the insolvent is defendant is pending at the time of the adjudication, the assignee may defend the same in the same manner and with like effect as it might have been defended by the insolvent. In a suit prosecuted or defended by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend.

Sec. 34. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every province or city within the

Philippine Islands where any real estate owned by the debtor is situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in all courts. If the schedule and inventory required by this act have not been filed by the debtor the assignee shall, within one month after his election, prepare and file such schedule and inventory from the best information he can obtain, and shall thereupon personally deliver notice or send same by registered mail, postage prepaid, to all creditors named in such schedule, whose claims have not been filed, to forthwith prove their demands.

Sec. 35. Any assignee may at any time, by writing filed in court, resign his appointment, having first settled his accounts and delivered up all the deeds, vouchers, books of account, notes, bills, bonds, and securities of the debtor and all his real and personal property, estate, and effects to such successor as the court shall appoint: Provided, that if, in the discretion of the court, the circumstances of the case require it, upon good cause being shown, the court may, at any time before such settlement of account and delivery of the estate shall have been completed, revoke the appointment of such assignee and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment of another in his stead.

Sec. 36. The said assignee shall have power: 1. To sue and recover all the estate, assets, debts, and claims, belonging to or due to such debtor; and no set-off or counterclaim shall be allowed in any such suit for debts contracted by the insolvent within thirty days immediately preceding the filing of the petition of insolvency except in case of creditors specified in section fifty of this act; 2. To take into his possession all the estate of such debtor except property exempt by law from execution, whether attached or delivered to him, or afterwards, discovered, and all books, vouchers, evidence of indebtedness, and securities belonging to the same; 3. In case of a non-resident or absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys, on paying him his lawful costs and charges for attaching and keeping the same; 4. From time to time to sell at public auction after advertisement in the manner provided by subsections 1, 2, and 3 of section four hundred and fifty-four of the code of civil procedure, upon order of the court, any of the estate, real and personal, which has come into his possession, and which is vested in him as such assignee, and on such sales to execute the necessary conveyances and bills of sale; 5. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property sold by him; or to sell such property, subject to such mortgage, contracts, pledges, judgments, or liens; 6. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court; 7. Under the order of the court or judge appointing him, to compound with any person indebted to such debtor, and thereupon discharge all demands against such person; 8. To recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this act, the property thereby transferred or assigned; or in case a redelivery of the property can not be had, to recover the value thereof, with damages for the detention.

Sec. 37. If any person, before the assignment is made, having notice of the commencement of the proceedings in insolvency, or having reason to believe that insolvency proceedings are about to be commenced, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the insolvent's estate.

Sec. 38. The same penalties, forfeitures, and proceedings by citation, examination, and commitment shall apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings which relate to any interest of the debtor in any real or personal estate as provided in the case of estates of deceased persons in sections seven hundred and nine to seven hundred and thirteen, inclusive, of the code of civil procedure.

Sec. 39. The assignee shall as speedily as possible convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by

him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid unless made under the order of the court, upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of the hearing thereof of at least ten days shall be given by publication and mailing, in the same manner as is provided in section nineteen of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.

Sec. 40. In all cases when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, and that the insolvent's estate will suffer if sufficient time elapses for the giving of notice, the court may order the same to be sold in such manner and at such time as may be deemed most expedient, under the direction of the sheriff, receiver, or assignee, as the case may be, who shall hold the funds received in place of the property sold until further order of the court.

Sec. 41. Outstanding debts, or other property due or belonging to the estate, which can not be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate. If there are any rights of action for damages in favor of the insolvent prior to the commencement of the insolvency proceedings, the same may, with the approval of the court, be compromised.

Sec. 42. Assignees shall be allowed all necessary expenses in the care, management, and settlement of the estate, and shall be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand pesos, at the rate of seven per centum; for all above that sum and not exceeding ten thousand pesos, at the rate of five per centum; and for all above that sum, at the rate of four per centum: Provided, however, that if the person acting as assignee was receiver of the property of the estate pending the election of an assignee, any compensation allowed him as such receiver shall be deducted from the compensation to which he otherwise would be entitled as such assignee: And provided further, that if there should be two or more assignees the court shall order an equitable division of the compensation herein provided, and if for any reason an assignee's term is completed before the final settlement of the estate and a successor is appointed the court shall not allow to any such assignee prior to the settlement of the estate an amount exceeding four per centum of the sums of money coming into his hands. Upon the final settlement of the estate an equitable distribution of the compensation of the assignee shall be made.

Sec. 43. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, a time and place shall be fixed by the court at which the assignee shall file just and true accounts of all his receipts and payments with proper vouchers, verified by his oath, and a statement of the property outstanding, specifying the causes of its outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his possession, and shall accompany the same with an affidavit that notice by registered mail has been given to all creditors named in the schedule filed by the debtor or the assignee that said accounts will be heard at a time specified in such notice, which time shall not be less than two nor more than eight weeks from the filing of such accounts. At the hearing the court shall audit the accounts of the assignee, and any person interested may appear and file exceptions thereto and contest the same. The court shall thereupon confirm said accounts if they shall be found to be correct, or order the same corrected if errors shall be found therein. The court shall also, in such hearing, determine the property which must be deducted from the estate as another's, under the provisions of section forty-eight of this act, and the right of the claimants to participate in the dividend and may order a dividend paid to those creditors whose claims have been proven and allowed. The decision of the court therefore rendered as to whether any claimant was entitled to vote for an assignee shall not be conclusive upon the right of the claimant to share in such dividend; but all claimants who were so allowed to vote shall participate in such dividend unless objections were filed to the same prior to such hearing. If any such objections have been filed against any claim, or if any claimant was refused the right to vote, the court

shall determine said objections and the rights of all such claimants in such hearing and refuse or allow the same before the declaration of a dividend. Thereafter, further accounts, statements, and dividends shall be made in like manner as often as occasion requires: Provided, however, that it shall be the duty of the assignee to file his final account within one year from the date of the order of adjudication, unless the court, after notice to creditors, shall grant further time, upon a satisfactory showing that great loss and waste would result to the estate by reason of the conversion of the property into money within said time, or that it has been impossible to do so by reason of litigation.

Sec. 44. The court may at any time, upon the motion of any two or more creditors, require the assignee to file his account in the manner and upon giving the notice specified in the preceding section, and if he has funds subject to distribution he may be required to distribute them without delay.

Sec. 45. Whenever any dividend has been duly declared, the distribution of it shall not be stayed or affected by reason of debts being subsequently proved, but any creditor proving such a debt shall be entitled to a dividend equal to those already received by the other creditors before any further dividend is made to the latter, if the failure to prove such claim shall not have resulted from his own neglect.

Sec. 46. Should the assignee refuse or neglect to render his accounts as required by sections forty-three and forty-four of this act, or refuse or neglect to pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, or shall neglect or mismanage the estate in any manner whatever or violate any of the provisions of this act, the court shall immediately discharge such assignee from his trust, and shall appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court all the funds, property, books, vouchers, or securities belonging to the insolvent, and he shall not be entitled for his services to the compensation provided in section forty-two.

Sec. 47. Preparatory to the settlement of the estate, the assignee shall file his final account in the court, accompanying the same with an affidavit that a notice by registered mail has been given to all creditors who have proved their claims, that he will apply for a settlement of his account and for a discharge from all liability as assignee at a time specified in such notice, which time shall not be less than two nor more than eight weeks from such filing. At the hearing the court shall audit the account, and any person interested may appear and file exceptions in writing and contest the same. The court thereupon shall settle the account, and order a dividend of any portion of the estate, if any, remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

Chapter VI. Classification and preference of creditors.

Sec. 48. Merchandise, effects, and any other kind of property found among the property of the insolvent, the ownership of which has not been conveyed to him by a legal and irrevocable title, shall be considered to be the property of other persons and shall be placed at the disposal of its lawful owners on order of the court made at the hearing mentioned in section forty-three or at any ordinary hearing, if the assignee or any creditor whose right in the estate of the insolvent has been established shall petition in writing for such hearing and the court in its discretion shall so order, the creditors, however, retaining such rights in said property as belong to the insolvent, and subrogating him whenever they shall have complied with all obligations concerning said property.

The following shall be included in this section: 1. Dowry property *inestimado* and such property *estimado* which may remain in the possession of the husband where the receipt thereof is a matter of record in a public instrument registered under the provisions of sections twenty-one and twenty-seven of the code of commerce in force; 2. Paraphernal property which the wife may have acquired by inheritance, legacy, or donation whether remaining in the form in which it was received or subrogated or invested in other property, provided that such investment or subrogation has been registered in the *registro mercantil* in accordance with the provisions of the sections of the code of commerce mentioned in the next preceding paragraph; 3. Property and effects deposited with the bankrupt, or administered, leased, rented, or held in usufruct by him; 4. Merchandise in the

possession of the bankrupt, on commission, for purchase, sale, forwarding, or delivery; 5. Bills of exchange or promissory notes without indorsement or other expression transferring ownership remitted to the insolvent for collection and all others acquired by him for the account of another person, drawn or indorsed to the remitter direct; 6. Money remitted to the insolvent, otherwise than on current account, and which is in his possession for delivery to a definite person in the name and for the account of the remitter or for the settlement of claims which are to be met at the insolvent's domicile; 7. Amounts due the insolvent for sales of merchandise on commission, and bills of exchange and promissory notes derived therefrom in his possession, even when the same are not made payable to the owner of the merchandise sold, provided it is proven that the obligation to the insolvent is derived therefrom and that said bills of exchange and promissory notes were in the possession of the insolvent for account of the owner of the merchandise to be cashed and remitted, in due time, to the said owner; all of which shall be a legal presumption when the amount involved in any such sale shall not have been credited on the books of both the owner of the merchandise and of the insolvent; 8. Merchandise bought on credit by the insolvent so long as the actual delivery thereof has not been made to him at his store or at any other place stipulated for such delivery, and merchandise the bills of lading or shipping receipts of which have been sent him after the same has been loaded by order of the purchaser and for his account and risk. In all cases arising under this paragraph assignees may retain the merchandise so purchased or claim it for the creditors by paying the price thereof to the vendor; 9. Goods or chattels wrongfully taken, converted, or withheld by the insolvent if still existing in his possession or the amount of the value thereof.

Sec. 49. All creditors, except those whose claims are mentioned in the next following section, whose debts are duly proved and allowed shall be entitled to share in the property and estate pro rata, after the property belonging to other persons referred to in the last preceding section has been deducted therefrom, without priority or preference whatever: Provided, that any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the debtor, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held, for the benefit of the party entitled thereto, as the court may direct.

Sec. 50. The following shall be preferred claims which shall be paid in the order named: a) Legal expenses, and expenses incurred in the administration of the insolvent's estate for the common interest of the creditors, when properly authorized and approved by the court; b) Necessary funeral expenses of the debtor, or of his wife, or children who are under their parental authority and have no property of their own, when approved by the court; c) Debts, taxes, and assessments due the insular government; d) Debts, taxes, and assessments due to any province or provinces of the Philippine Islands; e) Debts, taxes, and assessments due to any municipality or municipalities of the Philippine Islands; f) Debts for personal services rendered the insolvent by clerks, laborers, or domestic servants during the sixty days immediately preceding the commencement of proceedings in insolvency, not to exceed two hundred pesos for each claimant.

All other creditors shall be paid pro rata.

Chapter VII. Partnerships and corporations.

Sec. 51. A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged insolvent, either on the petition of the partners, or any one of them, or on the petition of three or more creditors of the partnership, qualified as provided in section twenty of this act, in either of which cases the court shall issue an order in the manner provided by this act, upon which all the property of the partnership, and also all the separate property of each of the partners, if they are liable, shall be taken, excepting such parts thereof as may be exempt by law; and all creditors of the partnership, and the separate creditors of each partner, shall be allowed to prove their respective claims; and the assignee shall be chosen by the creditors of the partnership, and shall also keep separate accounts of the property of the partnership, and of the separate estate of each member thereof. The expenses of the proceedings shall be paid from the partnership property and the individual property of the part-

ners in such proportions as the court shall determine. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. Certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been by or against him alone under this act; and in all other respects the proceedings as to the partners shall be conducted in like manner as if they had been commenced and prosecuted by or against one person alone. If such partners reside in different provinces, the court in which the petition is first filed shall retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a partnership, those partners who do not join in the petition shall be ordered to show cause why they, as individuals, and said partnership, should not be adjudged to be insolvent, in the same manner as other debtors are required to show cause upon a creditor's petition, as in this act provided; and no order of adjudication shall be made in said proceedings until after the hearing of said order to show cause.

Sec. 52. The provisions of this act shall apply to corporations and *sociedades anónimas*, and upon the petition of any officer of any corporation, or *sociedad anónima*, duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees as the case may be, or upon a creditor's petition made and presented in the manner provided in respect to debtors, like proceedings shall be had and taken as are provided in the case of debtors: Provided, that in case the articles of association or by-laws of any corporation or *sociedad anónima* provide a method for such proceedings, such method shall be followed. All the provisions of this act which apply to the debtor, or set forth his duties, examination, and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments, and assignments, apply to each and every officer of any corporation or *sociedad anónima* in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation. The provisions of this act shall not apply to corporations engaged principally in the banking business, or to any other corporation as to which there is any special provision of law for its liquidation in case of insolvency.

Chapter VIII. Proof of debts.

Sec. 53. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a discount being made if no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

Sec. 54. If the debtor is bound as indorser, surety, bail, or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of any person, and his liability shall not have become absolute until after the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

Sec. 55. In all cases of contingent debts and contingent liabilities, contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order of the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the court shall order, and it shall be allowed for the amount so ascertained.

Sec. 56. Any person liable as bail, surety, or guarantor, or otherwise, for the debtor, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the

debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor.

Sec. 57. Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

Sec. 58. In all cases of mutual debts and mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counterclaim shall be allowed of a claim in its nature not provable against the estate: Provided, that no set-off or counterclaim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to such debtor within thirty days immediately preceding the filing, or after the filing of the petition by or against the insolvent.

Sec. 59. When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, or an attachment or execution on property of the debtor duly recorded and not dissolved under this act, he shall be admitted as a creditor for the balance of the debt only, after deducting the value of such property, such value to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court or a judge thereof may decide to be fair and reasonable, before the election of an assignee, or by a sale thereof, to be made in such manner as the court or judge thereof shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, or its value fixed, the creditor shall not be allowed to prove any part of his debt, but the assignee shall deliver to the creditor all such property upon which the creditor holds a mortgage, pledge, or lien, or upon which he has an attachment or execution.

Sec. 60. No creditor, proving his debt or claim, shall be allowed to maintain any suit therefor against the debtor, but shall be deemed to have waived all right of action and suit against him, and all proceedings already commenced, or any unsatisfied judgment already obtained thereon, shall be deemed to be discharged and surrendered thereby; and after the debtor's discharge, upon proper application and proof to the court having jurisdiction, all such proceedings shall be dismissed, and such unsatisfied judgments satisfied of record: Provided, that no valid lien existing in good faith thereunder shall be thereby affected. A creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor when a discharge has been refused or the proceedings have been determined without a discharge. No creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or of any creditor, or the assignee, be stayed to await the determination of the court on the question of discharge: Provided, that if the amount due the creditor is in dispute, the suit, by leave of the court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount, when adjudged, may be allowed in the insolvency proceedings, but execution shall be stayed as aforesaid.

Sec. 61. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not be allowed to prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend thereon, until he shall have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

Sec. 62. The court may, upon the application of the assignee, or of any creditor, or without any application, before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate and may examine any other person tendering or making proof of claims, and may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses shall be had and depositions shall be taken in accordance with and in the same manner as is provided by the code of civil procedure.

Chapter IX. Compositions.

Sec. 63. An insolvent may offer terms of composition to his creditors after, but not before, he has filed in court a schedule of his property and list of his creditors as provided in this act. An application for the confirmation of a composition may be filed in the insolvency court after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims and after the consideration to be paid by the insolvent to his creditors and the money necessary to pay all debts which have priority and the costs of proceedings have been deposited in such place as shall be designated by and subject to the order of the court. A time shall be fixed by the court for the hearing upon an application for the confirmation of a composition, and for the hearing of such objections as may be made to its confirmation. The court shall confirm a composition if satisfied that 1. It is for the best interest of the creditors; 2. That the insolvent has not been guilty of any of the acts, or of a failure to perform any of the duties, which would create a bar to his discharge; and 3. That the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. Upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed, and the title to the insolvent's property shall revest in him. Whenever a composition is not confirmed, the estate in insolvency shall be administered as herein provided. The court may, upon application of a party in interest, filed at any time within six months after the composition has been confirmed, set the same aside, and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioner since the confirmation of such composition.

Chapter X. Discharge.

Sec. 64. At any time after the expiration of three months from the adjudication of insolvency, but not later than one year from such adjudication, unless the property of the insolvent has not been converted into money, the debtor may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given to all creditors who have proved their debts to appear on a day appointed for that purpose and show cause why a discharge should not be granted to the debtor; said notice shall be given by registered mail and by publication at least once a week, for six weeks, in a newspaper published in the province or city, or, if there be none, in a newspaper which, in the opinion of the judge, will best give notice to the creditors of the said insolvent: Provided, that if no debts have been proven, such notice shall not be required.

Sec. 65. No discharge shall be granted, or if granted shall be valid · 1. If the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in insolvency, in relation to any material fact concerning his estate or his debts or to any other material fact; or 2. If he has concealed any part of his estate or effects, or any books or writing relating thereto; or 3. If he has been guilty of fraud or wilful neglect in the care or custody of his property or in the delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act; or 4. If, within one month before the commencement of such proceedings, he has procured his real estate, goods, moneys, or chattels to be attached or seized on execution; or 5. If he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made, or been privy to the making of, any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or 6. If he has given any

fraudulent preference, contrary to the provisions of this act, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has admitted a false or fictitious debt against his estate; or 7. If, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or 8. If, being a merchant or tradesman, he has not kept proper books of account in Arabic numerals and in accordance with the provisions of the code of commerce; or 9. If he, or any other person on his account, or in his behalf, has influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation; or 10. If he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is, or may be, under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or 11. If he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act; or 12. In case of voluntary insolvency, has received the benefit of this or any other act of insolvency or bankruptcy within six years next preceding his application for discharge; or 13. If insolvency proceedings in which he could have applied for a discharge are pending by or against him in the court of first instance of any other province or city in the Philippine Islands. Before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as grounds for withholding such discharge or as invalidating such discharge, if granted.

Sec. 66. Any creditor opposing the discharge of a debtor shall file his objections thereto, specifying the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, according to the practice provided by law in civil actions.

Sec. 67. If it shall appear to the court that the debtor has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof, under the seal of the court, in substance as follows:

"In the Court of First Instance of the Philippine Islands. Whereas, has been duly adjudged an insolvent under the insolvency law of the Philippine Islands, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims, which by said insolvency law are made provable against his estate, and which existed on the day of, on which the petition of adjudication was filed by (or against) him, excepting such debts, if any, as are by said insolvency law excepted from the operation of a discharge in insolvency. Given under my hand, and the seal of the court, this day of, anno Domini Attest:..... clerk. (Seal), judge."

Sec. 68. No debt created by the fraud or embezzlement of the debtor, or by his defalcation as a public officer or while acting in a fiduciary capacity, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt. No discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.

Sec. 69. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities, and demands set forth in his schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be prima facie evidence in favor of such fact and of the regularity of such discharge: Provided however, that any creditor whose debt was proved or provable against the estate in insolvency who shall see fit to contest the validity of such discharge on the ground that it was fraudulently ob-

tained and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within one year after the date thereof, apply to the court which granted it to set it aside and annul the same.

Chapter XI. Fraudulent preferences and transfers.

Sec. 70. If any debtor, being insolvent, or in contemplation of insolvency, within thirty days before the filing of a petition by or against him, with a view to giving a preference to any creditor or person having a claim against him or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, mortgage, assignment, transfer, sale, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, to anyone, the person receiving such payment, pledge, mortgage, assignment, transfer, sale, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such debtor is insolvent, and that such attachment, sequestration, seizure, payment, pledge, mortgage, conveyance, transfer, sale, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of or to evade any of the provisions of this act, such attachment, sequestration, seizure, payment, pledge, mortgage, transfer, sale, assignment, or conveyance is void, and the assignee, or the receiver, may recover the property, or the value thereof, as assets of such insolvent debtor. If such payment, pledge, mortgage, conveyance, sale, assignment, or transfer is not made in the usual and ordinary course of business of the debtor, or if such seizure is made under a judgment which the debtor has confessed or offered to allow, that fact shall be *prima facie* evidence of fraud. Any payment, pledge, mortgage, conveyance, sale, assignment, or transfer of property of whatever character made by the insolvent within one month before the filing of a petition in insolvency by or against him, except for a valuable pecuniary consideration made in good faith, shall be void. All assignments, transfers, conveyances, mortgages, or incumbrances of real estate shall be deemed, under this section, to have been made at the time the instrument conveying or affecting such realty was filed for record in the office of the register of deeds of the province or city where the same is situated.

Chapter XII. Penal provisions.

Sec. 71. From and after the taking effect of this act, a debtor who commits any one of the following acts shall, upon conviction thereof, be punished by imprisonment for not less than three months nor more than five years for each offense: 1. If he shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate or part with, conceal, destroy, alter, mutilate, or falsify or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, with the intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee in recovering or receiving the same, or if he shall make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or if he shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or if he shall attempt to account for any of his property by fictitious losses or expenses. 2. If he shall, within three months before commencement of proceedings of insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud, or shall, with intent to defraud his creditors, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit and remain unpaid for, or shall have suffered loss in any kind of gaming when such loss is one of the causes determining the commencement of proceedings in insolvency, or shall have sold at a loss

or for less than the current price any goods bought on credit and still unpaid for, or shall have advanced payments to the prejudice of his creditors. 3. If he shall, from and after the taking effect of this act, during the proceedings for the suspension of payments, secrete or conceal, or destroy, or cause to be destroyed or secreted any property belonging to his estate; or if he shall secrete, destroy, alter, mutilate, or falsify, or cause to be secreted, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or if he shall, with intent to defraud his creditors, make any payment, sale, assignment, transfer, or conveyance of any property belonging to his estate; or if he shall spend any part thereof in gaming; or if he shall falsely swear to the schedule and inventory exacted by paragraph two of section two as required by sections fifteen, sixteen, and seventeen of this act, with intent to defraud his creditors; or if he shall violate or break in any manner whatsoever the injunction issued by the court under section three of this act.

Chapter XIII. Miscellaneous.

Sec. 72. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

Sec. 73. Pending insolvency proceedings by or against any person, partnership, corporation, or *sociedad anónima*, no statute of limitations shall run upon a claim of or against the estate of the debtor.

Sec. 74. Any creditor, at any stage of the proceedings, may be represented by his attorney or duly authorized agent, and the attorney or agent, properly authorized, shall be entitled to vote at any creditors' meeting as and for his principal.

Sec. 75. It shall be the duty of the court having jurisdiction of the proceedings, upon petition and after hearing, to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is by law exempt from execution, and also a homestead, as provided in section four hundred and fifty-two of the code of civil procedure; but no such petition shall be heard as aforesaid until it is first proved that notice of the hearing of the application therefor has been duly given by the clerk, by causing such notice to be posted in at least three public places in the province or city at least ten days prior to the time of such hearing, which notice shall set forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, and shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of that fact.

Sec. 76. The filing of a petition by or against a debtor upon which, or upon an amendment of which, an order of adjudication in insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency under this act,

Sec. 77. Words used in this act in the singular include the plural, and in the plural, the singular, and the word "debtor" includes partnership, corporations, and *sociedades anónimas*.

Sec. 78. Upon the filing of either a voluntary or involuntary petition in insolvency, a receiver may be appointed by the court in which the proceeding is pending, or by a judge thereof, at any time before the election of an assignee, when it appears by the verified petition of a creditor that the assets of the insolvent, or a considerable portion thereof, have been pledged, mortgaged, transferred, assigned, conveyed, or seized, on legal process, in contravention or violation of the provisions of section seventy of this act, and that it is necessary to commence an action to recover the same. The appointment, oath, undertaking, and powers of such receiver shall in all respects be regulated by the general laws of the Philippine Islands applicable to receivers. When an assignee is chosen, and has qualified, the receiver shall forthwith return to court an account of the assets and property which have come into his possession, and of his disbursements, and a report of all actions or proceedings commenced by him for the recovery of any property belonging to the estate, and the court shall thereupon summarily hear and settle the receiver's account, and shall allow him a just compensation for his services and his expenses, including a reasonable attorney's fee, whereupon the receiver shall deliver all property, assets, or effects remaining in his hands, to the assignee who shall be substituted for the receiver in all pending actions or proceedings.

Sec. 79. When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt.

Sec. 80. In all contested matters in insolvency the court may, in its discretion, award costs to either party to be paid by the other, or to either or both parties to be paid out of the estate, as justice and equity may require. In awarding costs, the court may issue execution therefor. In all involuntary cases under this act, the court shall allow the petitioning creditors out of the estate of the debtor, if any adjudication of insolvency be made, as a preferred claim, all legal costs and disbursements incurred by them in that behalf.

Sec. 81. If no creditor files written objections, the court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of an assignee, upon giving not less than two nor more than eight weeks' notice to the creditors, in the same manner that notice of the time and place of election of an assignee is given: Provided, however, that by written consent of all creditors filed in the court the proceedings may be dismissed at any time. After the appointment of an assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby.

Sec. 82. An appeal may be taken to the supreme court in the following cases: 1. From an order granting or refusing an adjudication of insolvency and, in the latter case, from the order fixing the amount of costs, expenses, damages, and attorney's fees allowed the debtor; 2. From an order made at the hearing of any account of an assignee, allowing or rejecting a creditor's claim, in whole or in part, when the amount in dispute exceeds three hundred pesos; 3. From an order allowing or denying a claim for property not belonging to the insolvent, presented under section forty-eight of this act; 4. From an order settling an account of an assignee; 5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution; 6. From an order granting or refusing a discharge to the debtor.

Chapter forty-two of the code of civil procedure, so far as applicable, shall govern appeals under this act, except that when an assignee has given an official undertaking and appeals from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties thereon are liable on such undertaking: Provided, however, that an interlocutory appeal shall not stay proceedings unless a written undertaking be entered into on the part of the appellant, with at least two sureties, in such an amount as the court, or a judge thereof, may direct, but not less than double the value of the property involved, to the effect that if the order appealed from be affirmed, or the appeal dismissed, appellant will pay all costs and damages which the adverse party may sustain by reason of the appeal and the stay of proceedings.

Sec. 83. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 84. This act shall take effect on its passage.

Enacted, May 20, 1909.

VIII.

SALE OF GOODS

Sale of Goods.

(By Orrin Kip McMurray, A. B., LL. B., of the San Francisco Bar, Professor of Law, University of California.)

Analysis.

I. INTRODUCTORY NOTE, 347

II. NATURE AND FORMATION

- A. Definition ; Distinction between Sales and Contracts to Sell, 348*
- B. Sale Distinguished from Similar Transactions, 348*
- C. Mutual Assent, 349*
- D. Capacity of Parties, 349*
 - 1. Infancy, 349*
 - 2. Insanity ; Drunkenness, 350*
 - 3. Married Women, 350*
 - 4. Corporations, 351*
- E. Form of the Contract ; Statute of Frauds, 351*
 - 1. What Contracts and Sales are within the Statute, 352*
 - 2. What Goods are Embraced within the Statute; "Goods, or Choses in Action", 352*
 - 3. "Of the Value of \$ 500 or Upwards", 353*
 - 4. Acceptance and Receipt of Part of the Goods, 353*
 - 5. Part Payment and Earnest, 354*
 - 6. Writing Sufficient to Satisfy the Statute, 355*
 - 7. Effect of Non-Compliance with the Statute, 356*
 - 8. Conflict of Laws, 356*
- F. Subject Matter of Sales, 356*
- G. The Price, 358*

III. TRANSFER OF PROPERTY

- A. In General, 358*
- B. Rules for Ascertaining Intention, 359*
 - Rule I. Property Presumed to Pass when Contract is Made, 360*
 - Rule II. Property Presumed not to Pass where Something to be Done by Seller to Put Goods in Deliverable State, 360*
 - Rule III. "Sale or Return" and "Sales on Approval", 360*
 - Rule IV. a) Subsequent Appropriation Necessary in Sales of Unspecified Goods, 361*
 - b) Appropriation by Delivery to Carrier, 362*
 - Rule V. Where the Seller is to Deliver at a Particular Place, the Presumption is that the Property Does Not Pass until such Delivery, 362*
- C. Reservation of the Jus Disponendi, 362*
- D. Risk of Loss, 364*
- E. Sales by a Person not the Owner, 364*
 - 1. In General, 364*
 - 2. Conditional Purchasers, 365*
 - 3. Rights of Second Purchasers and of Creditors of the Seller in Possession, 367*
 - 4. Bona Fide Purchasers from Buyers under Voidable Sales, 367*
 - 5. What Constitutes a Purchaser for Value and in Good Faith, 368*

IV. PERFORMANCE OF THE CONTRACT

- A. Duties of the Seller and of the Buyer, 368*
- B. Seller's Duty to Deliver in Performance of the Contract, 369*
- C. Seller's Duty to Perform Conditions and Warranties, 371*
 - 1. "Cash Sales", 372*
 - 2. Express Warranties, 372*
 - 3. Implied Warranties of Title and Quality, 374*
 - 4. Warranties on Sales by Sample, 376*
- D. Duties of Buyer, 377*
 - 1. Acceptance, 377*

2. *Effect of Acceptance on Right to Sue for Damages*, 378
3. *Duties of the Buyer with Respect to Goods Improperly Delivered*, 380
4. *Payment of the Price*, 381

V. REMEDIES FOR NON-PERFORMANCE

- A. *Classification of Remedies*, 382
- B. *Remedies of the Seller against the Goods*, 382
 1. *Unpaid Seller's Lien*, 382
 2. *Right of Stoppage in Transitu*, 384
 - a) *In General*, 384
 - b) *Effect of Stoppage in Transitu*, 386
 - c) *Manner in which Right of Stoppage in Transitu may be Exercised*, 387
 3. *Exercise of Right of Lien and of Stoppage in Transitu against Third Persons*, 387
 4. *Further Remedies of the Unpaid Seller against the Goods*, 388
- C. *Remedies of the Seller against the Buyer Personally*, 389
- D. *Remedies of the Buyer*, 390

VI. CIRCUMSTANCES AFFECTING VALIDITY OF SALES

- A. *In General*, 392
- B. *Fraud*, 393
 1. *Its Nature*, 393
 2. *Fraud on the Seller*, 393
 3. *Fraud on the Buyer*, 394
 4. *Fraud upon Creditors*, 394
- C. *Illegality*, 395

I. INTRODUCTORY NOTE. — The basis of the law of sales in the States of the United States of America is the common law of England, except in the State of Louisiana, where the civil law of France prevails¹). It is peculiarly difficult to state the principles of this law, for the reason that the highest court of each State is endowed with the power of authoritatively stating the principles of the unwritten law of that State. The consequence is that while the systems of the various States are alike in their broad features and fundamental principles, there are important differences in matters of detail. In addition to the common law thus administered by the State Courts, the Federal Courts, whose jurisdiction is to a certain extent concurrent with that of the State Courts in cases between citizens of different States and between aliens and citizens of one of the States, profess to determine the cases brought before them by the principles of a general commercial law²). The same transaction, therefore, may be governed by two systems of law, and the determination of a controversy may rest upon the accidental circumstance of the forum in which the action is tried.

Legislation has not, in general, until very recently served to simplify the matter. It has usually dealt piecemeal with details, such as the formalities with which the contract must be evidenced³). Recently, however, a noteworthy movement for scientific codification has begun to take practical form. In 1906, the Commissioners on Uniform State Laws adopted and recommended to the Legislatures of the various

¹) 1 Kent's Commentaries, p. 473, and note. — ²) Thayer; Legal Essays, p. 145; Swift v. Tyson, (1842) 16 Pet. 1. The Federal Courts do not profess to hold that there is a body of Federal common law distinct from that of the States, but they claim and exercise the right, in matters of general commercial law, to determine what is the rule of common law by which the particular matter before them is to be decided, without reference to the interpretation of that law by the State courts, even those of the jurisdiction where the transaction occurred. On the other hand, the State courts are not bound to follow the interpretation of the Federal courts in such matters. Western Union Telegraph Co. v. Call Publishing Co., (1901) 181 U. S. 92, 101, 103. Recent cases

show no tendency to abridge this doctrine, Muhlker v. Railroad Co., (1905) 197 U. S. 544.

— ³) In some States, the legislation approaches the character of a code. See for example, California, Civil Code, secs. 1721—1798; Montana, Civil Code, secs. 2310 et seq.; Idaho, Civil Code, secs. 3324 et seq., and North Dakota, Civil Code, secs. 3948 et seq., which are substantially identical, all of them being based upon the code proposed for New York by David Dudley Field, but never adopted by that State. See also, Georgia, Civil Code, secs. 3526 et seq. and Louisiana, secs. 2438 et seq. The provisions of the codes of California, Georgia, and Louisiana are reprinted in full, *infra*.

States, a Uniform Sales Act, prepared under its authority by Professor Samuel Williston, of the Harvard Law School. This Act has been adopted by the Legislatures of nine States and Territories¹).

This article will, as far as possible, follow this codification.

II. NATURE AND FORMATION. — A. Definition: Distinction between Sale and Contract to Sell. — Definitions from standard American authorities are cited in the note²). It will be observed that these definitions alike emphasize the contractual nature of the transaction, but some of them, for example Kent's, are equally applicable to two quite different transactions, — the sale and the contract to sell³). Both the sale and the contract to sell have the elements common to all contracts, of mutual assent and a consideration, but what distinguishes the sale from all other legal transactions is that it involves the transfer of the title to goods. Unless the distinction between the sale and the contract to sell is carefully marked, confusion results. And the two things are easily confused, for the reason that no particular formality marks the sale, but by the mere contract of the parties, without delivery or payment of the price or other formal act, the title to goods may pass from seller to buyer⁴). The Uniform Sales Act brings out the distinction in very definite form: "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."⁵)

Both a sale and a contract to sell may be conditional as well as absolute. The condition may be precedent, in which event no title will pass until performance of the condition, or it may be subsequent, in which case title vests, subject to be divested by the happening of the condition⁶).

It should be noted that the sale of lands and interests in lands is governed by quite other principles than the sale of goods. The two subjects are not usually treated together, and it would be impracticable so to do⁷).

B. Sale Distinguished from Similar Transactions. — No difficulty will usually be experienced in distinguishing a sale from a gift, save in cases where the proof of a consideration is difficult or doubtful. It is interesting to notice, however, that while the mere intention of the parties is sufficient to pass title in the case of a sale, the gift requires a formal element to complete it, to wit, delivery of the thing⁸).

Questions of considerable difficulty sometimes arise in distinguishing sales from bailments, especially in cases where the bailee is given the right to mingle fungible goods of his own, such as grain, with those of the bailor⁹). Where, in such cases, the depositor has the option of requiring the delivery of an equal quantity of grain

¹) The States of Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Wisconsin, and the Territory of Arizona. — ²) Benjamin on Sales, sec. 1: "A transfer of the absolute or general property in a thing for a price in money." 1 Mechem on Sales, sec. 1: "The transfer, in pursuance of a valid agreement, from one party called the seller to another called the buyer, of the general or absolute title to a specific chattel for a price, or a consideration estimated in money." 2 Kent's Commentaries, p. 468: "A contract for the transfer of property from one person to another for a valuable consideration." California, Civil Code, sec. 1721: "Sale is a contract by which for a pecuniary consideration, called a price, one transfers to another an interest in property." See also De Bary v. Dunne, (1909) 172 Fed. 940; Christensen v. Cram, (1909) 156 Cal. 633. — ³) "The fundamental difference between a sale properly so called and an agreement to sell is that in the former case the title passes, while in the latter it does not." Blackwood v. Cutting Packing Co., (1888) 76 Cal. 212. — ⁴) 1 Mechem on Sales, sec. 477. — ⁵) Sales Act, sec. 1, subdivisions 1 and 2. For reasons why the phrase

"contract of sale" used in the English Sale of Goods Act should be abandoned, see Williston, Sales, sec. 2. — ⁶) Sales Act, sec. 1, sub. 3. — ⁷) Proper acknowledgment should here be made of indebtedness to Professor Williston's recent work on the "Law Governing Sales of Goods at Common Law and under the Uniform Sales Act." New York: Baker Voorhis & Co., (1909). This book is the most elaborate and complete work in the English language upon the subject of Sales. Other useful works are "A Treatise on the Law of Sale of Personal Property" by Floyd R. Mechem. 2 vols., Chicago: Callaghan & Co., (1901) and Benjamin's "Treatise on the Law of Sale of Personal Property." Seventh American Edition, Edited by Edmund H. Bennett and Samuel C. Bennett. Indianapolis and Kansas City: Bowen-Merrill Company, 1899. — ⁸) Beaver v. Beaver, (1889) 117 N. Y. 421. — ⁹) Such bailments are quite common in the grain producing States, where grain is stored in warehouses or grain elevators in a common mass; contracts allowing the proprietor of the elevator or warehouse to deliver quantity of grain equal to that stored or to pay market price when demand is made.

or the payment of the price, the fact that the same thing is not to be returned does not make the transaction a sale¹). But where the bailee has the right to use the grain, and has also the option to return other grain or to pay the price, the courts incline to regard the transaction as a sale, even though the parties have designated it otherwise²).

Other relations from which it is often difficult to distinguish a sale, are those of a factor with a *del credere* commission, or a consignee for sale where the consignor authorizes the consignee to make himself a debtor instead of a fiduciary, that is, to mingle the proceeds of sales with his own money. Here too the form that the parties have given to the transaction is not conclusive. If the arrangement between the parties, by whatever name called, is such that it provides that a fixed sum is to be paid to the owner of the goods in any event, the contract is one of sale³). The real nature of the relation is always looked to, not the mere form in which the parties have clothed their intent⁴).

Whether a contract is one of sale or of manufacture is best discussed under the head of the Statute of Frauds⁵).

C. Mutual Assent. — The discussion of the subject of mutual assent belongs to the general subject of contracts. The assent required is not an actual meeting of minds, but one indicated by the overt act of accepting an offer as made⁶).

D. Capacity of Parties. — 1. **INFANCY.** — An infant may avoid a sale or purchase or a contract to sell or buy goods by disaffirming the contract and restoring the consideration received⁷). This he may do, either during infancy, or within a reasonable time after he attains majority⁸). Until disaffirmed the sale is valid, however⁹). And notwithstanding disaffirmance of his contract to buy necessities, he is liable for the value of such goods upon principles of quasi contract¹⁰). If he does not disaffirm his

¹) *Mayer v. Springer*, (1901) 192 Ill. 270; *J. M. Guffey Petroleum Co. v. Glass Oil Co.*, (1904) 37 Tex. Civ. App. 413; *State v. Cowdery*, (1900) 79 Minn. 94. See article by Justice Holmes of the United States Supreme Court in 6 Am. Law Review, 450. — ²) *Savage v. Salem Mills*, (1906) 48 Oreg. 1; *O'Neal v. Stone* (1899) 79 Mo. App. 279; *State v. Cowdery*, (1900) 79 Minn. 94; *Chase v. Washburn*, 1 Ohio St. 244. The fact that the transaction is called a "bailment," or that the depositor pays "storage" is not conclusive. *Ledyard v. Hibbard*, (1882) 48 Mich. 421. The ultimate test is the intention of the parties. — ³) On the distinction between the *del credere* commission and sale, see *In re Columbus Buggy Co.*, (1906) 143 Fed. 859; *In re Heckathorn*, (1906) 144 Fed. 499; *In re Martin Vernon Music Co.*, (1903) 132 Fed. 983; *Johnson v. Allen*, (1898) 70 Conn. 738; *Saxlehner v. Eisner and Mendelson Co.*, (1900) 179 U. S. 19, 33. On the distinction between consignment for sale and sale, see *Fleet v. Hertz*, (1904) 201 Ill. 594 (where the court says a test in doubtful cases is whether the supposed agent has the option to keep and pay for the goods); *Keswick v. Rafter*, (1901) 165 N. Y. 653; *Childs v. Waterloo Wagon Co.*, (1901) 167 N. Y. 576; *Walther v. Williams Mercantile Co.*, (1909) 169 Fed. 270. In *Miles Medical Co. v. Park & Sons*, (1908) 164 Fed. 803, a contract called one of agency was held to be a contract of sale and in violation of the provisions of the *Sherman Anti-Trust Law*. See also *Sturm v. Boker*, (1893) 150 U. S. 312; *Arbuckle Bros. v. Kirkpatrick*, (1897) 98 Tenn. 221. — ⁴) *Eaton v. Richeri*, (1890) 83 Cal. 185. Another contract under which business men in recent times seek to preserve for themselves the rights of owners without the risks is the lease of goods with an option of purchase. Instruments called

leases have been sometimes construed as sales. *Hervey v. Rhode Island Locomotive Works*, (1877) 93 U. S. 664. — ⁵) See post: *What contracts and Sales are within the Statute of Frauds.* — ⁶) *Williston on Sales*, sec. 5. — ⁷) Since the privilege of disaffirmance is for the infant's benefit and protection, even an emancipated infant, or one conducting a business in his own name, may disaffirm his contracts. *Muller v. Chuse Grocery Co.*, (1909) 241 Ill. 398. — ⁸) Mere failure to disaffirm renders the contract valid. It is not necessary that the infant ratify it to render it a binding obligation. A ratification merely indicates that the infant waives his privilege of avoiding the contract. *Williston on Sales*, sec. 20. The time in which the disaffirmance is to be made depends on circumstances. In *Sims v. Everhart*, (1880) 102 U. S. 300, disaffirmance of a sale of land made twenty-one years after the sale was made, was held to be made within a reasonable time, the infant having been a married woman when the sale was made. — ⁹) *Spencer v. Collins*, (1909) 104 Pac. 320. In some jurisdictions, the infant is required to place the other party in statu quo. *Rice v. Butler*, (1899) 160 N. Y. 578. If he has squandered the consideration received, he cannot, therefore, in such States disaffirm his contract. In other States, however, the fact that he has squandered the consideration or the goods received does not prevent his setting the contract aside. *Muller v. Chuse Grocery Co.*, (1909) 241 Ill. 398; *Reynolds v. McCurry*, (1881) 100 Ill. 356; *Mechem on Sales*, sec. 109. The latter would seem to be the prevailing view. 22 Cyc. 613—616. — ¹⁰) *Trainer v. Trumbull*, (1886) 141 Mass. 527, 530. Under a Statute in New Hampshire which rendered contracts made by infants under guardianship void, he was held liable in quasi contract for necessities. Mc-

contract to buy necessities, he will be liable on the contract for the price, although that be more than the reasonable value of the necessities¹).

In ascertaining what are necessities, the social position of the infant is regarded, but the American courts have not been so liberal as the English Courts in making allowance for such position²). Articles cannot be considered necessities where the infant is already well supplied, and the good faith of the seller will not affect the infant buyer's right to disaffirm the sale³). Those dealing with infants must therefore, at their peril, ascertain whether the infant is already supplied before furnishing him goods⁴). Whether, in addition to the quasi contractual liability of the infant for necessities, there exists a tort liability where he actively misrepresents his age is a question upon which the courts of various States have differed⁵). The better view would seem to be that he is so liable⁶).

2. INSANITY; DRUNKENNESS. — Insane persons and drunkards are, under the prevailing doctrine, placed in the same position as infants, with an important qualification of the case of insane persons, that where such a person is under guardianship pursuant to a decree of a competent court, his contracts are absolutely void and incapable of ratification⁷). In cases of sales by or to an insane person, therefore, (unless he is under a decree incompetent), the sale will be valid unless disaffirmed within a reasonable time after his disability is removed⁸). This right of disaffirmance, in the absence of statutory provisions, avails in the case of the insane person or the drunken man, as in the case of the infant, even as against bona fide buyers from an original buyer⁹). The Sales Act protects the purchaser in good faith and without notice¹⁰).

3. MARRIED WOMEN. — Legislation removing disabilities from married women has been had in all the States¹¹). A married woman is, therefore, nowhere absolutely without power to buy and sell as a principal, as she formerly was. Still her power to contract is only that conferred by statute, and the prevailing type of such statute allows her to contract only with respect to her separate property, and does not give her power to contract with respect to other matters¹²). A married woman may, therefore, sell her separate property, and she may also buy other property with her own money. She may also bind her husband's property for the value of necessities, if he omits to supply her with such articles as befit his station in life, or for such as are furnished her while she is living apart from her husband under an agreement of separation, or by reason of his misconduct¹³). On principles

Connell v. McConnell, (1909) 74 Atl. 875. The father is, of course, also liable for necessities furnished to his infant child, if he has omitted the duty of support. Schouler on Domestic Relations, sec. 241 et seq.; 29 Cyc. 1906.

¹) Atwell v. Jenkins, (1895) 163 Mass. 362. — ²) Williston on Sales, sec. 24: 1. Metchem, Sales, secs. 130 et seq. — ³) Conboy v. Howe, (1890) 59 Conn. 112; McKanna v. Merry, (1871) 611 Ill. 177; Trainer v. Trumbull, (1886) 141 Mass. 527; McConnell v. McConnell, (N. H. 1909) 74 Atl. 875. — ⁴) Hoyt v. Casey, (1874) 114 Mass. 397. — ⁵) Thus, for example, in Massachusetts it has been repeatedly held that no such action will lie. Slayton v. Barry 175 Mass. 512 (1900). So also in Pennsylvania, Minnesota, and Vermont. On the other hand, it has been held that the action for misrepresentation will lie in Illinois, New Hampshire, Indiana, and Texas. In Mississippi the Supreme Court seems to have adopted the last named doctrine after having decided to the contrary in an earlier case. In New York the point has not been determined by the Court of Appeals and there are conflicting decisions by inferior Courts. See Lake v. Perry, (Miss. 1909) 49 So. 569. — ⁶) Williston Sales, sec. 26. — ⁷) Hughes v. Jones, (1889) 116 N. Y. 67. See Wright v. Walker, (1900) 127 Ala. 557, 54 L. R. A.

440, and note, to the effect that generally the contracts of insane persons and drunkards are voidable, not void. See also California, Civil Code, secs. 39 and 40, to the effect that while the contracts of persons of unsound mind generally are voidable, the contracts of persons judicially determined to be insane are void. Sec. 38 provides that a person "entirely without understanding" has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished him necessary for his support or the support of his family. — ⁸) Newman v. Taylor, (1909) 122 S. W. 425. — ⁹) 1 Metchem on Sales, secs. 79, 110; Williston on Sales, secs. 14 and 31. — ¹⁰) Sales Act, sec. 24. — ¹¹) See the various statutes summarized in Stimson: American Statute Law, article 645, et seq. See also the article on *Contracts* in this Work, *supra*. — ¹²) Bank v. Partree, (1878) 99 U. S. 325. — ¹³) Wanamaker v. Weaver, (1903) 176 N. Y. 75; Charles v. Strouse, (1910) 120 N. Y. Supp. 736. The party supplying the goods must prove the facts that render the husband liable. Hare v. Gibson, (1876) 32 Ohio St. 33, 30 Am. Rep. 568; Charles v. Strouse *supra*. In California, under Civil Code, sec. 175, the husband is not liable for necessities in case of separation by agreement, unless the agreement provides that he shall be liable.

of agency, the wife may also bind the husband for the price of goods bought, even though they are not necessities, if he has authorized her to act, or permitted her to represent herself as having authority to bind him¹). In a few States, the separate property of the wife is made liable for the value of necessities furnished to the family, but this type of statute is not widely adopted²).

4. CORPORATIONS. — A contract to sell or buy goods when made by a corporation for purposes entirely outside of its authorized business will not be enforced so long as the contract remains executory on both sides³). On the other hand, it seems to be universally conceded that where the corporation has actually used goods which it had no power to buy under the terms of its charter, it must pay at least the reasonable value of the goods. The doubtful case seems to be whether where goods are sold and delivered to a corporation which had no power to buy them, it should not be held to pay the contract price. The United States Supreme Court has held that the contract would be void, so that the only recovery would be for the value of the goods, upon principles of quasi contract. The highest courts of the important commercial States of New York and Illinois, on the other hand, have held that the corporation will be precluded from setting up the defence of *ultra vires*, where the contract has been executed on one side⁴).

E. Form of the Contract; Statute of Frauds. — By the common law of the States, no form is requisite to the validity of the sale or of the contract to sell⁵). But in most of the States statutes modelled upon the seventeenth section of the old English Statute of Frauds require sales and contracts to sell goods of more than a certain price or value to be evidenced by writing, or by other formalities⁶). Section 4 of the Uniform Sales Act is a type of such Statute: "A contract to sell or a sale of any goods or choses in action of the value of \$ 500 or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf⁷)."

¹) Meader v. Page, (1866) 39 Vt. 306.

— ²) Iowa, Code, (1897) sec. 3165; Illinois, Starr and Curtis' Annotated Statutes, (1896) c. 68, sec. 15; Missouri, 2 Ann. Statutes, (1906) sec. 4340; Oregon, Bellinger & Cotton's Ann. Codes, (1902) sec. 5239. — ³) *Jennison v. Citizens Savings Bank*, (1890) 122 N. Y. 235; *Bosshardt, etc., Co. v. Crescent Oil Co.*, (1895) 171 Pa. St. 109, where a manufacturing company bought goods for the purpose of reselling them at a profit. —

⁴) See article on *Corporations*, in this Work.

— ⁵) Sales Act, sec. 3. — ⁶) Adopted by the English Parliament in 1676, but not effective in the Colonies in America, for the reason that it was not expressly made applicable. The Courts in Maryland and New Mexico, however, have held that it is a part of the common law of those states. It is now (1910) adopted in the former state as section 4 of the Sales Act. — ⁷) Statutes of Frauds providing formalities for the sale of goods or for contracts for the sale of goods, exist in all but thirteen of the States and Territories of the United States. The States in which no such act is in force respecting sales of goods are Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia. In the other States and Territories, the English statute furnishes the model, though there are minor differences among the statutes, chiefly in respect to the value of goods to which the statute applies. This varies considerably:

in Florida and Hawaii, for example, all contracts or sales of goods of whatever value are within the statute, while in Ohio the statute applies only to contracts or sales of goods where the value is over \$ 2500. The following references indicate where the statutes may be found: Arizona, Statutes, 1907, c. 99 (Uniform Sales Act); Alaska, Carter's Annotated Code, (1906) sec. 1044; Arkansas, Kirby's Digest of Statutes, (1904) sec. 3656; California, Civil Code (1909) secs. 1624, 1739, Code of Civil Procedure, secs. 1971—1974; Colorado, Revised Statutes, (1908) sec. 2666; Connecticut, Laws of Connecticut, (1907) c. 212; Florida, General Statutes, (1909) sec. 2518; Georgia, Code of Statutes, (1895) sec. 2693; Hawaii, Revised Laws, (1905) sec. 1999; Idaho, Civil Code, (1901) sec. 6009; Indiana, Burns' Annotated Statutes, (1908) sec. 7469; Iowa, Code of, (1897) sec. 4625; Maine, Revised Statutes, (1903) c. 113, sec. 4; Maryland, Laws, Art. 83, (1910) c. 346, sec. 22 (Uniform Sale Act); Massachusetts, Acts of Massachusetts, (1908) c. 237 (Uniform Sales Act); Michigan, Compiled Laws, (1897) sec. 9516; Minnesota, Revised Laws, (1905) sec. 3484; Mississippi, Code, (1906) sec. 4779; Missouri, 2 Annotated Statutes, (1906) sec. 3419; Montana, Revised Statutes, (1907) secs. 5089 and 7966; Nebraska, Cobby's Annotated Statutes, (1909) sec. 6028; Nevada, Compiled Laws, (1900) sec. 2701; New Hampshire, Public Statutes, (1901), c. 215, sec. 3; New Jersey, Laws of New Jersey, (1907) c. 132 (Uniform Sales Act); New York, 4 Birdseye, Cumming and

1. WHAT CONTRACTS AND SALES ARE WITHIN THE STATUTE OF FRAUDS. — Contracts for the manufacture of goods are not required by the Statute of Frauds to be in writing, or evidenced by other formal act¹). Much controversy has existed as to what are contracts for manufacture²). The New York Court has made the definition turn upon the existence or non-existence of the goods at the time of the making of the contract. Where the goods are in existence when the contract is made, such contract is one of sale, it is held by that Court, although the seller is to do work upon them to comply with the terms of the contract; if, however, the things are non-existent at the time of the contract, even though they be things such as the seller is in the habit of manufacturing and selling, the contract is one of work and labor, or as it sometimes called, of manufacture³). The Massachusetts rule is that where the goods are in existence, or are such as the seller in the ordinary course of his business manufactures, the contract is one of sale; but if the things are manufactured especially for the buyer and are not suitable for the general market, the contract is one of manufacture and not within the Statute⁴). This rule has been adopted in the Sales Act⁵) and has been accepted in a number of States⁶).

Where the person who orders the goods furnishes the materials from which they are made, or the principal part of such materials, the contract is one of work and labor, and not within the Statute⁷).

Contracts of exchange or barter are within the Statute. Indeed, if we accept the definition in the Sales Act hereinbefore quoted, there is no difference in legal effect between sale and barter⁸).

2. WHAT GOODS ARE EMBRACED WITHIN THE STATUTE; "GOODS OR CHOSSES IN ACTION." — A doubt exists in many States where the Sales Act has not been adopted as to whether sales or contracts to sell stocks, bonds, commercial paper, or other choses in action are within the Statute, the usual form of the Statute referring only to "goods, wares, and merchandise"⁹). This doubt is removed by the language of the Sales Act, which, however, serves to raise a serious question as to whether contracts for the sale of patent rights are not within the Statute¹⁰). Such contracts have heretofore been held to be without the Statute, but the cases have arisen under the usual form of the Statute¹¹).

Growing crops of the class known as *fructus industriales*, (i. e. such as grow as the result of planting or sowing seed and cultivation), are goods within the Statute, while those of the class known as *fructus naturales*, (such as fruit and grass), are

Gilbert Consolidated Laws of New York, Annotated (1909) p. 4189; North Dakota Revised Statutes (1895) sec. 5405; Ohio, General Code, (1910) sec. 8384 (Uniform Sales Act); Oklahoma, Compiled Laws, (1909) sec., 1089; Oregon, Bellinger and Cotton's Annotated Codes, (1902) sec. 797; Rhode Island, Laws of 1908, c. 1548 (Uniform Sales Act); South Carolina, Code, (1902) sec. 2653; South Dakota, Revised Code, (1903) (Hipple's Ed.) p. 757, Civil Code, sec. 1238; Utah, Compiled Laws, (1907) sec. 2469; Vermont, Statutes, (1894) sec. 1225; Washington, Remington and Ballinger's Annotated Codes of Washington, (1910) sec. 5290; Wisconsin, Sanborn and Berryman, Revised Statutes, (1898) sec. 2308; Wyoming, Revised Statutes, (1899) sec. 2954. See Statutes *infra*.

¹) Browne on Statute of Frauds, secs. 299—309. California Civil Code, sec. 1740. —

²) See 1 Mechem on Sales, sec. 304. Cooke v. Millard, (1875) 65 N. Y. 352. — ³) Warren Chemical Co. v. Holbrook, (1890) 118 N. Y. 586. This distinction seems to be peculiar to New York. Hientz v. Burkhard, (1896) 29 Oreg. 55. — ⁴) Mixer v. Howarth, (1838) 21 Pick. 205. — ⁵) Sales Act, sec. 4, subsec. 2. — ⁶) Flynn v. Dougherty, (1891) 91 Cal. 669.

Penn. Plate Co. v. James H. Rice Co., (1905) 216 Ill. 657. Courtney v. Bridal Veil Box Factory, (1909) 105 Pac. Rep. 896 Oregon. L. Campbell & Co. v. Mion Bros., (Georgia 1909) 64 S. E. 571. — ⁷) The Non Magnetic Watch Co., (1895) 34 N. Y. Supp. 1017. (Hair springs furnished watch manufacturer; contract of sale); Sattler v. Hallock, (1899) 160 N. Y. 291. — ⁸) Bennett v. Hill, (1813) 10 Johns. 364; Franklin v. Matoa, etc., Co., (1907) 158 Fed. 941. An agreement by a creditor to accept goods in payment of a debt is a sale. Campbell v. Heney, (1900) 128 Cal. 109. — ⁹) Tisdale v. Harris, (1838) 20 Pick. (Mass.) 9, holds that shares of stock are within the Statute. Contra, Webb v. Baltimore, etc., Ry. Co., 77 Md. 92. (Subscriptions to stock not contracts to sell goods.) In N. Y., California, and a few other States, the words used in the Statute are "goods, chattels, or things in action." 1 Mechem on Sales, sec. 287. California, Code Civil Procedure, sec. 1973. — ¹⁰) The words of the Sales Act are "choses in action" — words of very wide and somewhat uncertain scope. — ¹¹) Somerby v. Buntin, (1875) 118 Mass. 279 (Assignment of right to letters patent); Banta v. Chicago, (1898) 172 Ill. 204, 218.

considered a part of the land¹). However, where fruit is the result of annual labor, even though it otherwise be of the class *naturalis*, it has been considered as *industrialis*²).

Fixtures, including buildings or other structures, however firmly attached to or incorporated in the land, pass as chattels, where the purchaser is by the terms of the contract to have no right in the materials until removal³). So, with coal or other minerals, if no title passes until severance, it is a sale of chattels⁴). Where the contract is for the sale of mineral products which require reduction or refinement, and does not contemplate the passage of title until the mineral is so treated, it is suggested that the contract, under the prevailing American rule, may well be considered one of work and labor, and not within the Statute.

3. "OF THE VALUE OF \$ 500 OR UPWARDS." — Where the aggregate of several articles sold at the same time amounts to the sum mentioned in the Statute, the sale is within the Statute, although the price of each article was separately fixed by agreement⁵). The rule has been extended to sales of separate articles at auction, even where the sales have been made on different days⁶). But if there be different terms in regard to the various sales, as if some be sold with warranty and some without, the sales are considered as separate sales⁷). Where the price is not fixed, a fair price is intended. Until the price is fixed, it is uncertain whether or not the Statute applies⁸).

4. ACCEPTANCE AND RECEIPT OF PART OF GOODS. — One of the three means of satisfying the Statute is by the buyer's acceptance of the goods or part thereof, and his actual receipt of the same⁹). Both requirements are equally important, and an acceptance without receipt, or a receipt without acceptance will not satisfy the Statute¹⁰). The order, however, in which the acts take place is immaterial, — receipt may precede acceptance, or acceptance may precede receipt¹¹). Acceptance means more than that the parties have come to a final agreement regarding the passing of the title to the goods. The parties may have agreed that the title to specified chattels has passed, and yet the contract be unenforceable under the Statute of Frauds. The buyer, in such a case, may, notwithstanding the delivery of the goods, refuse acceptance without just cause¹²). Any act, however, which indicates that the buyer intends to appropriate the goods as owner will be an acceptance, and, if accompanied by actual receipt, will satisfy the Statute¹³). But merely receiving the goods for examination will not amount to an acceptance¹⁴). The prevailing rule seems to be that the acceptance need not, however, be final for

¹) If the contract is for the sale of an interest in land, it must be in writing under other sections of the Statute of Frauds irrespective of price or value, and no other act, such as part payment of the purchase price will satisfy the requirements of the Statute. Under the usual form of such Statutes a note or memorandum is not sufficient, but the contract itself must be in writing. It should be observed, however, that a mere license to enter land, even though accompanied by a permission to remove a portion of the soil or something attach to do or incorporated in the soil, is not a transfer of an interest in land, even though a consideration be paid for the license. Wood v. Leadbitter, (England, 1845) 13 Meeson & Welsby, 838. Many of the cases really turn on this principle rather than on the distinction between fructus naturales and fructus industriales. 1 Mechem on Sales, secs. 336—347. — ²) Purner v. Piercy, (1874) 40 Md. 212; Vulicevich v. Skinner, (1888) 77 Cal. 239. — ³) Bostwick v. Leach, (1809) 3 Day (Conn.) 476; Browne on Statute of Frauds, sec. 234. — ⁴) Williston on Sales, sec. 64. A contract to sell water to a town has been held to be a contract to sell chattels. Jersey City v. Harrison, (1904) 71 N. J. L. 69, (1905) 72 N. J. L. 185. — ⁵) Browne on Statute of Frauds,

sec. 314. Garfield v. Paris, (1877) 96 U. S. 557; Tompkins v. Sheehan, (1899) 158 N. Y. 617. — ⁶) Jenness v. Wendell, (1871) 51 N. H. 63. — ⁷) Barclay v. Tracy, (1842) 5 Watts & Serg. (Penn.) 45. — ⁸) Browne on Statute of Frauds, sec. 313. This conclusion, which is plainly right, serves to show that the Statute does something more than merely prescribe a rule of evidence. No objection could be taken that the contract was not in writing until the value was shown and yet, in many jurisdictions where the evidence theory prevails, the objection must be taken when the contract is offered in evidence, or it is deemed waived. — ⁹) Sales Act., sec. 4, subsec. 1. "Unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same." The two other means of satisfying the Statute are by part payment and by a writing. These are discussed in the succeeding sections of this article. — ¹⁰) Benjamin, Sales (7th Am. Ed.) sec. 139. ¹¹) Sales Act, sec. 4, subsec. 3. — ¹²) Remick v. Sandford, (1876) 120 Mass. 309; 1 Mechem on Sales, sec. 367. — ¹³) Hinchman v. Lincoln, (1888) 124 U. S. 38; Dauphiny v. Red Poll Creamery Co., (1889) 123 Cal. 548. — ¹⁴) Stone v. Browning, (1872) 51 N. Y. 211.

all purposes, in order to satisfy the Statute, and that notwithstanding acceptance under the Statute, the buyer may reject the goods as not meeting the description in the contract, or as not equal to a sample displayed when the contract was made¹).

Of equal importance with acceptance, is actual receipt of the goods by the buyer. Though the parties agree to a present passage of title, and the buyer accept the chattel, either party may, nevertheless, withdraw from the contract, unless the buyer has received the goods²). A receipt by a carrier, while often a decisive test as to the passage of title, is not sufficient to satisfy the Statute³), and the fact that the buyer has designated the carrier, in most States, makes no difference⁴). The word "actual," however, is not inconsistent with a change of possession by construction, as, where goods are in the hands of a third person, the buyer is considered as having received them where the third person agrees to hold them as bailee for him, though there be no actual change of possession⁵), or where negotiable documents of title are transferred to the buyer⁶). Where the goods are already in the possession of the buyer at the time the contract is made, it seems the Statute is satisfied if he continue his possession as owner⁷). There may be a receipt by the buyer, it seems, even though the goods never actually leave the possession of the seller, provided the latter waives all liens for the purchase price and continues to hold the goods solely as bailee for the buyer⁸).

The Statute does not require acceptance of all the goods sold; acceptance of a part is sufficient⁹). If, however, the buyer, when he receives part of the goods, denies the contract and refuses to accept any more, it has been held that the Statute is not satisfied¹⁰). This seems reasonable, inasmuch as the receipt must be referred to the contract¹¹).

5. PART PAYMENT AND EARNEST. — The second method of satisfying the Statute is by part payment of the purchase price. The provision for giving earnest, while preserved in the Sales Act, and in most Statutes, is of no practical importance, for the custom of giving earnest to bind the bargain is obsolete¹²). Payment of any kind, if accepted as such, is sufficient¹³). The buyer's own promissory note or acceptance will not, however, amount to payment, unless there be an express agreement to that effect¹⁴). It would seem that the buyer's check would not be sufficient until paid, but there is authority to the contrary¹⁵). The payments may be made after the contract is made, except in those States which have adopted the form of the Statute in use in New York, providing for payment "at the time"¹⁶).

¹) *Remick v. Sandford*, (1876) 120 Mass. 309; *Williston on Sales*, sec. 80. — ²) *Sales Act*, sec. 4, subsec. 1; *Hatch v. Gluck*, (1905) 93 N. Y. Supp. 508. Delivery and receipt need not be at the time the contract or sale is made, although in New York part payment must be made "at the time." *Theford v. Herbert* (1909) 195 N. Y. 63. — ³) *Fein v. Weis*, (1908) 114 N. Y. Supp. 426. — ⁴) *Jones v. Mechanics Bank*, (1868) 29 Md. 287. — ⁵) The word "receipt" normally includes "delivery." *McMillan v. Heeps*, (1909) 123 N. W. 1041; *Townsend v. Hargraves*, (1875) 118 Mass. 325. But where the goods are in a warehouse, with duties to the government unpaid, it has been held that the bailee cannot consent to deliver them to the vendee. *In re Clifford*, (1873) 2 Sawy. (U. S.) 428. It is to be noted that the New York cases hold that the assent of the bailee cannot amount to an actual receipt by the buyer for the reason that thus the very purpose of the Statute, — to require something more than oral expression to evidence the transaction, — would be frustrated. *Shindler v. Houston*, (1848) 1 N. Y. 261. This view is exceptional, however, and based on an erroneous theory of the Statute. *Browne on Statute of Frauds*, sec. 320. — ⁶) *Williston on Sales*, sec. 93. — ⁷) *Gorman v. Brossard*, (1899)

120 Mich. 611. — ⁸) *Terney v. Dolen*, (1886) 70 Cal. 399; *Rodgers v. Jones*, (1880) 129 Mass. 420. — ⁹) Merely taking a sample will not amount to a receipt, unless there be an understanding to the effect that it is taken as a part of the goods. *Dierson v. Petersmeyer*, (1899) 109 Ja. 233. — ¹⁰) *Atherton v. Newhall*, (1877) 123 Mass. 141. — ¹¹) *1 Mechem on Sales*, sec. 403. — ¹²) *Benjamin on Sales*, sec. 189. — ¹³) *Sales Act*, sec. 9, subsec. 2; *Moreland v. Newberger Cotton Co.* (1909) 48 So. 187. — ¹⁴) Such instruments are treated as conditional payments, merely suspending the right of action on the original transaction, but not extinguishing it, until the instruments are actually discharged by payment. The note of a third person indorsed to the seller as owner is considered a payment. *Combs v. Bateman*, (1850) 10 Barb., (N. Y.) 573. The cancellation of a pre-existing indebtedness rather illogically is not considered payment. *Brabin v. Hyde*, (1865) 32 N. Y. 519; *Gorman v. Brossard*, (1899) 120 Mich. 611. — ¹⁵) *McLure v. Sherman*, (1895) 70 Fed. 190. *Sed quaere*. It is, of course, necessary that the check be retained by the seller; if he immediately returns it, there is no part payment. *Edgerton v. Hodge*, (1869) 41 Vt. 676. (In this case money sent in a letter was at once returned.) — ¹⁶) *Alabama, Cali-*

6. WRITING SUFFICIENT TO SATISFY THE STATUTE. — The third and the most usual mode of satisfying the Statute, is by a note or memorandum in writing of the contract or sale, signed by the party to be charged or his agent. The law does not require the contract or sale itself to be entered into in writing, though, of course, if it is, the Statute is satisfied¹). All that is required is that there shall be written evidence, in the form of a note or memorandum of the contract, in existence at the time the action is brought²). This note or memorandum must contain all of the essential terms of the transaction between the parties, which in every case will require at least the names of the parties, the description of the goods and the price. The omission of any of the terms, or an improper statement of the terms, may be shown by parol evidence, for the purpose of establishing the fact that no sufficient note or memorandum was made³). This, however, would not be the case if the contract or sale was itself in writing, for then the law regards the written instrument as being the conclusive statement of the contract⁴).

The note or memorandum need not be contained in one paper; it is sufficient if it can be gathered from several papers, provided the papers are physically attached, or there is such reference from one to the other of the various papers that they may be identified as constituting one correspondence in regard to the same transaction⁵). The writing, to satisfy the Statute, need not be made for the purpose of constituting a note or memorandum. A letter, for example, stating the terms of an alleged contract, and then repudiating it, has many times been held to be a sufficient note or memorandum⁶); and a letter written to a third person, even to the writer's own agent, may be a compliance with the Statute⁷).

The signature need not be made by the party himself. An agent whose powers are conferred by oral warrant or by implied conduct may bind his principal, even though he sign his own name to the memorandum⁸). A broker whose authority extends to buying and selling, may sign the names of both buyer and seller⁹). The only limitation on the ordinary principles of agency, seems to be that the other party to the contract cannot be constituted an agent to sign¹⁰). Where the Statute merely requires signature, the writing of the name on any part of the paper is sufficient; some

fornia, Idaho, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oregon, Utah, Wisconsin, and Wyoming. 1 Mechem on Sales, sec. 419 note. Arizona and Colorado, which Professor Mechem includes, have adopted the Sales Act.

¹) 1 Mechem on Sales, sec. 423. The sections of the Statute of Frauds in reference to the conveyance of lands usually require the contract itself to be in writing. Browne on Statute of Frauds, sec. 345. — ²) Some question once existed whether a memorandum made even after action brought was not sufficient. It seems to be settled that it is not. Purdon Co. v. Western Union Telegraph Co. (1907) 153 Fed. 327. A memorandum made after breach of the contract is, however, in time. Weymouth v. Goodwin, (1909) 105 Me. 510. — ³) The names of the parties must either appear or be described with reasonable certainty, and the buyer should be distinguished from the seller; but this does not prevent evidence to show that the parties named in the memorandum were in fact agents for undisclosed principals. Salmon Falls Manufacturing Co. v. Goddard (1852), 14 How. 446. This case also contains a valuable discussion as to the character of the description of the goods required, and as to the admissibility of trade usage to explain the memorandum. See also, Bibb v. Allen, (1893) 149 U. S. 481. W. E. Moses Land Co. v. Steck-Gibbs Lumber Co., (1910) 106 Pac. 207. The statement of the price is essential. Inman v. F. N. Burt Co., (1908) 108 N. Y. Supp. 210. That the

inaccuracy of the memorandum may be shown by parol evidence, see Fisher v. Andrews, (1901) 94 Md. 46; Kelley v. Holbrook, (1906) 191 Mass. 565. 1 Mechem on Sales, sec. 448. —

⁴) Gardiner v. McDonogh, (1905) 147 Cal. 313. — ⁵) Letters, telegrams, corporation records, private memoranda have all been held sufficient. Where the contract is effected by correspondence, it seems the letter relied upon for the signature of the party to be charged should so refer to the letter containing the terms of the contract that the latter instrument is unmistakably identified by the reference in the former. Smith v. Colby, (1884) 136 Mass. 562. Some courts, however, read all letters bearing on the same subject matter, though this intimate reference be absent. Ryan v. U. S., (1890) 136 U. S. 68, 83; Brewer v. Horst-Lachmund Co., (1900) 127 Cal. 643; Jennings v. Schartz, (1909) 88 N. E. 729. — ⁶) Capital City Brick Co. v. Atlanta Ice and Coal Co., (1909) 63 S. E. 562, where the defendant had repudiated a contract on the alleged ground that it was not in writing. The fact that the terms were disputed does not prevent the memorandum being good. See also Turner Co. v. Robinson, (1907) 105 N. Y. Supp. 98. — ⁷) Jacobson v. Hendricks (Conn. 1910) 75 Atl. 85. (Statements in letter to party's own agent. Case of land, but same principle.) — ⁸) Walker v. Hafer, (1909) 170 Fed. 37. — ⁹) Ankeny v. Young Brothers, (1909) 100 Pac. 736. — ¹⁰) Wilson v. Lewiston Mill Co., (1896) 150 N. Y. 314 but see Snyder v. Wolford, (1885) 33 Minn. 175.

statutes, however, require the memorandum to be subscribed, in which case a signature at the end of the document is required¹).

Unlike the other two methods of satisfying the Statute, to wit, acceptance and receipt, and part payment, which render the contract or sale enforceable against either party, the method of satisfaction by writing may have only a one-sided effect; the sale may be valid only against the person signing. The note or memorandum is to be "signed by the party to be charged," that is, the defendant. Though the sale may be unenforceable against the plaintiff had he been sued, because he had not signed a note or memorandum, his right to sue the defendant who has signed is not affected. A written offer accepted by parol, therefore, is a sufficient memorandum to bind the offeror²).

7. THE EFFECT OF NON-COMPLIANCE WITH THE STATUTE OF FRAUDS. — The defense of the Statute of Frauds is generally considered a privilege, and it may be waived by the defendant's failure to claim it. Notwithstanding a failure to comply with the requirements of the Statute, the title to goods may have passed from the seller to buyer, and such buyer will transfer a good title to a third person. Third persons, e. g., insurers of the goods, cannot complain of the buyer's want of title for the reason that he did not sign the memorandum. In an action brought upon the contract or sale itself, the defence will avail, but the language of the Statutes generally does not make informal sales "void," but merely "unenforceable."

Even when the word "void" is used the Courts do not, as a rule, consider it necessary to adopt a different theory of the Statute.

8. CONFLICT OF LAWS. — Although the theory of the Statute is that the defence that a contract or sale is not sufficiently evidenced is a matter appertaining to procedure, the Courts have held that the validity of the contract in connection with the question of the Statute of Frauds will be governed by the law of the place where the contract or sale was made³).

F. Subject Matter of Sale. — Some writers under the subject of Sale include the assignment of choses in action and incorporeal rights⁴). While many principles are common to the two, the characteristic problems relating to the sale of chattels are different in kind from those dealing with assignment of things in action, and clearness is obtained by confining the discussion, in general, to sales of chattels⁵). No sale can be made, it is obvious, so as to pass a present title to a chattel, unless the seller is at the time of the sale its present owner⁶). But may one agree to sell goods of which he is not yet the owner, nor, as the expression is, the "potential" owner, so that upon his acquiring the goods the title will pass to the purchaser without other act upon the latter's part? The answer is, No⁷). The rule seems to be an important exception to the fundamental principle that whether or not the title passes is wholly a question of intention. In the case of a sale of things of which the seller is potentially the owner, the question generally would be answered in the affirmative⁸). The Sales

¹) However, in *California Canneries Co. v. Scatena*, (1897) 117 Cal. 447, where the Statute required subscription, the Court held writing the name across the face of the memorandum sufficient. A printed signature has been held sufficient, as where the memorandum is written by the party to be charged upon his printed letter-head. *Grieb v. Cole*, (1886) 60 Mich. 397. — ²) *W. F. Maine and Co. v. Howell*, (1910) 66 S. E. 804. — ³) *Hunt v. Jones*, 12 R. I. 265. Cf. *Leroux v. Brown*, (England, 1852) 12 C. B. 801; *Dicey, Conflict of Laws* (2d Ed.) p. 532. — ⁴) *Story on Sales*, sec. 187; *1 Mechem on Sales*, sec. 197. Patent rights, copyrights, goodwill of a business, seats in a stock exchange, are examples of intangible or incorporeal rights that are frequently the subject of sale. — ⁵) *Sales Act*, sec. 76 provides: "Goods include all chattels personal other than things in action, and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale"

— ⁶) *1 Mechem on Sales*, sec. 199. — ⁷) *Low v. Pew*, (1871) 108 Mass. 347. In this case a sale was made of a catch of fish to be made on a particular voyage. The title to the fish did not pass to the purchaser when the fish were caught, but the title passed to the assignee in bankruptcy of the seller — the latter having become bankrupt after making the contract. — ⁸) Thus the owner of a farm may sell the growing crop, or the owner of domestic animals may sell the young of such animals before birth. *Blackwood v. Cutting Packing Company*, (1888) 76 Cal. 212. And this doctrine has been extended to cases where the crop is for a future year, or is not yet sown. *Cutting Packing Co. v. Packers Exchange*, (1890) 86 Cal. 574. The precise limits of this doctrine have never been definitely fixed. It would seem that a grant of all future crops to be grown from a particular farm, or to be grown for an indefinite time, is bad. *Shaw v. Gilmore*, (1889) 81 Me. 396 (the case of a mortgage, but governed by the principles of Sale).

Act repudiates this distinction however, and places all sales of future goods on the same footing¹). While one cannot effect a present sale of a mere expectancy, as just stated, there is no reason why his contract to sell such goods should not be good, aside from questions of public policy and statutory prohibitions²). A transaction purporting to be a transfer of title to a specified chattel, where the seller does not yet own it, will be treated as an agreement to sell so as to carry out the intention of the parties³).

Undivided interests in chattels may be the subject of sale, and if a vendor sell an undivided share, as one-half of a chattel or of a mass of chattels, no difficulty arises⁴). Suppose, however, the sale is of a defined quantity out of a mass containing an undetermined quantity, as five thousand bushels of wheat out of the vendor's warehouse; does the title to the defined quantity pass at once, if that be the intention of the parties? The rules in various jurisdictions are conflicting, and perhaps, in a majority of jurisdictions the title does not pass⁵). There seems to be no good reason, however, why some title should not be regarded as having passed to the buyer where the mass is of a uniform kind and quality⁶). A tenancy in common results, under a reasonable view, if the portion sold is a part of the undetermined mass, and if the quantity sold is greater than or equal to the mass, the title to the whole will pass⁷). This tenancy in common is subject to some peculiar incidents, for example, the proportion cannot be stated until the mass is measured; but such difficulties do not seem sufficient to warrant the classification of such transactions with sales of expectancies, and to engraft another exception upon the general rule giving effect to the intention of the parties⁸). The rule should apply to cases where, though the goods are not strictly all of the same kind and quality, they are, nevertheless, treated by the parties as such, as in the case of sheep out of a flock, and the like⁹).

¹) Sales Act, sec. 5. "1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called future goods. 2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. 3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods."

— ²) Contracts to sell for future delivery are valid in the absence of Statute, unless they amount to a wagering contract. *Bibb v. Allen*, (1893) 149 U. S. 481. If either of the parties honestly intends delivery of goods, the contract is not a gambling contract, but if there be an absence of intention on the part of both to actually buy or sell goods, and if their real intention be to speculate merely upon the fluctuations in price, the contract is a gambling contract and unenforceable. *Irwin v. Williar*, (1884) 110 U. S. 499. In some States, statutes have made contracts for dealing in "futures" illegal in some other cases. *Illinois*, Rev. Stat., c. 38, sec. 130; *Wolf v. McNulta*, (1899) 178 Ill. 85; *Loeb v. Steen*, (1902) 198 Ill. 371; *California*, Constitution, Art. IV, sec. 26; *Parker v. Otis*, (1900) 130 Cal. 322; *Otis v. Parker*, (1903) 187 U. S. 607. These provisions deal with sales of shares of corporation stock upon margins. In a few States the Statutes are more rigorous. Thus, in South Carolina contracts for the future delivery of cotton, are void, unless the intention of the parties be to actually deliver the cotton, and the plaintiff has the burden of showing that actual delivery was intended. *South Carolina*, Rev. Stat., secs. 1859—1861; *Saunders v. Phelps Co.*, (1898) 53 S. C. 173; *Missouri*, Rev. Stat. (1889), secs. 3931—3936; *Georgia*, Civil Code, sec. 3537

is particularly sweeping: "A bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling, to a future benefit; so a contract for the sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase himself to fulfil his contract, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party." *Mississippi*, Rev. Code, 1892 secs. 1120, 1121, and 2117; *Arkansas*, Sand. and H. Dig. secs. 1634, 1635. — ³) *Bates v. Smith*, (1890) 83 Mich. 347. — ⁴) *Williston on Sales*, sec. 147; *Sales Act*, sec. 6, subsec. 1. — ⁵) 24 Am. & Eng. Encyc. Law (2d Ed.), 1055—1057. It should be observed that many of the jurisdictions which deny the possibility of passing title in such cases, allow an exception in the cases of public warehouses. Among the jurisdictions in which it has been held that title does not pass are: *Massachusetts*, *N. E. and Co. v. Standard Worsted Co.*, (1896) 165 Mass. 329; *Pennsylvania*, *Haldeman v. Duncan*, (1865) 51 Pa. St. 66; *Ohio*, *Woods v. Magec*, (1836) 7 Ohio, 467. But see *Newhall v. Langdon*, (1883) 39 Oh. St. 87; *California*, *McLaughlin v. Piatti*, (1865) 27 Cal. 451, apparently overruling *Horr v. Barker*, (1858) 11 Cal. 393. The rule in both *Massachusetts* and *Ohio* has been abrogated by the adoption of the Sales Act. — ⁶) In the following States, among others, the title passes: *New York*, *Kimberly v. Patchin*, (1859) 19 N. Y. 330; *Illinois*, *Cloke v. Shafroth*, (1891) 137 Ill. 393; *Connecticut*, *Chapman v. Shepherd*, (1872) 39 Conn. 413; *Iowa*, *Welch v. Spies*, (1897) 103 Ia. 389. — ⁷) *Sales Act*, sec. 6, subsec. 2, adopting the rule in *Kimberly v. Patchin*, (1859) 19 N. Y. 330. — ⁸) *Kimberly v. Patchin*, (1859) 19 N. Y. 330. — ⁹) *Williston Sales*, sec. 159.

If the thing which is the subject of the sale has ceased to exist when the sale is made, no rights are created by the transaction¹); if partly destroyed, the buyer should have the right of avoiding the sale. He may, of course, have the remaining goods if he choose to pay the whole price. The difficult question is whether he shall not be permitted to make an abatement from the price for the goods destroyed. He should be permitted to make such abatement if the price is divisible. In case of the contract to sell, the accidental destruction of the subject matter avoids the contract altogether. The partial destruction or deterioration of the goods should authorize the rescission of the contract²).

G. The Price. — The existence of a price is necessary to a sale and distinguishes it from a gift³). But the price need not be fixed by express agreement. A sale may be made without any price being fixed in which case the buyer is bound to pay a reasonable price — a question to be determined by the jury from evidence⁴). The price need not be payable in money; the best modern authorities class barter or exchange with sale⁵). The sale may be made leaving the price to be fixed subsequently by valuers. In such case, the defendant will be liable only for the price so fixed, and the valuation is absolutely conclusive, in the absence of fraud on the part of the valuers⁶). If the valuation is, for any reason, not made, or if it becomes impossible to make the valuation, the sale is not complete, the buyer need not pay the price, and the seller may retake the goods, if they have been delivered to the buyer⁷). If the goods cannot be returned, the buyer will be liable in an action for conversion or in an action in quasi contract⁸).

Sometimes the price is made contingent upon events other than the action of valuers⁹). The limitations on the power of the parties to make such agreements are chiefly two: 1. The event must not be one entirely within the control of the buyer or the seller¹⁰); 2. It must bear some relation to the value of the property¹¹). An executory contract to sell for such price as the parties may subsequently agree to pay, or to buy such goods as the buyer may desire, cannot be enforced for the reason that there is no agreement to buy or sell, but at most a mere offer or proposal, looking to a future contract¹²). The second limitation may be illustrated by the hypothetical case of the buyer agreeing to pay \$ 20 000 for a race horse if it should outrun another horse, and \$ 50, if it does not, the actual value of the horse being \$ 1000. Such a contract is a thinly disguised wager¹³).

III. TRANSFER OF PROPERTY. — **A. In General.** — The property in specific or ascertained goods passes at such time as the parties indicate that they intend it

¹) *Gardner v. Lane*, (1865) 12 Allen, 43. —

²) The statements in the text are based on the Sales Act, secs. 7 and 8. — ³) *Gray v. Barton*, (1873) 55 N. Y. 68. — ⁴) *McEwen v. Morey*, (1871) 60 Ill. 32. ("Will make it satisfactory as to price"); *Taft v. Travis*, (1883) 136 Mass. 95; *Lambert v. Hays*, (1910) 121 N. Y. Supp. 80. — ⁵) *Williston on Sales*, sec. 170; Sales Act, sec. 1. The price must, however, be payable in personal property; if payable in land, the contract is one for the transfer of real estate. — ⁶) *Chicago, etc., R. R. v. Price*, (1891) 138 U. S. 185. — ⁷) *Elberton Hardware Co. v. Hawes*, (1895) 122 Ga. 858. An agreement by which an officer is appointed valuer is not satisfied where his deputy makes the valuation. *Leonard v. Davis*, (1861) 1 Black (U. S.) 476. — ⁸) *Humaston v. American Telegraph Co.*, (1873) 20 Wall., 20. — ⁹) As an agreement to sell "at the lowest jobbing prices." *Beardsley v. Smith*, (1895) 61 Ill. App. 340. — ¹⁰) Thus, an agreement to sell ice at such a price as to give the seller a profit of "not less than \$ 1 per ton," gives the buyer complete control as to the price, and is hence unenforceable. *Buckmaster v. Consumer's Ice Co.*, (1874) 5 Daly (N. Y.) 313. Sometimes this is spoken of as uncertainty. — ¹¹) *Deyo v. Hammond*, (1895) 102 Mich. 122.

— ¹²) Instances of such "illusory" contracts are frequent; e. g. an agreement to sell oil at a certain rate in such quantities as the buyer might desire. *American Cotton Oil Co. v. Kirk*, (1895) 68 Fed. 791. (The court erroneously holds it void for want of mutuality, a thing not required by the law.) An agreement, however, to buy the entire output of a factory or whatever is needed of a certain material for the requirements of a particular business is valid. *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, (1903) 121 Fed. 298. An agreement to buy "all that is needed" of a certain article is unenforceable. *McCaw Mfg. Co. v. Felder*, (1902) 115 Ga. 408. But an agreement to pay \$ 12 per ton for all of such scrap iron then on plaintiff's premises, as plaintiff might desire to sell, was held valid, because plaintiff lost his right to sell to any one else. *Burgess Sulphite Fibre Co. v. Broomfield*, (1902) 180 Mass. 283. See also *Price v. Atkinson*, (1906) 94 S. W. 816; *Wheaton v. Cadillac Automobile Co.*, (1906) 143 Mich. 21. The distinction seems to be between fixing the quantity or price by a subjective standard and fixing it by an objective one. — ¹³) Cf. *Newell v. Smith*, (1885) 53 Conn. 72.

to pass¹). Thus it may pass at the time of making the contract, or at any subsequent time upon which the parties may agree²). The property may pass without delivery, and conversely delivery may be made without passing property³). Not even the fact that the possession and the risk of loss are both with the buyer under the contract necessarily establishes that the property has passed⁴).

The ultimate question is always: What was the manifested intention of the parties with reference to the passing of the property⁵)? If the determination of this question depends altogether upon the construction of writings, that is, if the contract is completely in writing, the judge will alone pass upon it⁶). If, however, the circumstances of the case, the usages of trade, and the conduct of the parties are all that the tribunal has before it to form a judgment, the question as to when the title passes will be left to the jury in a doubtful case, under proper instructions from the Court⁷).

B. Rules for Ascertaining Intention. — Certain rules for ascertaining intention have been developed, and are to be applied where the intention is not otherwise expressed. But it must be noted that these rules only state presumptions and may therefore be displaced by proofs of facts warranting different conclusions. The rules are:

1. If the goods are ascertained and in a deliverable state, the property is presumed to pass when the contract is made. The facts that the time of payment and the time of delivery are postponed, do not overcome this presumption.

2. If the goods are ascertained, but are not in a deliverable state, and the seller must do something to put them in that state, the property is presumed not to pass until that thing is done.

3. a) If goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer the option of returning the goods instead of paying the price, the property is presumed to pass to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time.

b) If, however, the goods are delivered "on approval" or "on trial" or "on satisfaction" or similar terms, the property is presumed to pass to the buyer only when he signifies his approval or acceptance or does other act adopting the transaction, or when he retains the goods beyond the time fixed for this return, if a time has been fixed, or, if no time for return has been fixed, beyond a reasonable time.

The rules thus far stated, it will be observed, deal with the transfer of the property in specified goods. The following rules deal with the presumptions in regard to the passing of the property in cases of contracts to sell where the goods were not ascertained or specified at the time the contract to sell was made.

4. Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property passes when such appropriation is made. A delivery to the buyer or to a carrier or other bailee (whether designated by the buyer or not) for transmission to the buyer is presumed to be an appropriation by the buyer under the contract.

5. If the contract to sell expressly requires delivery to the buyer or at a particular place, or requires the seller to pay the freight or cost of transportation to the buyer, the property is presumed not to pass until the goods have been so delivered⁸).

¹) Sales Act, sec. 18, subsec. 1. The property in unascertained goods cannot pass, so long as they are unascertained; such contract is necessarily executory. Sales Act, sec. 17. — ²) Hatch v. Oil Co., (1879) 100 U. S. 124; Briggs v. U. S., (1892) 143 U. S. 346. — ³) Leonard v. Wood, (1879) 1 Black (U. S.) 124. Delivery, not essential, Driscoll v. Driscoll, (1904) 43 Cal. 528. — ⁴) The Elgee Cotton Cases, (1874) 22 Wall 180, 194. The Court argues that the fact that the contract expressly put the risk on the buyer, indicated a purpose that the title should not pass, for the provision would otherwise be unnecessary, because the

risk always passes in cases of executed sales. — ⁵) 1 Mechem on Sales, secs. 477—479. — ⁶) Ruthrauff v. Hagenbuch, (1868) 58 Pa. St. 103; Leonard v. Davis, (1861) 1 Black (U. S.) 476. So also where the facts are so clear as to justify but one conclusion, the court should determine the question. Wigton v. Bowley, (1881) 130 Mass. 252. — ⁷) Yee v. Tetzen, (1909) 12 Cal. App. 54. It should be remarked that it is not the secret or undisclosed intention which governs, but the intention as disclosed by the parties, acts, and declarations at the time the contract is made. Foster v. Ropes, (1872) 111 Mass. 10. — ⁸) Sales Act, sec. 19.

In some jurisdictions another rule exists, as follows:

6. Where the goods are ascertained and in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act for the purpose of ascertaining the price, the property does not pass until such act is done¹). This rule has not been adopted in the Sales Act²).

RULE I. PROPERTY PRESUMED TO PASS WHEN CONTRACT IS MADE. — This is the most general rule. If the goods are specified and nothing remains for the seller to do, except to deliver the goods, and nothing for the buyer, except to receive them and pay the price, the title will be regarded as having passed by the contract³). After the sale and before the delivery to the buyer, the seller remains a bailee or custodian of the goods, with a right to detain the goods until the price is paid. His position is very analogous to that of a pledgee⁴). If the sale is for cash, however, the payment of the price will be a condition precedent to the passage of title⁵). The payment of the price is of course strong evidence in every case that the title has passed, but is by no means conclusive evidence of that fact⁶).

RULE II. PROPERTY PRESUMED NOT TO PASS WHERE SOMETHING IS TO BE DONE BY THE SELLER TO PUT THE GOODS IN A DELIVERABLE STATE. — This rule applies to cases where something more than merely counting, weighing, testing, or measuring the goods is necessary⁷). Thus, in a sale of wool, the fact that the wool is to be put in sacks and weighed, raises the presumption that the title has not passed⁸). The delivery and acceptance of the goods in an incomplete form shows a waiver of the condition, and the same effect would be given a mere delivery, so far as the seller is concerned. If he deliver the goods in an incomplete form, he cannot claim that the title has not passed⁹). Where only a part of the goods have been put in a deliverable state, the title will not be presumed to pass, where there is no indication that the contract was divisible¹⁰).

RULE III. "SALE OR RETURN" AND "SALES ON APPROVAL." — The difference between these two transactions is that in the first the title to the goods passes at once, subject to the buyer's right of returning them if unsatisfactory; in the second the title does not pass until the goods are approved by the buyer¹¹). In the case of sale or return, the conditions must be strictly complied with in order that the right to return the goods may be exercised, and the risk of the return becoming impossible of performance is on the buyer. If, therefore, the goods are accidentally lost or destroyed, the buyer must pay for them¹²). So the return must be made strictly within the time limited¹³). If no time is fixed, the return must be made within a reasonable time¹⁴). All that the buyer need do in order to revest title in the seller is to tender the goods to the latter; it is not necessary that the seller actually retake possession of the goods¹⁵).

¹) The Elgee Cotton Cases, (1874) 22 Wall. 180; Nicholson v. Taylor, (1858) 31 Pa. St. 128; Home Ins. Co. v. Heck, (1872) 65 Ill. 111. In New York and a few other States, the rule is limited to sales of unascertained goods, where the weighing is necessary for identification. Sawyer v. Waterbury, (1889) 116 N. Y. 374; Lassing v. James, (1895) 107 Cal. 348. In a few States, the title does not pass even where the weighing or testing or measuring is to be done by the buyer. Mc Fadden v. Henderson, (1901) 128 Ala. 221; Bannantyne v. Appleton, (1890) 82 Me. 570. — ²) The rule, therefore, which was adopted by the Massachusetts Court, no longer prevails in that jurisdiction. Weslowski v. Wysoski, (1900) 186 Mass. 495. — ³) 1 Mechem on Sales, sec. 483. — ⁴) Sales Act, sec. 54. — ⁵) Not every so called "cash" sale necessarily implies that the property does not pass until payment of the price. Sometimes the sale is called a "cash" sale where it is the understanding of the parties that the possession shall not pass until payment. See post *Cash Sales*. — ⁶) Terry v. Wheeler, (1862) 25 N. Y. 520. — ⁷) 1 Mechem on Sales, sec. 507. — ⁸) Straus v. Ross, (1865) 25 Ind. 300. — ⁹) Williston on

Sales, sec. 265. — ¹⁰) Kein v. Tupper, (1873) 52 N. Y. 550. — ¹¹) On difference "sale or return" and "option to purchase or return," see Gottlieb v. Rinaldo, (1906) 78 Ark. 123; Northwestern Wheel, etc., Co. v. Milwaukee Electric St. Ry. Co., (1896) 94 Wis. 603; In re Miller v. Brown, (1905), 135 Fed. 868. — ¹²) Foley v. Fehrath, (1893) 98 Ala. 176; Carter v. Wallace, (1884) 32 Hun (N. Y.) 384. (Horse died before time for return.) — ¹³) Prairie Farmer Co. v. Taylor, (1873) 69 Ill. 440. — ¹⁴) The court sometimes determines whether the time is reasonable, in cases where the matter is not doubtful. Buckstaff v. Russell, (1897) 79 Fed. 611. (Machines kept three years and a half.) In Greacen v. Poehlmann, (1908) 191 N. Y. 493 (goods kept six months and defect latent) the question was left to the jury under instructions. The buyer has the full period allowed for the test, if sold to be tested for a certain time, and a reasonable time in addition thereto. Springfield Engine Shop Co. v. Sharp, (1903) 184 Mass. 266. — ¹⁵) The failure of the seller to give directions as to reshipment will waive the condition for a return within a fixed period. Colles v. Swens-

The cases of "sales on approval" or "sales if satisfactory," or "on trial" are sometimes difficult to distinguish from the case of "sale or return," and in doubtful cases, the question as to what was the intention of the parties will be left to the jury¹). Unlike the corresponding case in a "sale or return," the failure of the buyer to notify his approval or satisfaction, or to return the goods within the time fixed has been decided not to be a conclusive circumstance²). The Sales Act, with perhaps doubtful propriety, makes the retention beyond the time specified for the rejection of the goods conclusive³). The failure to notify rejection for an unreasonable time is equivalent in its effect, so far as the claim against the buyer is concerned, to an approval⁴). Whether the seller should be considered as having consented to the title passing in such case, is a somewhat different question⁵). But the Sales Act makes no distinction between the two cases⁶). The buyer in such sales, if not satisfied, need not return the goods; he need only express his dissatisfaction⁷). Whether the dissatisfaction must have a reasonable basis, is not wholly clear. A distinction may perhaps exist between objects intended merely to satisfy the taste, as pictures, and other objects. In the case of the former, there is evidently no standard by which courts can say the goods are satisfactory⁸); in case of the latter, they are able to determine whether the dissatisfaction is honest or only feigned⁹).

RULE IV. SUBSEQUENT APPROPRIATION NECESSARY IN SALES OF UNSPECIFIED GOODS. — The title to goods under a contract to sell where the goods are not appropriated by the contract itself, that is, where they are unspecified at the time the contract is made, does not pass until the goods are appropriated to the contract either by the seller or by the buyer with the consent of the other party¹⁰). The mere completion of the goods and putting them in a deliverable shape is not sufficient in general to pass the title in such case as it is in the case of specified goods, although the parties may by clear agreement provide otherwise by their agreement¹¹). Some other act is necessary to constitute appropriation¹²).

An appropriation, to be sufficient for the purpose of passing title to the goods, must be an act done by one of the parties with the assent of the other, given either antecedently or subsequently¹³). Consequently, the questions as to what acts are sufficient to constitute an appropriation, are as numerous as possible contracts for sale¹⁴). Setting apart the goods and marking them for the buyer has been held a sufficient appropriation, these acts being done pursuant to the contract¹⁵). Placing goods in receptacles furnished by the buyer is also considered a sufficient appropriation¹⁶). But when the goods are thus placed in the buyer's receptacle, the appro-

berg, (1892) 90 Mich. 223. See also *Gay v. Dare*, (1893) 103 Cal. 454, to the effect that the buyer's right to return is absolute in such cases. See also *Cornell v. Fox*, (1904) 88 N. Y. Supp. 482. A mere notice by the purchaser that the property is held subject to the seller's order, is not sufficient. *Dickey v. Winston Cigarette Machine Co.*, (1903) 117 Ga. 131.

¹) *Reber v. Schitler*, (1891) 141 Pa. St. 640. — ²) *Hunt v. Wyman*, (1868) 100 Mass. 198. The failure to return the goods may of course be caused by accident or inability to ship the goods, or other cause. —

³) Sales Act, sec. 16, Rule 3, subd. 2 b. —

⁴) *Cook v. Gross*, (1901) 69 N. Y. Supp. 924. The same effect will follow from any disposition of the goods by the buyer which shows an intention to exercise dominion, as by reselling them. 1 *Mechem on Sales*, sec. 671. — ⁵) *Re George M. Hill Co.*, (1903) 123 Fed. 866. — ⁶) Sales Act, *ubi supra*. — ⁷) 1 *Mechem on Sales*, sec. 670. — ⁸) *Zaleski v. Clark*, (1876) 44 Conn. 218. (Bust); *Brown v. Foster*, (1873) 113 Mass. 136. (Suit of clothes). — ⁹) *Duplex Safety Boiler Co. v. Garden*, (1886) 101 N. Y. 387. (Boilers) *Hawkins v. Graham*, (1889) 149 Mass. 284. (Heating plant). Of course the language of the contract may be so precise, even in this class of cases, as to show that

nothing less than the personal satisfaction of the buyer was intended. — ¹⁰) Sales Act, sec. 19, Rule 4, sub. 1. — ¹¹) The requirement of some formal act in the case of sales of unspecified or future goods (including goods to be manufactured) seems reasonable, and is not in conflict with the general principle that no form whatever is necessary under the common law in cases of sales of specified chattels. — ¹²) *Williston on Sales*, sec. 274; 1 *Mechem on Sales*, secs. 726—728. — ¹³) This assent need not be given expressly. Thus, where one orders goods of a particular description from a dealer, he impliedly assents to the seller's making the appropriation. *Mitchell v. Le Clair*, (1896) 165 Mass. 308. Where the sale is by sample, the seller must show that the goods appropriated conformed to the sample. *Smith v. Edwards*, (1892) 156 Mass. 221. — ¹⁴) The question is, therefore, one of fact for the jury. *Weld v. Came*, (1867) 98 Mass. 152. — ¹⁵) *Mitchell v. Le Clair*, *ubi supra* (1896) 165 Mass. 308. — ¹⁶) As, in the buyer's ship or car, sacks, or bottles. It should be observed in this, as in all the other cases mentioned in this section, that these acts only raise presumptions, and acts of the parties indicating different intentions will control.

priation will ordinarily not be sufficient, unless all of the goods intended to be sold have been placed in the receptacles¹). A partial appropriation is not an appropriation pursuant to the contract.

Appropriation by Delivery to Carrier. — Where the seller delivers the goods to a carrier for shipment to the buyer, the title is presumed to pass, and the delivery to the carrier is an appropriation of the goods to the contract²). The delivery, however, to have this effect must be in accordance with the terms of the contract, or the directions of the buyer, if such directions be given. Thus, shipping the goods by another route than that designated will prevent this act from constituting an appropriation⁴). The delivery which may be sufficient to pass title, may not, as already mentioned, be sufficient to satisfy the requirement of acceptance and receipt under the Statute of Frauds³). The presumption that the title passes in case of delivery to a carrier is applicable under the Sales Act, even where the seller marks the goods "C. O. D.", meaning "Collect on delivery"⁵). Such is also the prevailing doctrine⁶). The Sales Act expressly excepts from the presumption, cases where delivery is to be made at a particular place and other cases falling under the fifth rule of the section under consideration, and also cases where the seller reserves the right of possession or the property in the goods under the twentieth section of the Sales Act.

RULE V. WHERE THE SELLER IS TO DELIVER AT A PARTICULAR PLACE, THE PRESUMPTION IS THAT THE PROPERTY DOES NOT PASS UNTIL SUCH DELIVERY. — Ordinarily the seller's duty is discharged by having the goods ready for delivery at his residence or place of business⁷). If he undertakes to deliver the goods to the buyer at the latter's residence or place of business, or elsewhere, the title does not pass until such delivery is made⁸). If the buyer is by the contract to pay the freight, the presumption is that the title passes when the delivery is made to the carrier; if, however, the seller is to pay the freight to the point of destination, the presumption is that the title does not pass until the goods reach that point⁹). The letters "F. O. B." have acquired a well defined meaning in this connection. They stand for the words "free on board," and mean that the seller is to pay all costs until the goods are delivered at the place where they are to be "F. O. B."¹⁰). If goods are sold "F. O. B." at place of shipment, the presumption will accordingly be that the title passes there; if "F. O. B." at the point of destination, the presumption is that the seller reserves the title until delivered at that point¹¹).

C. Reservation of Jus Disponendi. — Notwithstanding the delivery of the goods to a carrier, the seller may indicate an intention to reserve title until payment of the price by the buyer. One of the most usual means by which this intention may be evinced is by the disposition of the bill of lading. Under the prevailing practice of American railroads, sanctioned by judicial decisions, two classes of bills of lading have come into use, — the so-called "straight" bill of lading, under which the goods are deliverable to the consignee only, and the "order" bill of lading, under which the goods are deliverable to the order of the consignee, that is, upon his written indorsement. When the first kind of bill of lading is issued, the carrier is not bound to

¹) Thus, in *Rochester Oil Co. v. Hughey*, (1867) 56 Pa. St. 322, where there was a contract to sell several boat loads of oil to be drawn from tanks into the buyer's boats, and where one of the buyer's boats was destroyed by fire when partly filled, the loss was held to fall upon the seller, and the buyer was not liable for the price of the oil already placed in his boat. See also, *Hays v. Pittsburgh Packet Co.*, (1888) 33 Fed. 552. The same principle applies to the case of manufactured articles, as the building of a ship. The title does not pass until the ship is finished and ready for delivery. *Clarkson v. Stevens*, (1882) 106 U. S. 505; *Yukon Steamboat Co. v. Gratto*, (1902) 136 Cal. 538; *Andrews v. Durant*, (1854) 11 N. Y. 35. — ²) *Carthage v. Munsell*, (1903) 203 Ill. 474; *United States v. Andrew*, (1907) 207 U. S. 229; *Sales Act*, sec. 19, Rule 4, subd. 2. — ³) *Filley v. Pope*, (1885) 115 U. S. 213. — ⁴) See *supra*,

Acceptance and Receipt of Part of Goods. — ⁵) *Sales Act*, sec. 19, Rule 4, sub. 2. — ⁶) See cases collected and discussed in 4 *Columbia Law Review*, 541, by Charles Noble Gregory. It is stated by Professor Gregory that the rule is as laid down in the *Sales Act* in Alabama, Arkansas, Illinois, Kansas, Kentucky, Maine, North Carolina, New York, Pennsylvania, Texas, and West Virginia. The rule that title does not pass until payment prevails in Georgia, Iowa, Missouri, and Vermont. — ⁷) *Sales Act*, sec. 43. — ⁸) *United States v. Andrews*, (1907) 207 U. S. 229; *Pacific Iron Works v. Long Island R. R.*, (1875) 62 N. Y. 272. — ⁹) *Dr. A. P. Sawyer Medicine Co. v. Johnson*, (1901) 178 Mass. 374. — ¹⁰) *Silberman v. Clark*, (1885) 96 N. Y. 522. — ¹¹) *Devine v. Edwards*, (1881) 101 Ill. 138; *Knapp Electrical Works v. N. Y. Insulated Wire Co.*, (1895) 157 Ill. 456; *Hurst v. Altamont Mfg. Co.*, (1906) 73 Kas. 422.

demand the bill of lading before delivering the goods, and is protected by a delivery to the consignee, notwithstanding the bill of lading may be in a third person's hands¹). Where an order bill is issued, the carrier must deliver to the holder of the bill of lading and must therefore demand its production²).

The seller of goods may:

1. Take a straight bill of lading with his own name or that of his agent. Title is presumed to be reserved, but the presumption, while very strong, is not conclusive³).

2. Take an order bill of lading in his own name or in that of his agent. Title is presumed to be reserved as in the first case. In both of these cases, the title is reserved only as security⁴).

3. Take a straight bill of lading in the buyer's name, and forward the same to the buyer. Title is presumed to pass in such case.

4. Take an order bill of lading in the buyer's name, and forward the same properly indorsed to the buyer. Title is presumed to pass⁵).

5. Take a straight bill of lading in the buyer's name and retain the same by himself or agent until payment, of the price. The title is presumed to pass, but the seller's right of possession is retained. So far as third persons are concerned, this method is inadequate. For as the buyer may procure the goods without the bill, he may sell them to a third person for value, and defeat the seller's right of possession.

6. Take an order bill of lading in the buyer's name and retain the same until payment of the price. Title passes, but the right of possession is effectually reserved to the seller. This is a somewhat usual means of reserving the right of possession⁶).

7. Take a straight bill to the seller's order and discount a bill of exchange for the price with a bank, giving the bill of lading as security. The bank becomes the owner of the goods as security for the payment of the bill. This is a very usual method⁷).

8. If the bill of lading be a straight bill in favor of the seller, and be delivered by the buyer to the bank which discounts the bill of exchange, the bank in such case becomes an equitable pledgee of the bill of lading.

9. If the bill be a straight bill in favor of the buyer, the bank is an equitable assignee of the seller's rights until the carrier agrees to hold the goods for the bank, when it becomes in effect a pledgee. This form is manifestly very inadequate for the buyer may obtain possession without such bill.

10. If the bill be an order bill in favor of the buyer, the bank, by taking the bill, stands in the same position as the seller, — it has a right of possession until payment of the price⁸).

11. Though the bill of lading be taken in the name of the buyer, or in the name of the seller, and indorsed by him, and forwarded to the buyer, the presumed intention that title passes is overcome, where the seller annexes to the bill and sends to the buyer, at the same time and by the same means of conveyance, a bill of exchange for the price⁹). In such cases, title is presumed not to pass until payment of the bill of exchange, if it be payable on demand or at sight¹⁰), nor until acceptance, if it be payable a definite time after date or after sight¹¹). Of course, the seller would be imprudent to deliver such a bill of lading to the buyer, for the reason that third persons buying the bill of lading or the goods from the buyer under such circumstances without notice of the buyer's defect of title will be protected.

¹) *Singer v. Merchants Transportation Co.*, (1906) 191 Mass. 449. — ²) *Walters v. Western, etc.*, R. R. Co., (1893) 56 Fed. Rep. 369; (1894) 63 Fed. 391. — ³) *North Penn., etc.*, R. R. v. *Commercial Bank*, (1887) 123 U. S. 727; *The Prussia*, (1900) 100 Fed. Rep. 484. In *Dows v. National Exchange Bank*, (1875) 91 U. S. 618, evidence of taking the bill to seller or his order was held "almost conclusive" on this question of the seller's intent to reserve title. — ⁴) *Sales Act*, sec. 20, subsec. 2; "If, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under

the contract." — ⁵) *Hatch v. Bayley*, (1835) 12 Cush. 27. The carrier plainly waives his *jus disponendi* by sending the bill to the buyer. — ⁶) *Williston on Sales*, sec. 285. — ⁷) Sometimes the bank itself is made consignee. In such case it becomes an owner, but only for the purpose of securing itself. *Farmers' and Mechanics' Bank v. Logan*, (1878) 74 N. Y. 568; *Williston on Sales*, sec. 286. — ⁸) *Williston on Sales*, sec. 284. — ⁹) *Sales Act*, sec. 20, subsec. 4. And see, *Emery's Sons v. Irving Bank*, (1874) 25 Oh. St., 360; *Dows v. National Exchange Bank*, (1875) 91 U. S. 618. — ¹⁰) *Kentucky Refining Co. v. Globe Refining Co.*, (1898) 104 Ky. 559. — ¹¹) *National Bank v. Merchants' Bank*, (1875) 91 U. S. 92.

12. Instead of sending the bill of lading and draft directly to the buyer, it is more usual to send the documents to the seller's agent, with instructions. If the bill of exchange is, as in the last case, a demand or sight bill, the buyer must pay the draft before he is entitled to the bill of lading; if it be a time bill, he is entitled to the bill of lading upon merely accepting the bill of exchange, unless, of course, the terms of the contract are otherwise¹).

It should be noticed that under the rules prevailing in the United States, no difference is made between the bills of lading of land carriers and of carriers by sea, so far as these questions are concerned²). The right of stoppage *in transitu* should be carefully distinguished from the reservation of the *jus disponendi*. The right of stoppage *in transitu*, (which is becoming infrequent in its exercise by reason of the facility with which in modern commercial practice the title may be reserved by means of the bill of lading), is merely a remedy and avails the seller only after title has passed³).

D. Risk of Loss. — The risk of loss usually follows title⁴). Indeed, one of the most familiar tests for the determination of the question as to whether the property has passed or not, is to ask the question: on whom was the risk of loss⁵)? Nevertheless, it is possible for the risk of loss to be upon a party notwithstanding the title is not in him. An illustration of this is in the case of conditional sale, where the title is expressly reserved to the seller until the price is fully paid, but the buyer is at once entitled to use the goods as his own. The prevailing view in such cases is that, notwithstanding title has not passed to the buyer, the seller reserves the legal title simply as security, and the risk of loss is upon the buyer⁶). Again, in the case of goods shipped under a bill of lading, even though in form title is reserved in the seller, as when the bill is taken to the order of the consignee and is sent to his agent to hold until payment of the price by the buyer, if the property is reserved only as security for the payment of the price, the risk of loss has been held to be upon the seller⁷). In the case where the bill of lading is to the buyer's order, there can be no doubt that the risk of loss is on the buyer. The Sales Act also provides that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault⁸). It also provides that where the custom is to insure goods in transit, the seller must notify the buyer of the shipment so as to enable him to insure, or the goods will be at the seller's risk during the transit⁹).

E. Sale by a Person not the Owner. — 1. IN GENERAL. — A sale, in general, carries only the interest which the seller has, and, when an unauthorized sale is made by a third person not the owner, the owner may retake the goods from subsequent purchasers however remote from the wrongdoer, and without regard to their good faith in purchasing¹⁰). If negotiable instruments and money are considered as subjects of sale, an exception will have to be made to the above statement in favor of such classes of property¹¹). So, too, bills of lading, warehouse receipts, and certificates of stock, considered as property, partake of the character of negotiable instruments in some degree¹²). But with these possible exceptions, the rule is universal that the buyer gets only the title which his seller had.

This rule, however, is subject to qualification by the operation of the so-called doctrine of estoppel, whereby a person who, by his conduct, has induced another to

¹) Where the bill of exchange is a sight bill, it is by the common law, and in most states where the Uniform Negotiable Instruments Law is not in force, not payable until three days after sight (days of grace). Even where the days of grace are allowed, however, it would seem that the agent should require payment of the draft, and not merely acceptance, before surrendering the bill of lading. *Walters v. Western etc. R. R. Co.*, (1893) 56 Fed. 369, (1894) 63 Fed. 391. — ²) Williston on Sales, sec. 283. It should be noted that the fact that goods are shipped on the buyer's ship does not overcome the presumption in favor of the reservation of the *jus disponendi* when the receipts are in the seller's name. *National Bank v. Merchants Bank*, (1875)

91 U. S. 92. — ³) See section on *Stoppage in Transitu*. — ⁴) Sales Act, sec. 22. — ⁵) This, of course, is merely an empirical test and by no means conclusive, but, in a doubtful case, is of importance. — ⁶) *Chicago Equipment Co. v. Merchants Bank*, (1890) 136 U. S. 268. — ⁷) Williston on Sales, sec. 305; *Farmer's and Mechanics' Bank v. Logan*, (1878) 74 N. Y. 568. — ⁸) Sales Act, sec. 22b. — ⁹) Sales Act, sec. 46, subsec. 3. On the general subject of the risk of loss, see article in 9 *Harvard Law Review*, p. 106, by Professor Williston. — ¹⁰) *Soltau v. Gerdau*, (1890) 119 N. Y. 380. — ¹¹) *1 Mecham on Sales*, sec. 124. — ¹²) See Sales Act, secs. 27—40; California, Civil Code, sec. 2117.

change his position, is precluded from asserting rights against such person¹). While, therefore, the title may not have passed by reason of an unauthorized sale by a third person, the owner may, by his conduct, have prevented himself from setting up his rights. The precise limits of the doctrines of estoppel have, perhaps, not been fixed, as the doctrine itself in the present form is not an ancient one in the law, and is an importation into the strict rules of the common law of principles of natural justice. It has been decided that merely entrusting the possession of goods to a third person is not such conduct on the part of the owner as will forbid his recovering the goods, if the third person wrongfully sells them²). On the other hand, where the owner of goods entrusts the possession of the goods, together with the indicia of title, as the indorsed warehouse receipts or bills of lading, to a third person for any purpose, and the third person, in violation of his duty, sells the goods to a bona fide purchaser, the owner is estopped from asserting his demand against such third person³). The reason of the distinction is found in the fact that the owner, who merely lends his goods to a third person is not guilty of any degree of fault or negligence — he does no act which enables the lender to commit a fraud on third persons — while the owner who puts into the hands of a third person the negotiable or quasi negotiable evidences of title should suffer for that person's fraud rather than innocent persons who have no means of learning the limits of his powers or rights. Between these two extremes, however, there may arise an infinite number of situations in which the decision of the question will turn upon the application of this broad principle of justice. One of the most usual cases is where goods are entrusted to an agent of the seller with power to sell them upon certain terms, as for cash only, and the agent sells the goods in disobedience of his instructions, for example, on credit⁴). The principal is universally held bound, where the purchaser bought without notice of the limitations or in the usual course of trade. But a sale by a factor or agent entrusted with possession of the goods for purposes of sale, in settlement of his own debts is, by the common law, void, as is his pledge of the goods⁵). The principal in such cases is not by the common law estopped from claiming the goods from the purchaser or pledgee.

This harsh doctrine still prevails in most of the States, although in a few of them the rigor of the rule has been modified by Factors Acts in favor of bona fide purchasers⁶).

2. CONDITIONAL PURCHASERS. — The words "conditional sales" have been fixed in commercial and legal phraseology as indicating sales where the seller parts with the possession and enjoyment of goods to the buyer, under a condition reserving title to himself until final payment of the purchase price, which most often is payable in instalments⁷). Both the seller and the buyer under such contracts have rights which are capable of assignment⁸). In fact, while in form the seller is the owner, he holds the title merely as security for the performance of the obligations

¹) Ewart on Estoppel, pp. 10—11. — ²) Ewart on Estoppel, p. 297. — ³) McNeil v. Tenth National Bank, (1874) 46 N. Y. 330. — ⁴) Story on Agency, sec. 226. However, if it be the custom not to sell on credit and the custom is known, or may be presumed to be known, to the buyer, the owner will not be bound. Thus, generally speaking, a broker cannot sell stock upon credit so as to bind his principal. *White v. Fuller*, (1875) 67 Barb. 267. — ⁵) *Wright v. Solomon*, (1861) 19 Cal. 64. But where the factor is also dealing in goods of the kind entrusted to him by the principal, such sale of the goods to a third person will be protected. Even in such case, however, a pledge by the factor is void. *Wright v. Solomon*, *supra*. — ⁶) Only a few American States, but among them some of those of the greatest commercial importance, have passed Factors Acts. Those in which such acts are in force are: Maine, Rev. St. 1903, c. 33; Maryland, Public Gen. Laws, (1904) Art. 2; Massachusetts, Rev. Laws, (1902), c. 68; New York, Cons. Laws, (1909),

c. 45, sec. 43; Ohio, Gen. Code, (1910) secs. 3214—3220; Pennsylvania, *Brightly's Purdon's Digest*, (1894) p. 867; Rhode Island, Gen. Laws, (1909) c. 158; and Wisconsin, *Sanborn and Berryman, Annot. Stats.*, (1898) secs. 3345, 3346. These statutes are discussed in *Williston on Sales*, secs. 320—324, and are reprinted *infra* in the article on *Factors*. — ⁷) The use of the words is criticized by Professor Mechem (1 *Mechem on Sales*, pp. 560—563) upon the ground that the word sale applies only to executed contracts, but is defended by Professor Williston (*Williston on Sales*, sec. 330). — ⁸) As pointed out in a previous note, under *Sale Distinguished from Similar Transactions*, the courts look to the intent, not the form of the transaction, and instruments designated as absolute bills of sale, leases, chattel mortgages, consignments and agencies, have been held to constitute conditional sales. See *Harkness v. Russell*, (1886) 118 U. S. 663; *Van Allen v. Francis*, (1899) 123 Cal. 474; *Bryant v. Swofford Brothers*, (1908) 214 U. S. 279.

due him¹), and the buyer is in effect the potential owner of the thing sold²). So long as the buyer pays the instalments of the purchase price, he has the right, (if the contract does not otherwise expressly provide), to transfer his interest in the chattel to third persons³). If he makes default, however, his right of possession ceases⁴).

This question has often arisen: What rights does a bona fide purchaser from such defaulting conditional buyer obtain as against the seller? The answer, in the absence of statute, is plainly, None. Under the principles stated in the last section, the seller has not estopped himself from setting up his title by entrusting possession to the buyer⁵). Sometimes, however, additional circumstances creating an estoppel may exist. As, where the conditional seller authorizes the conditional buyer to place the goods in the latter's store along with goods which the buyer is himself in the habit of selling⁶).

The frequency of such transactions, and the liability to injury of innocent third persons, has led the legislatures of many States to adopt statutes requiring that such contracts of conditional sale should be recorded in a public office. The penalty usually fixed by such statutes is that the conditional seller who neglects to record his contract is precluded from claiming the goods as against a bona fide purchaser from the buyer, or, under many statutes, as against the creditors of the buyer⁷).

¹) Accordingly, where a promissory note or bill of exchange or other evidence of indebtedness is taken by the seller, his assignment of such evidence of indebtedness will carry the right to the seller's interest in the goods as security. *W. W. Kimball Co. v. Mellon*, (1891) 80 Wis. 133. — ²) 9 *Harvard Law Review*, 106. — ³) *Mechem on Sales*, sec. 588. The attempt of the buyer to convey a greater interest than he has is regarded as a conversion of the goods, and the seller may at once recover the entire value of the goods against the buyer, notwithstanding the period of credit under the contract has not expired. Or, he may recover the goods or their value from the person who purchased from the buyer. It would seem, in such a case, however, that a demand should be made upon such sub-purchaser, that he may have the opportunity to pay the seller the balance due under the contract and acquire the title to the goods, where he has acted on the belief that the conditional buyer was the owner of the goods. See *Carter v. Kingman*, (1870) 103 Mass., 517. The more recent cases regard the interest of the conditional buyer as in the nature of a qualified property in the goods, and no reason is perceived why the sub-purchaser should not take at least all of the rights of the conditional buyer. The question, however, is by no means settled, and authority may readily be found to the effect that the conditional seller may recover the goods from the bona fide purchaser in such cases without demand. *Bailey v. Colby*, (1856) 34 N. H. 29. — ⁴) 1 *Mechem on Sales*, secs. 606, 628. — ⁵) See authorities collected in *Williston on Sales*, sec. 324. In a few jurisdictions (including the important states of Pennsylvania and Illinois), the bona fide purchaser is preferred to the owner. In Louisiana, no conditional sale can be made. *Williston on Sales*, sec. 325 (citing *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, [1908] 46 So., 193). — ⁶) *Romeo v. Martucci*, (1900) 72 Conn. 504. — ⁷) The following are the States and territories which have adopted statutes requiring

conditional sales to be recorded, (which, of course, implies that the contract must be in writing): Alabama, Code, (1907) secs. 3393, 3394; Arizona, Rev. St. (1901) secs. 2700, 2702; Connecticut Gen. St., (1902) secs. 4864—4867; District of Columbia, Code, (1906) sec. 547; Florida, Gen. Stat., (1906) secs. 2496, 2497; Georgia, Code, (1895) secs. 2776, 2777; Illinois, Laws, (1893) p. 166, secs. 1 and 2; Iowa, Code, (1897) secs. 2905, 2906; Kansas, Gen. Stats., (1897) c. 120, secs. 1, 4, 5, 13; Maine, Rev. St., (1903) c. 113, sec. 5; Minnesota, Rev. Laws, (1905) secs. 3476—3478; Missouri, Rev. St., (1906) secs. 3412—3413; Montana, Laws of, (1899) p. 124; Nebraska, Cobby's Comp. St., (1889), secs. 3200—3203; New Hampshire, Pub. St., (1901) c. 140, secs. 23—26; New Jersey, Laws of 1898, c. 232, secs. 71—73; New York, Cons. Laws, (1909) c. 45, secs. 60—67; North Carolina, Revision of 1905, sec. 983; North Dakota, Rev. Code, (1895), secs. 4732, 4733, 4737; Ohio, Gen. Code, (1910) sec. 4155; Oklahoma, Compiled Laws, (1909) sec. 7911; South Carolina, Code, (1902) sec. 2456 (the statute covers chattel mortgages, but the courts have held the conditional sale to be a chattel mortgage within its meaning. *Herring v. Cannon*, (1883) 21 S. C. 212); Texas, Sayles Civil St., (1897) arts. 3327, 3328; Vermont, Statutes, (1894) sec. 2290; Virginia, Acts, 1893—4, c. 362; Washington, Remington & Bellinger's Code, (1910) secs. 3670—3672, 8741, 8742; West Virginia Code, (1906) sec. 3101; Wisconsin, Sanborn and Berryman Annotated St., (1898), secs. 2317, 2319b; Wyoming, Rev. St., (1889) sec. 2837. In Massachusetts, the Statute applies only to household furniture. *Rev. Laws*, 1902, c. 198, secs. 11—13. In Tennessee, no recordation is necessary, but the contract must be in writing. Acts 1899, c. 15. In a few states such statutes have been passed dealing with sales of railroad equipment. All of the statutes referred in this section are unaffected by the Sales Act, see sec. 23, subsec. 2a. The principal ones are reprinted *infra*.

If the chattel sold under the contract of conditional sale be affixed to the land of the conditional purchaser, the questions arising in respect to the rights of the parties and of third persons are to be solved by the law of Fixtures, — a branch of the law of real property, — and not by the law respecting sales of personalty¹).

3. RIGHTS OF SECOND PURCHASERS AND OF CREDITORS OF THE SELLER IN POSSESSION. — As has been said before, delivery is not essential to the transfer of title between the parties²). But where the seller is permitted by the buyer to remain in possession, evidently a situation arises somewhat different from the ordinary case where one entrusts his property to another. For while ordinarily where one lends his chattels to another, without clothing the latter with the indicia of ownership, he does no act which, in the ordinary course of business, has a tendency to mislead third persons³), yet where the buyer suffers the seller to remain in possession of goods which he has bought from the latter, third persons are justified in believing that the ownership of the goods is unchanged, and the Sales Act in section 25 states a principle generally recognized in protecting the bona fide purchaser under a seller who remains in possession⁴).

The position of a creditor is not precisely the same as that of a second purchaser for value. In the latter case the seller is enabled by the conduct of the buyer to commit an active misrepresentation, while in the case of the creditor, the seller usually does not make any affirmative statement concerning the ownership of the goods when he contracts the credit. It cannot therefore, be said that the creditor parted with value relying upon the seller's ownership of the property. However, the courts have generally held that such retention of possession is either evidence of fraud, or renders the transaction absolutely void as to creditors. The prevailing rule is that the retention of possession is evidence of fraud, which may be rebutted by proof that there was no fraudulent intent in fact. But in many States, every transfer of chattels not accompanied by an immediate delivery, and by an actual and continued change of possession is conclusively presumed to be void as against creditors of the seller and purchasers or incumbancers from him in good faith and without notice⁵).

4. BONA FIDE PURCHASERS FROM BUYERS UNDER VOIDABLE SALES. — It sometimes happens that title has passed to a buyer under circumstances which give a party the right to avoid the sale. Such circumstances are fraud or mistake in certain cases; and, of a different kind, infancy, insanity and drunkenness; and of a still different kind, the existence in the contract of conditions which enable the buyer to return the goods after title has passed.

¹) 1 Mechem on Sales, secs. 644—647. —

²) See Sections on *Definition: Distinction between Sale and Contract to Sell* and on *Transfer of Property*. — ³) Ewart on Estoppel, p. 297.

— ⁴) Stephens & Gifford, (1890) 137 Pa. St. 219. Many cases, however, instead of placing the rule on the ground of estoppel, place it upon the ground of a presumption of fraud — sometimes said to be conclusive, sometimes only prima facie. The subject is covered in many states by the statutes cited in the next note. — ⁵) Prima facie evidence in the following jurisdictions: Alabama, Arkansas, Arizona, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Michigan, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, Tennessee, Virginia, West Virginia, and Wisconsin. Conclusive evidence of fraud in the following jurisdictions: California, Colorado, Connecticut, Illinois, Iowa, Kentucky, Montana, Missouri, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, and Washington. In the following states and territories the matter is regulated by statutes: Alaska, Carter's Annotated Code, sec. 1043; Arizona, Statutes, (1901) sec. 2700; California, Civil Code, (1909) sec. 3440; Colorado, Mill's Ann. Statutes, (1891)

sec. 2027; Delaware, Code, (1893) c. 63 sec. 4; District of Columbia, Code, (1906) secs. 1636, 1640 (see Maryland Act, [1729] c. 8 sec. 5); Hawaii, Revised Statutes, (1905) sec. 2668; Idaho, Civil Code, (1901) sec. 2467; Indiana, Burns' Annotated Statutes, (1908) secs. 6636, 6637; Iowa, Code, (1897) secs. 2906, 2980; Kansas, General Statutes, (1897) c. 112, sec. 3; Kentucky, Statutes, (1903) sec. 1908; Louisiana, Rev. Civil Code, (1909) arts. 2247 and 2480; Maryland, Code, (1904) art. 21, secs. 41 and 50; Michigan, Compiled Laws, (1897) sec. 9520; Minnesota, Revised Laws, (1905) sec. 3496; Missouri, Annotated Statutes, (1906) sec. 3410; Montana, Revised Statutes, (1907) sec. 6128; Nebraska, Cobby's Annotated Statutes, (1909) sec. 6030; Nevada, Compiled Statutes, (1900) sec. 2701; New York, Cons. Laws, (1909) c. 45, sec. 36; North Dakota, Revised Statutes, (1895) sec. 5053; Oklahoma, Compiled Statutes, (1909) sec. 2933; Oregon, Ballinger and Cotton's Annotated Codes, (1902), sec. 788, subsec. 40; South Dakota, Civil Code, (1903) sec. 2369; Utah, Compiled Laws, (1907) sec. 2473; Washington, Remington & Ballinger's Annotated Codes, (1910) sec. 5291; Wisconsin, Statutes, 1908, sec. 2310. The decisions in each jurisdiction are fully discussed by Professor Williston in chapter XI of his work on Sales.

These cases differ from those mentioned in the preceding sections in that the title has actually passed, although subject to avoidance. If, before the contract is avoided, the buyer sells the goods to a third person, who buys in good faith, the latter obtains an indefeasible title¹). The rule thus stated from the Sales Act is perhaps wider than that obtaining in many of the States where that Act does not apply, so far as the right of avoidance for infancy or insanity is concerned. In many States, an honest purchaser from the vendee of an infant or lunatic is not protected²).

It should be mentioned that a rather close distinction exists, in cases of fraud, between the situation where the seller is fraudulently induced to part with title and where he is fraudulently induced to part with possession merely. It is only in the former case that the bona fide purchaser from the fraudulent vendee is protected³).

5. WHAT CONSTITUTES A PURCHASER FOR VALUE AND IN GOOD FAITH. — The Sales Act defines value as any consideration sufficient to support a simple contract.⁴) Whether the cancellation by the buyer of a pre-existing indebtedness from the seller to him, constitutes the buyer a purchaser for value, is a question upon which different jurisdictions disagree; the prevailing view in the case of ordinary chattels is that such cancellation does not constitute value⁵). The Sales Act, however, expressly adopts the rule laid down in the Negotiable Instruments Law, and generally prevailing in regard to negotiable paper, that such pre-existing indebtedness constitutes a sufficient consideration⁶). It was probably unnecessary (though perhaps expedient) to make express provision to this effect, for it was covered by the general provision that any consideration sufficient to support a simple contract is value. It may be doubted whether the last definition is not itself too broad, — whether, for example, in States where the Sales Act is not adopted, one could claim to be a bona fide purchaser for value, where, before actual payment of the purchase price, though after the contract was made, he acquired notice of the owner's rights⁷).

The other requirement, that of good faith, means that the thing is done honestly, even though it may be done negligently⁸). A distinction must, however, be drawn between negligence and constructive notice. For while mere negligence in itself cannot affect a purchaser's good faith, yet if he has notice of any fact, which, if investigated with reasonable diligence, would lead to knowledge, he is chargeable with the results of his failure to employ such diligence⁹).

Neither an attaching creditor, nor an assignee or trustee in bankruptcy, nor an assignee for the benefit of creditors is a purchaser for value. They have not altered their position in reliance on their debtor's apparent ownership. Their rights over goods in the situation considered in the preceding sections, therefore, depend upon the presumption of fraud arising from the failure to transfer possession¹⁰).

IV. PERFORMANCE OF THE CONTRACT. — A. Duties of the Seller and of the Buyer. — The seller's duties are:

¹) Sales Act, sec. 24. — ²) Williston on Sales, secs. 14 and 31. — ³) *Levy v. Cooke*, (1891) 143 Pa. St., 607; *National Bank of Commerce v. Chicago, etc., Ry. Co.*, (1890) 44 Minn. 224. —

⁴) Sales Act, sec. 76, subsec. 1 (last paragraph).

— ⁵) *Peoples Savings Bank v. Bates*, (1887) 120 U. S., 656; *Sargent v. Sturm*, (1863) 23 Cal. 359; *Barnard v. Campbell*, (1874) 58 N. Y. 73.

— ⁶) Sales Act, sec. 76, subsec. 1 (last sentence). — ⁷) In general where one gets notice

at any time before payment of the price he is bound by the notice. If he buys on credit, therefore, and before the term of credit expires, learns of the real owner's title, he must refuse to pay the price. *Ukiah Bank v. Gibson*, (1895) 109 Cal. 197. *Pomeroy, Equity Jurisprudence*, sec. 751. If a negotiable note or bill of the buyer be given for the purchase price, the purchaser is considered a bona fide purchaser, at least where the bill has been sold to a holder for value. Whether the result is the same when the negotiable instrument has not been transferred, seems to be doubtful. See *Pomeroy*, sec. 751, note. Where only part payment has been made, the bona

fide purchaser is protected only to the extent of his payment. *Combination Land Co. v. Morgan*, (1892) 95 Cal. 55. The giving of negotiable paper of a third person is absolute payment, and hence constitutes value under the law generally. *Pomeroy*, sec. 750. It is apparent that the Sales Act in this section makes very radical changes in the general law. The changes are justified by the author of the Act thus: "Upon principle there seems no good reason why a purchaser should be deprived of the benefit of his bargain, because his obligation to pay is executory. The original owner or claimant of the goods should not have the right to deprive the innocent purchaser of the goods, but should be obliged to get relief from the enforcement, for his advantage, of the obligation of the purchaser to pay the price." *Williston on Sales*, sec. 620. — ⁸) Sales Act, sec. 70, subsec. 2. — ⁹) *Shauer v. Alterton*, (1894) 151 U. S. 607, 622. — ¹⁰) See section on *Rights of Second Purchasers and of Creditors of the Seller in Possession*.

1. To deliver possession of the goods to the buyer.
2. To comply with all conditions precedent.
3. To perform warranties or collateral agreements, express or implied.

The buyer's duties are:

1. To accept the goods.
2. To pay the price.

In case of the contract to sell, the seller must, in addition to the duties mentioned, transfer the title to the buyer¹).

B. The Seller's Duty to Deliver in Performance of the Contract. — The duty of the seller to deliver and of the buyer to pay the price are concurrent conditions²). Even though the title to the goods may have passed to the buyer, he is not entitled to their possession until he pays the price, or at least offers to pay it; and, on the other hand, the seller is not entitled to the price until he is at least ready and willing to give possession of the goods to the buyer³). It is, perhaps, unnecessary to say that the duties of the parties may, in this respect, as in any other, be changed by the contract of the parties: and that such contract may be established by usage as well as by an express agreement. For example, it may be the custom in a certain trade or in a certain community to sell upon credit. In such case, manifestly, the buyer is entitled to possession before payment⁴). So, it may be an express or implied term of the contract that payment shall be made before delivery, as in the usual case of sales of goods in a store to be sent to the buyer; indeed, though the contract is very unusual, it may even be that neither the title nor the possession is to pass until after payment⁵).

The duty to deliver the goods does not imply that the seller must place the goods in the actual possession of the buyer, in the absence of an agreement to that effect. He need not carry the goods to the buyer's place of business or residence⁶). On the other hand, he must do something more than merely give the buyer the means of obtaining possession⁷). The rule adopted by the Sales Act provides that, in the absence of contract or usage, the goods must be brought to the seller's place of business, if he has one; if not, to his residence⁸). His duty is discharged in having the goods there ready for the buyer to take. When, however, specific goods are sold, which, to the knowledge of the parties, are in some other place, the place of sale is the place of delivery⁹). If the goods, when sold, are in the hands of a third person, as a warehouseman, the seller's obligation is not discharged until such third person acknowledges to the buyer that he holds the goods for the buyer; but mere notice to the bailee is sufficient delivery to the buyer to protect his interest in the goods against the claims of the seller's creditors¹⁰). The transfer of a bill of lading or warehouse receipt, payable to order, is a sufficient delivery, without notice or attornment¹¹). Where the contract requires delivery on the cars, or F. O. B., at the seller's factory or warehouse, it is the seller's duty, not the buyer's, to supply the cars¹²).

¹) Sales Act, sec. 41. — ²) Sales Act, sec. 42. It should be noticed that the word "deliver" has several meanings in the law of sales; sometimes it is erroneously spoken of as the synonym of appropriation; its meaning in connection with acceptance and receipt under the Statute of Frauds is different from its meaning in the present connection. See *ante* section on *Acceptance and Receipt*. — ³) It is not essential that delivery be tendered by the seller, but notice that he is ready and willing to deliver is essential to put the buyer in default. So, it is not essential that the buyer actually tender the price, but he should offer to pay it before he can consider the seller in default. *Hapgood v. Shaw*, (1870) 105 Mass. 276. — ⁴) 2 *Mechem on Sales*, sec. 1119. — ⁵) *White v. Solomon*, (1895) 164 Mass. 516. — ⁶) *Mitchell v. Le Clair*, (1895) 165 Mass. 308; 2 *Mechem on Sales*, secs. 1185—1187. — ⁷) Thus, in the case of the sale of a herd running on a large ranch, the place of delivery was at

the ranch and where the foreman of the property had his temporary residence, and the seller's foreman would at least have to indicate that the cattle were at the disposition of the buyer. *Dakota Stock Co. v. Price*, (1887) 22 Neb. 96. A delivery to constitute possession of title in a gift is more formal. See *Pollock and Wright, An Essay on Possession in the Common Law*, Oxford: Clarendon Press: 1888 Part III, c. II, secs. 14 and 15. — ⁸) Sales Act, sec. 43, subsec. 1. — ⁹) 2 *Mechem on Sales*, sec. 1124; *Williston on Sales*, sec. 450. If the goods are on the seller's land an implied license is granted the buyer to remove the goods. *McLeod v. Jones*, 105 Mass. 403. — ¹⁰) Sales Act, sec. 43, subsec. 3; *Williston on Sales*, sec. 454. — ¹¹) *Michigan Central R. R. Co. v. Phillips*, (1871) 60 Ill. 190. — ¹²) *Hurst v. Altamont Manufacturing Co.*, (1906) 6 L. R. A. (N. S.), 928, and note. See also Sales Act, sec. 43, subsec. 5.

The time within which delivery is to be made, when not fixed by the contract, is a reasonable time¹). If a time be fixed, it is essential that the delivery be made at that time, notwithstanding it does not appear that the buyer was damaged by failure to deliver at the time fixed²). The delivery must be made at a reasonable hour³).

The buyer is entitled to the quantity of goods which he bought. He may refuse to accept a less or a greater quantity, if delivered to him by the buyer, and may even refuse to select the quantity ordered out of a greater quantity sent to him⁴). If the contract provides for the sale of a specified quantity, "more or less," the words are construed as applying only to "accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight"⁵), and the buyer may refuse to accept goods not amounting to the specified quantity. Sometimes, however, a certain quantity is given as matter of description only in connection with other means of identification, which are more certain, in which case the statement of quantity is unimportant. Thus, an agreement to sell a cargo of iron to be delivered by a certain ship, "about 300 to 350 tons," was held to be satisfied by a delivery of the full cargo, though it amounted to 227 tons only⁶). If the seller delivers less or more than the quantity called for by the contract, the buyer may waive the fault in delivery, in which event he will be liable in an action on contract for the price of the goods retained by him, as fixed by the contract⁷). If the seller delivers a larger quantity of goods than specified in the contract, the buyer may elect to keep the portion included in the contract and reject the rest, or may reject the entire delivery⁸).

Where the contract calls for delivery of the goods in instalments, the United States Supreme Court has held that a failure to deliver one instalment excused the buyer from taking the rest, and entitled him to rescind the contract, if the breach is material⁹). If the breach is not material, however, the buyer cannot rescind the contract, but must seek compensation for damages¹⁰). Whether the breach is or is not material, depends in each case on the words of the contract, and the circumstances of the case¹¹).

Where, under the terms of the contract, goods are to be sent to the buyer a delivery to a carrier satisfies the requirement¹²). If no carrier be named, the seller acts as the buyer's agent in selecting the carrier¹³). He must deliver the goods to the carrier in such form that they will not be liable to injury in carriage¹⁴), and must give such notice to the buyer as may enable the latter to insure the goods, if it is the custom to insure them¹⁵). He must also procure a proper contract with the carrier, having reference to the character of the goods¹⁶).

¹) A question of fact, usually, for the jury, but where the time is plainly unreasonable the Court will so determine without submitting the matter to the jury. *Wright v. Bank of Metropolis*, (1888) 110 N. Y. 237. Upon the meaning of such words as "forthwith," "immediately," "as soon as possible," see *Williston on Sales*, sec. 452. — ²) The rule which has been said to apply to "mercantile" contracts, (*Filley v. Pope*, [1885] 115 U. S. 213), that time is of the essence of the contract, is not applicable to all contracts, as, for example, contracts for the sale of land, where a mere failure to perform at the day does not discharge the obligation of the other party. *Pomeroy on Specific Performance of Contracts*, secs. 370 et seq. — ³) *Sales Act*, sec. 43, subsec. 4. This is necessarily a question of fact. Some goods would have to be delivered during daylight to permit of proper inspection. *Croninger v. Crocker*, (1875) 62 N. Y. 151. — ⁴) *Norrington v. Wright*, (1885) 115 U. S. 188; *Clark v. Baker*, (1846) 11 Metc. 186. — ⁵) *Brawley v. U. S.* (1877) 96 U. S., 168, 171. In *Moore v. U. S.*, (1905) 196 U. S. 157, 4634 tons were held not to be "about" 5000 tons.

— ⁶) *Pembroke Iron Co. v. Parsons* (1856), 5 Gray, (Mass.) 589. — ⁷) *Sales Act*, sec. 44.

— ⁸) *Sales Act*, sec. 44, subsec. 2, *Cleveland Rolling Mills v. Rhodes*, (1887) 121 U. S. 255.

— ⁹) *Norrington v. Wright supra*, a leading case. Default in the payment of an instalment of the purchase price will have the same effect. *McGrath v. Gegner*, (1893) 77 Md., 331. — ¹⁰) *Herzog v. Purdy*, (1897) 119 Cal. 99. — ¹¹) *Sales Act*, sec. 45, subsec. 2; *Williston, Sales*, sec. 467, pp. 823—4. —

¹²) *Sales Act*, sec. 46, subsec. 1 — ¹³) *2 Mechem, Sales*, sec. 1182. — ¹⁴) *Diebold Safe Co. v. Holt*, (1896) 4 Okla., 479. — ¹⁵) *1 Mechem on Sales*, sec. 749; *Sales Act*, sec. 46 subsec. 3. —

¹⁶) In general the remedy against the carrier for failure to perform his common law liability must be preserved, but if the articles are of a perishable nature such that the carrier is not bound to accept them without a contract limiting his liability, the shipper is justified in shipping the goods under such a contract. *Stafford v. Walker*, (1873) 67 Ill. 83. (Shipment of fruit.) See *Sales Act*, sec. 46, subsec. 2.

It should be observed that where an order bill of lading is taken, the delivery is not made until the bill of lading is handed to the buyer¹).

C. Seller's Duty to Perform Conditions and Warranties. — The Sales Act very much simplifies the obscure distinctions between conditions and warranties by confining the meaning of the word "condition" to its original signification as a provision, on the fulfilment of which depends the taking effect or continuance in effect of the contract, or some clause or term of it, and excluding from it the sense of promise; and by limiting warranty to the meaning of "a material promise"²).

Examples of sales in which the title is to pass upon the happening of a condition have already been given, e. g., conditional sales in which the title is to pass upon payment of the price, sales where the *jus disponendi* is reserved³). Another example of the same sort is the so called "cash sale." Examples of sales where the title passes, subject to a condition subsequent, are sales with a power of resale, or the common case of the transaction known as "sale or return"⁴). An example in which the liability of neither party arises until the happening of an event is afforded in the case of "sales to arrive" by a certain ship⁵). In such case there may be a double condition precedent, viz., that the ship shall arrive and that the goods shall be on board. If the ship arrives without the goods where such double condition exists, the buyer is not liable, and if the goods arrive, but by another ship, it is a question of fact whether the arrival by that particular ship is or is not a condition⁶). Generally, such expressions do not create a warranty, and the seller is not liable if the goods do not arrive at all, though he may be liable for the arrival of goods not answering the description of those sold⁷).

A condition frequently found in contracts of sale is a condition to the effect that the manufacturer will give notice when the goods are ready. The buyer's liability to pay is conditional upon receiving this notice⁸). So, where the time or place of delivery or the method of shipment of goods is left to the other party to designate, his notice to the person bound to deliver is a condition precedent to the liability of the latter for non-delivery⁹).

By the express terms of the contract or by the interpretation of the acts of the parties, delivery of the goods may be a condition precedent to the passing of title, or payment of the price may be made such a condition¹⁰). In fact, any stipulation may be a condition, if the parties so intend it.

Where a condition is wholly for the benefit of one only of the parties, he may waive its performance¹¹). In cases for example, like that of *Filley v. Pope*, cited in the note, the condition in regard to shipment might have been waived. Often very slight evidence will be sufficient to excuse strict performance. Mere failure to act may have that effect¹²).

¹) Williston on Sales, sec. 469. — ²) Williston on Sales, secs. 179—183. Sales Act, sec. 11, which gives the other party the election, as against the party committing the breach to consider the obligation broken either as a condition or as a warranty. This view, while novel in its statement, is confirmed by commercial practice, and is practically recognized by many courts. — ³) See *ante*, section on *Conditional Sales* and on *Reservation of the Jus Disponendi* and *post*, section on "*Cash Sales*." — ⁴) See *ante*, section on "*Sale or Return*." — ⁵) Benjamin on Sales, sec. 588; 1 Mechem on Sales, secs. 652—655; Williston on Sales, sec. 188. — ⁶) In *Filley v. Pope*, (1885) 115 U. S. 213, the contract was for the sale of iron, "shipment from Glasgow as soon as possible." The agent of the seller being unable to procure a ship sailing from Glasgow procured one sailing from Leith, which delivered the iron sooner than the iron could have been brought from Glasgow. The Court held the requirement a condition precedent, and that the buyer was not obliged to accept the iron. — ⁷) The language used or the circumstance surrounding the transaction may, however,

indicate that the seller warrants that the goods are on the ship. For example, in *AbeStein Co. v. Robertson*, (1901) 167 N. Y. 101, the sellers sold goat skins of a certain quality "expected to arrive" by a certain ship, "no arrival, no sale." Goat skins did arrive by that ship, but were not of the quality specified. The seller was held liable. The words "no arrival, no sale" usually refer to the goods and not to the ship, it was said in *Harrison v. Fortlage*, (1896) 161 U. S. 57, 64. In the latter case, where goods were to be "shipped" from a certain place "no arrival, no sale," the condition was satisfied by shipment from that place although the goods were later transhipped at another point to another ship. — ⁸) *Hunter v. Wetsell*, (1881) 84 N. Y. 549. — ⁹) *Dingley v. Oler*, (1886) 117 U. S. 490. — ¹⁰) 2 Mechem on Sales, sec. 1206. — ¹¹) A condition is usually for the benefit of the party entitled to performance, the party from whom performance is due cannot insist that the non-performance by him, has discharged the contract. *Westbrook v. Reewes*, (1907) 133 a. 655. — ¹²) *Bank v. Partee*, (1878) 99 U. S. 325.

Prevention of performance by the promisee also excuses non-performance of conditions¹).

1. "CASH SALES." — The expression, "cash sales," means that the payment of the price is a condition precedent to the transfer of title²). The distinction between the cash sale and the conditional sale is that in the former the possession is not given to the buyer, while in the latter transaction, the possession and use of the chattels are transferred to the buyer³). In every sale where no time is expressed for payment, or where by the known usage of the trade or community, credit is given, the seller may always demand payment as a condition of delivery of the goods⁴). But the fact that payment of the price is to be concurrent with delivery of the goods does not, as a general rule, even raise a presumption that title is not to pass until payment⁵). The presumption, on the contrary, is that the title passes as soon as the goods are appropriated to the contract, and, as a general rule, express words are necessary to indicate that a "cash sale" in the strict sense was meant.

To this general rule an exception should, however, be made in the case of sales by shopkeepers over the counter⁶). The natural inference in such case is that the seller does not intend to part with the title until the price is paid. If in such a case, however, the seller parts with possession without demanding the price, he is deemed to have waived the condition⁷).

It is a common practice for merchants to send invoices or statements along with the goods with the words, "terms cash," written or printed thereon. Notwithstanding the use of these words, there is no presumption of a reservation of title. The words usually mean that the payment must be made at once, and that no long period of credit is to be allowed; the fact that title is not reserved is shown by the delivery of the goods without condition⁸).

Where the sale is a cash sale, in the strict sense of the word, a payment by check is not conclusive evidence that title has passed. Until the check is paid, the payment is only conditional, the title may still be in the seller⁹). The same, of course, is true in the case of every other payment in the negotiable paper of the buyer.

2. EXPRESS WARRANTIES. — An express warranty is defined in the Sales Act as being any affirmation of fact or any promise by the seller in relation to the goods which has a natural tendency to induce the buyer to purchase the goods, and upon which he actually does rely in purchasing the goods¹⁰). Perhaps this statement is slightly in advance of the law in some jurisdictions, in which more or less stress is laid upon the intent of the seller to warrant — an element wholly disregarded by the Sales Act. This latter Act to constitute a warranty requires only reliance by the buyer on the statement of the seller¹¹).

¹) Thus, where a defendant at whose house goods were to be delivered was not at home and his wife refused to permit them to be left on the premises, the seller was justified in leaving them on the sidewalk in front of the buyer's house. *Barber v. McKelway*, (1849) 22 N. J. L. 165. — ²) Williston on Sales, sec. 341; 1 *Mechem on Sales*, secs. 538 et seq. — ³) The two transactions are often confused, but there are material distinctions between them. In the "Cash Sale," the risk of loss will ordinarily accompany the title: in a "Conditional Sale," after possession has been given, the risk is, by the weight of authority, upon the buyer. The rights of the buyers in the two cases are also of very different natures. The conditional buyer before payment has a property right in the goods, the buyer in the cash sale, before payment has a mere contractual right. — ⁴) Sales Act, sec. 42. — ⁵) *Safford v. Mc Donough*, (1876) 120 Mass. 290; *Catlin v. Jones*, (1906) 48 Oreg. 158. A reason for this is that the seller is just as well protected, in the great majority of cases, by retaining the right of possession as he would be by retaining the title. The buyer also is secured by having the owner-

ship of the goods. Williston on Sales, sec. 343. — ⁶) Cases of this sort are rare in the modern reports, but the rule is well settled. Williston on Sales, sec. 343. — ⁷) There is no waiver of the condition in regard to payment of the price in a sale over the counter by the shopkeeper's entrusting the customer with the goods for an instant, relying upon his immediately paying the price. If the customer should run away with the goods, he would be guilty of larceny from the shopkeeper. *Commonwealth v. Devlin*, (1886) 141 Mass. 423. It is, of course, impossible that both conditions should be performable at the same instant of time. — ⁸) On the words, "terms cash," and "cash down," see *Clark v. Greeley*, (1882) 62 N. H. 394, which holds that the presumption is that the title passes, where such words are used, and that the rational meaning of the words is that no extended credit is to be given. — ⁹) *Johnson Bringman Co. v. Central Bank*, (1893) 116 Mo. 558; 2 *Mechem on Sales*, sec. 545. See also as to the buyer's note, *Davison v. Davis*, (1888) 125 U. S. 90. See *post*, section on *Payment of the Price*. — ¹⁰) Sales Act, sec. 12. — ¹¹) *Polhemus v. Heiman*, (1873) 45 Cal. 573; *Reed v. Has-*

No form is required to make a statement a warranty; in certain cases mere silence has been held an affirmation for that purpose¹). If, however, the contract is in writing, no evidence can be given of the express warranty unless it is contained in the writing evidencing the contract²).

Not every statement, however, is a warranty. Mere commendation of the goods, or other statements of the seller purporting to be only statements of opinion do not constitute warranties³). Words of description, on the other hand, always constitute warranties⁴).

Notwithstanding that the defect is obvious, it is conceivable that the buyer actually relied upon the seller's statements and, if that be proved, the latter will be liable⁵). But, in general, a warranty will not be presumed from mere informal statements, where the defect is an obvious one.

Whether an agent has power to warrant goods sold by him for the principal, depends upon the actual or ostensible powers conferred upon him. If it is usual to warrant the goods, as in the sale of horses, his warranty will bind his principal, otherwise not⁶).

Rules are often laid down as to what is or what is not a warranty in particular cases. Thus, it has been said that statements in printed advertisements are mere "dealer's talk" and are not presumably warranties⁷). The basis for such a statement, however, is that it is difficult to establish the reliance of the buyer upon the advertisement, and hence the plaintiff can rarely recover in such a case⁸). There is no general rule to be stated upon the subject beyond the proposition that any statement may be a warranty where the buyer actually does rely upon it in making the purchase⁹).

It is not necessary to a warranty that the statement be made to the buyer: a statement to a third party, if intended to be communicated to the buyer, or which the seller may reasonably suppose will be so communicated, may be a warranty¹⁰).

It is not essential that the warranty be made at the time of sale; statements made a long time before the sale have been construed as warranties, where it can reasonably be inferred that the buyer relied upon the statements in making the

tings, (1871) 61 Ill. 266; *Shippen v. Bowen*, (1887) 122 U. S. 575. The law in Pennsylvania is peculiar; to constitute a warranty in that State, there must be an intent to promise. *Holmes v. Tyson*, (1892) 147 Pa. 305.

¹) *Ingraham v. Union Railroad Co.*, (1896) 19 R. I. 356, where at an auction sale of horses it was stated generally that if any horse offered was unfit for single driving, it would be mentioned; a sale of a horse without saying anything was held to be an express warranty that it was fit for single driving.

— ²) *Seitz v. Brewers Refrigerating Co.*, (1891) 141 U. S. 510. But if the warranty be an independent contract, it may be shown by parol. *Chapin v. Dobson*, (1879) 78 N. Y. 34.

³) Sales Act, sec. 12. The line between statement of opinion and statement of fact is difficult to draw, and no definite rule is laid down to determine what is opinion and what fact. A statement that a machine was in "first rate order" has been held a warranty of fact. *Latham v. Shipley*, (1892) 86 Ia. 543, while a statement that Balzac's works were "nice books," "books that children would love to read," was held a mere expression of opinion, and no defence to an action for the purchase price; *Barrie v. Jerome*, (1904) 112 Ill. App. 329. See *Hodgkins v. Dunham*, (1909) 10 Cal. App. 690. On "dealer's talk," see *Morley v. Consolidated Mfg. Co.*, (1907) 196 Mass. 257. — ⁴) "Good clear merchantable ice." *Morse v. Moore*, (1891) 83 Me. 473.

— ⁵) *Williston on Sales*, sec. 207. The matter

of inspection of the goods rests on the same principles. Inspection is a fact tending to show that the buyer did not rely on the seller's word, and is therefore important but not conclusive. — ⁶) *Williston on Sales*, sec. 445; *2 Mechem on Sales*, secs. 1281—1288. — ⁷) 30 Am. & Eng. Encyc. Law (2d Ed.) 149. — ⁸) In some of the very cases which make the general statement in regard to advertisements, printed circulars, and catalogues have been held to be warranties, because more deliberately made than advertisements. *Hicks v. Stevens*, (1887) 121 Ill. 186. — ⁹) Sales Act, sec. 12. There is no reason in modern procedure in preserving a distinction between actions for breach of warranty and actions for damages for misrepresentation, and justice demands that the scope of the latter action be extended so as to cover statements made with the apparent purpose of inducing another to change his position, even though not made with knowledge of the falsity of the statements. See article in 14 Harvard Law Review, p. 184, by Professor Jeremiah Smith. — ¹⁰) Thus, in *Iowa Economic Heater Co. v. American Economic Heater Co.*, (1887) 32 Fed. 735, a representation made by the owner of a patent to certain parties, who afterwards formed a corporation for the purpose of utilizing the patent, was held a warranty upon which the corporation might sue. See also *Cooke v. Le-Lewis*, (1837) 3 Sum. (U. S.) 1; s. c. Fed. Cas. No. 3399.

purchase¹). On principle, it must be made, however, either before or at the time of the sale, for otherwise the buyer could not show his reliance upon the warranty in buying the goods. But when the buyer has a legal excuse for returning the goods or refusing to pay their price, a statement made by the seller to induce him to abandon his objection, and in reliance upon which he does waive them, is sufficient to constitute a warranty²).

A warranty may be made so as to cover only specified points, or it may be limited in time, or may be upon certain conditions³). Usually, for example, in the case of sales of machinery, the contract provides for a test by the buyer and notice of defects within a specified time, so that the seller may have an opportunity to remedy them⁴). Such conditions attached to warranties are construed as other conditions⁵).

Where the contract is silent as to the time and place where the warranty is to apply, it is deemed to be a warranty of the goods at the time they are sold and at the place of sale⁶).

Although statements as to the quality of goods are made, the person making them may expressly refuse to warrant them. In such cases, the seller is not liable for the defect⁷).

3. IMPLIED WARRANTIES OF TITLE AND QUALITY. — The seller of personal property, in general, by operation of a rule of law, warrants to the buyer the title of the goods which he sells, in this respect presenting a striking contrast to the modern law in respect to the sale of land where no implied warranties exist⁸).

The warranty of title extends to every class of personal property, including stocks, bonds, and choses in action⁹). The warranty, of course, may be excluded by express language, and does not exist in cases where the seller does not purport to sell the goods as his own, as where he acts as an executor or administrator, or an assignee or trustee in bankruptcy, or an agent¹⁰).

This warranty of title covers every incumbrance or lien upon the goods, and insures the buyer's undisturbed possession¹¹).

On the other hand, the general rule is that the seller does not warrant the quality of the goods sold, nor does he in general warrant their fitness for the particular purpose for which they are sold¹²). This is the so-called doctrine of *caveat emptor*.

To the rule of *caveat emptor* several important exceptions have, however, been established:

¹) *Leavitt v. Fiberloid Co.*, (1907) 196 Miss. 540. This case recognizes the qualification that if a formal and complete contract be made in writing, such statements cannot be proved to introduce an additional term into it, such as an express warranty. — ²) *Blaess v. Nichols & Shepard Co.*, (1902) 115 Ia. 373. — ³) 30 Am & Eng. Encyc. Law. (2d Ed.), p. 152. — ⁴) *Advance Thresher Co. v. Vinckel*, (1909) 84 Neb. 429. — ⁵) Such condition is waived where the seller under an informal notice undertakes to remedy the defect. *Hale v. Van Buren*, (1909) 103 Pac. 1026. — ⁶) *Lord v. Edwards*, (1889) 148 Mass. 476. — ⁷) *Fauntleroy v. Wilcox*, 80 Ill. 477; *Gilchrest Lumber Co. v. Wilson*, (1909) 84 Neb. 583. — ⁸) Sales Act, sec. 13, subsec. 1. On transfer of land, see California, Civil Code, sec. 1113. The doctrine of *caveat emptor* is not in force in South Carolina. *Barnard v. Kellogg*, (1870) 10 Wall. 389. Nor in Louisiana. *George v. Shreveport Cotton Oil Co.*, (1905) 114 La. 489. It should be observed that the warranty of title does not "run" with the goods, but is personal. *Williston on Sales*, sec. 244. In other words, a subvendee cannot sue the original seller on failure of his title but must sue his immediate seller. — ⁹) Thus, a seller of a leasehold interest in land (which is considered as personal property with the technical designation

"chattel real") warrants his title to the lease, and is, therefore, liable to the assignee of the lease upon eviction of the latter by the true owner of the land. No such liability would exist if the interest sold had been real estate. *Jeffers v. Easton*, (1896) 113 Cal. 345. — ¹⁰) *Brandon v. Brown*, (1883) 106 Ill. 519. An agent, however, does warrant the fact that he has an authority from the principal. *Kroeger v. Pitcairn*, (1882) 101 Pa. St. 311. — ¹¹) Hence, if the seller do not have title at the time of the sale but afterwards procures it, the title so procured inures to the benefit of the purchaser. *Kane v. Loder*, (1897) 56 N. J. Eq. 268; and *vice versa*, if the facts exclude an implied warranty, the subsequent acquisition of title does not inure to the purchaser. *Scranton v. Clark*, (1868) 39 N. Y., 220. It was formerly frequently said that the warranty did not exist where the goods were not in the seller's possession, but it may be doubted whether this was ever the law. 2 *Mechem on Sales*, sec. 1302. The fact that the lien under which the buyer's possession is disturbed was of record, does not affect this implied warranty, although the record imparted notice to purchasers, *Burpee v. Holmes*, (1909) 132 Ga. 464. — ¹²) Sales Act, sec. 15; California, Civil Code, sec. 1764.

1. A manufacturer of goods warrants that the goods which he sells are merchantable, except against obvious defects which are apparent on inspection. In other words, the manufacturer or producer warrants against latent defects¹⁾.

2. A dealer in goods sold by description, under the Sales Act, and in many jurisdictions which have not adopted that Act, warrants the goods which he sells to be merchantable in the same way as does a manufacturer²⁾.

3. A seller, (whether a dealer or manufacturer, or not), warrants that goods shall be reasonably fit for the purpose for which they are bought, where the seller knows the particular purpose and that the buyer relies upon his skill or judgment³⁾.

4. Under the Sales Act, an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. This is not the law generally⁴⁾.

5. In cases of sales by a manufacturer, the manufacturer warrants: a) that the goods were manufactured by him, b) have been properly manufactured, c) from reasonably proper materials, and d) that the goods are new or unused⁵⁾.

Certain limitations must be made upon the above exceptions. If, for example, the buyer indicates by his words or conduct that he does not rely upon the dealer or manufacturer, the implied warranty is excluded⁶⁾. Accordingly if he inspects the goods, or has an opportunity to inspect them, he cannot hold the seller for obvious defects which might have been discovered on such inspection⁷⁾. Again, if the seller sells a patented article or one which is sold under a trade name, obviously there is generally no reliance on the judgment of the seller⁸⁾. So, too, where the buyer specifies in detail the precise kind, character, and description of article which he wishes furnished to him, there is no implied warranty for the same reason⁹⁾. Again, the character of the goods sold may exclude the implication of a warranty, for example, when they are second-hand goods or waste products¹⁰⁾.

It has been said that the existence of an express warranty excludes the possibility of an implied warranty¹¹⁾. This is doubtless true if the implied warranty would be inconsistent with the express one, but it is not a correct statement if the implied warranty covers points not covered by the other¹²⁾. The existence of a written contract does not necessarily exclude proof of an implied warranty; the implied warranty may be relied upon notwithstanding the written contract is silent upon the subject¹³⁾, though an implied warranty inconsistent with the writing would be excluded¹⁴⁾.

It will be noticed that the rules in regard to the warranty of merchantability apply only in cases of sale by description, or of articles to be manufactured. It is only where the goods are not present at the time of sale that the law attaches this implied warranty. Where the buyer has an opportunity of inspection at the time the bargain is made, many cases rather harshly hold that there is no warranty even as to latent defects, though this is not the prevailing rule¹⁵⁾. And it makes no difference in the application of this rule that the inspection is inconvenient or difficult¹⁶⁾.

¹⁾ The word "manufacturer," in this connection has the meaning of a producer. Thus, a grower of plants or seeds is construed to be a manufacturer under this rule. *White v. Miller*, (1877) 71 N. Y. 118. California, Civil Code, sec. 1771 enacts that there is an implied warranty in cases where goods are sold which are inaccessible to inspection. — ²⁾ This warranty extends only to the sales of goods by description; if a specified chattel is sold which is subject to inspection, the rule of *caveat emptor* applies. *Barnard v. Kellogg*, (1870) 10 Wall. 383. — ³⁾ *Kellogg Bridge Co. v. Hamilton*, (1884) 110 U. S. 108; 2 *Mechem on Sales*, sec. 1345. — ⁴⁾ *Williston on Sales*, sec. 246; *Barnard v. Kellogg*, *supra*. The statements in the first four rules in the text are based on Sales Act, sec. 15, subsecs. 1 and 2. — ⁵⁾ *Goulds v. Brophy*, (1889) 42 Minn. 109; *Pease v. Sabin*, (1866) 38 Vt. 432; *Grieb v. Cole*, (1886) 60 Mich. 397. — ⁶⁾ 1 *Mechem on Sales*, secs. 1350, 1355 — ⁷⁾ The reason why

the buyer who has an opportunity of inspection of goods before sale cannot rely upon the implied warranty of quality has been said to be that "the rule requiring the purchaser to take care of his own interests has been found best adapted to the wants of trade in the business transactions of life." *Barnard v. Kellogg*, *ubi supra*. The buyer can demand a warranty if he distrusts his own judgment. — ⁸⁾ Sales Act, sec. 15, subsec. 4. — ⁹⁾ *Seitz v. Brewer's Refrigerating Mach. Co.*, (1891) 141 U. S. 510. — ¹⁰⁾ *Morley v. Consolidated Manufacturing Co.*, (1907) 196 Mass. 257. (Implied warranty excluded on sale of second hand automobile.) — ¹¹⁾ *De Witt v. Berry*, (1890) 134 U. S. 306. — ¹²⁾ *Alpha Checkrower Co. v. Bradley*, (1898) 105 Ia. 537. — ¹³⁾ *Elgin Jewelry Co. v. Estes*, (1905) 122 Ga. 807. — ¹⁴⁾ Sales Act, sec. 15, subsec. 2. — ¹⁵⁾ *Barnard v. Kellogg supra*; *Browning v. McNear*, (1904) 145 Cal. 272. — ¹⁶⁾ 15 *Am. & Eng. Encyc. Law*, (2d Ed.) 1221.

The Sales Act confines the operation of inspection by providing that its effect is to waive only defects which might be discovered upon inspection, but not latent defects¹).

In addition to the warranties above mentioned, there is an implied warranty, (and also an implied condition), in the case of sales by description that the goods shall correspond with the description. Sometimes goods are sold by description and a sample is also shown. In addition to the usual warranties on a sale by sample, a warranty is implied, in such cases, that the goods also correspond with the description. In other words, a sale may, at the same time, be both a sale by description and a sale by sample²).

It is often said that a special implied warranty exists in the case of the sale of provisions sold by a dealer for consumption by human beings, to the effect that they are fit for food³). Some cases imply the warranty even where the goods are not sold by a dealer, but probably this doctrine is not law, except in one jurisdiction⁴). In jurisdictions where the Sales Act is in force, as well as in those jurisdictions which imply the warranty in the case of dealers, there seems no reason for giving a separate statement to this rule, as it is covered by the exceptions to the general doctrine of *caveat emptor*, noted above⁵). A manufacturer or producer always warrants food to be reasonably fit to be eaten in the same way in which he warrants any article which he makes or grows, and in many jurisdictions, including all where the Sales Act applies, a dealer in provisions also makes the warranty when he knows, (as he must always know), that the food is bought to be eaten⁶).

The effect of a warranty seems to be rather limited in regard to the persons who may take advantage of it. Only the buyer can claim its benefits, and a sub-purchaser has no right of action for its breach⁷). Thus, if a manufacturer sells unwholesome provisions to a dealer, and the dealer then resells them to a customer, the customer cannot maintain an action against the manufacturer for injuries caused by eating them. He may, however, sue the dealer, who in turn may recover from the manufacturer the damages he is obliged to pay the customer. If the customer instead of consuming the food himself sold it, (not being a dealer), or otherwise transferred it to a third person, the manufacturer would escape ultimate responsibility on the warranty. If, however, instead of suing upon the warranty, any person injured can show that the manufacturer or dealer wilfully sold unwholesome provisions or other defective food, he may recover, however remote from the original wrong-doer⁸).

4. WARRANTIES ON SALES BY SAMPLE. — A sale by sample exists where the seller exhibits a sample or specimen of the goods not open to inspection for the purpose of showing their quality⁹). This warranty like the warranty in regard to description is perhaps express rather than implied¹⁰).

1) Sales Act, sec. 15, subsec. 3. — 2) Sales Act, sec. 14. In fact, the warranty would seem to be an express warranty, but it is usually spoken of in the American cases as an implied one. In *Gould v. Stein*, (1889) 149 Mass. 570, the contract was for 102 bales "second quality Ceara rubber, as per samples." The rubber was not of second quality, though it was equal to the samples shown. The warranty was held broken. — 3) 2 *Mechem on Sales*, sec. 1356; *California, Civil Code*, sec. 1775. — 4) *Hoover v. Peters*, (1869) 18 Mich. 51. — 5) Under the Sales Act, the warranty will extend to food sold for consumption by animals. The existence of such an implied warranty has been denied, *Lukens v. Friend* (1882) 27 Kas. 664, but has been sustained where the rule as stated in regard to sales of goods by dealer prevails. *French v. Vining* (1869) 102, Mass. 132. It has been decided, that the sale of water by a water company does not imply a warranty of purity, upon the theory that the contract is really one of service and not of sale, the company furnishing the customer the use of its pipes and reser-

voirs for the supply of a natural product. *Green v. Ashland Water Co.*, (1898) 101 Wis. 258. But see *Buckingham v. Plymouth Water Co.*, (1891) 142 Pa. 221. 2 *Jaggard on Torts*, sec. 261. — 6) In jurisdictions where the Sales Act is not adopted and where the doctrine of warranty by a dealer is not recognized, the rule in regard to provisions is still important. — 7) *Tomlinson v. Armour*, (1907) 74 N. J. L., 274. — 8) Upon the right of a remote subvendee to recover in tort on the ground of fraud or negligence, see *Schubert v. Clark*, (1892) 49 Minn. 331, s. c. 32 Am. St. Rep. 559; *Waters-Pierce Oil Co. v. Deselms*, (1909) 212 U. S. 159, (in which case a purchaser of kerosene oil, bought from a retail grocer, recovered damages on account of the death of his wife and children caused by an explosion owing to its defective character, from the original producers who knew of its dangerous and defective character.) See also, 2 *Mechem on Sales*, sec. 878, and note; 2 *Jaggard on Torts*, sec. 261. — 9) 2 *Mechem on Sales*, sec. 1320. — 10) *Bradford v. Manly*, (1816) 13 Mass. 139.

The warranties that exist in the case of a sale by sample are:

1. That the bulk of the goods corresponds in quality with the sample shown¹).
2. That the buyer shall have a reasonable opportunity of comparing the bulk with the sample²).

3. If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample³).

A sale by sample does not necessarily arise because a sample was shown. It may be that the seller's representation is simply that he has taken the sample fairly from the bulk, and it may be understood by the parties that the buyer is to take the risk as to the bulk⁴). As in the case of other warranties, the buyer must rely upon the implied warranty in order to claim its benefit⁵). If the buyer actually inspects the goods, or if the seller requires the buyer to inspect them, the sale will be considered to be made on inspection and not by sample⁶).

The warranty that the bulk is equal to the sample is satisfied where the bulk is fairly equal to the sample in nature, kind and quality⁷). Though there be a defect both in the bulk and the sample, the warranty is satisfied, even though the defect be latent, provided the sale is not made by a dealer under the subsection of the Sales Act above referred to⁸).

The rules in regard to proof that a sale was by sample are the same as those in regard to express warranties⁹). If a complete written contract be entered into between the parties, evidence cannot be received to show that the sale was in fact by sample¹⁰). If the writing be incomplete, however, or if it be merely a memorandum made to satisfy the Statute of Frauds of a contract in fact oral, parol evidence is admissible to show the true character of the sale. In the latter case, the proof that the sale was by sample and that the memorandum is therefore incomplete, would destroy the value of the written evidence to satisfy the Statute¹¹).

D. Duties of the Buyer. — 1. ACCEPTANCE. — In the case of the sale of a specified chattel present at the time of sale there is no question as to acceptance. There has been an examination or an opportunity for examination by the buyer and the law presumes acceptance when the contract is made¹²). Where, however, the goods are to be delivered to the buyer and the latter has not had an opportunity to inspect them, he has a right to examine the goods upon delivery before finally accepting them, for the purpose of ascertaining whether they are in conformity with the contract¹³).

This right of inspection may, under the contract, exist in several forms.

1. It may be a condition precedent to the passing of the property to the buyer, as in the case of *McNeal v. Braun* cited in the note¹⁴).

2. It may be a condition precedent to the payment of the price, even though the title has passed. Thus, in the ordinary case where the seller delivers the goods to a carrier for the buyer, while the presumption is that title passes upon such delivery, the buyer is not obliged to pay the price until he has had an opportunity of inspection¹⁵).

3. It may be a condition subsequent. Thus, in a case where the seller transmits to his own agent a demand bill of exchange drawn on the buyer for the purchase price with an order bill of lading the purchaser must pay the draft before he can get the

¹) *Dickinson v. Gay*, (1863) 7 Allen 29. — ²) 15 Am. & Eng. Encyc. Law. (1d Ed.) 1226. — ³) Sales Act, sec. 16. The third warranty, while well recognized in the case of articles to be manufactured according to a sample shown, is not, in the jurisdictions where the Sales Act is not adopted, fully established as to dealers who are not manufacturers. See *Bierman v. City Mills Co.*, (1897) 151 N. Y. 482. 2 *Mechem on Sales*, sec. 1330. — ⁴) *Gould v. Stein*, (1889) 149 Mass. 570. — ⁵) *Ames v. Jones*, (1879) 77 N. Y. 614. — ⁶) *Salisbury v. Stainer*, (1838) 19 Wend. 159. — ⁷) 2 *Mechem on Sales*, sec. 1328. — ⁸) There is no implied warranty of merchantability in a sale by sample except in the case of manufacturers who may be deemed to know of latent defects. *Dickinson*

v. Gay, (1863) 7 Allen, 29. — ⁹) *Gardiner v. Mc Donogh*, (1905) 147 Cal. 313. — ¹⁰) *Harrison v. McCormick*, (1891) 89 Cal. 327. — ¹¹) *Fisher v. Andrews*, (1901) 94 Md. 46. — ¹²) 2 *Mechem on Sales*, sec. 1366. — ¹³) *McNeal v. Braun*, (1892) 53 N. J. L. 617. In this case a large load of coal had been laid alongside of the buyer's wharf, and he had begun unloading, when the barge sank with the cargo. The loss was on the seller, because the buyer had not accepted. The Court held he had the right to unload the entire cargo for examination before accepting any part of it. — ¹⁴) See also *Holmes v. Gregg*, (1890) 66 N. H. 621. — ¹⁵) *Pope v. Allis*, (1885) 115 U. S. 363; *Alden v. Hart*, (1894) 161 Mass. 576; *Wadhams v. Balfour*, (1898) 32 Oreg. 313.

bill of lading. In such case it would seem reasonable that the buyer should be permitted to return the goods and recover the price paid, if the goods do not comply with the contract¹). And the authorities sustain this view²). In this connection it should be noted that the Sales Act³) provides that, where the goods are not to be delivered by the carriers until payment of the price, (including the case of C. O. D. sales), the buyer has no right of inspection before payment. It follows that in such cases it is a breach of the seller's contract to send goods with a draft attached to a bill of lading, where the contract provides for the right of inspection⁴).

The right of inspection involves the right of the buyer's taking the goods into his possession for that purpose⁵). The mere taking of the goods therefore is an equivocal act — it may be for this temporary purpose, or it may be in performance of his duty of acceptance. What is intended by the buyer's taking possession in each case is a question of fact⁶).

The right of inspection also involves, when reasonably necessary, the right of testing the goods⁷). In making the test a reasonable quantity of the goods may even be destroyed⁸). The expense of making the test is upon the buyer, although if he rightfully reject the goods he may recover the amount thus expended as part of the damages arising from the breach of the contract by the seller⁹).

The time allowed for inspection depends upon the circumstances of the case; the time that would be reasonable in the case of machinery, would be unreasonable in the case of perishable fruits¹⁰).

It is probably needless to add that the condition of inspection may be waived by the buyer, as any other condition may be waived¹¹). If the seller refuses, after demand, to permit the buyer to have a reasonable opportunity to inspect the goods, the latter may decline to pay the price¹²).

Acceptance of the goods may be indicated either by the buyer's expressed assent, or it may be inferred from his conduct¹³). Conduct which amounts to an acceptance is doing any act inconsistent with the seller's ownership, as by reselling or attempting to resell them¹⁴), or by using them as owner¹⁵), or by making substantial alterations in the goods¹⁶). Merely retaining the goods for an unreasonable time may amount to an acceptance. Failure to give notice of non-acceptance or rejection is itself sufficient to establish an acceptance, or, more strictly speaking, a waiver of the right to reject¹⁷).

Where the seller tenders delivery properly and requests the buyer to take the goods and the buyer after such tender and request does not within a reasonable time take them, he is liable to the seller for any loss occasioned by his delay in taking the goods, and also must pay a reasonable charge for their care and custody. If the neglect or refusal amounts to a repudiation or breach of the entire contract, the seller has the right to the usual remedies available in case of the default of the buyer¹⁸).

2. EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DAMAGES. —

The buyer's right to reject the goods delivered may exist in three cases:

1. Where the goods delivered are not the proper quantity;
2. Where they are not delivered within proper time; and
3. Where they are not of proper quality.

In these cases, he may decline to accept the goods tendered, and the seller can have no redress, (except of course where the variances are immaterial)¹⁹). But very

¹) *Dudley v. Chicago, etc., R. R. Co.*, (1906) 58 W. Va. 604, s. c. 3 L. R. A. (N. S.) 1135. — ²) *Hudson v. Germain Fruit Co.*, (1892) 95 Ala. 621. — ³) Sales Act, sec. 47, subsec. 3. — ⁴) *Erwin v. Harris*, (1891) 87 Ga. 333. — ⁵) *McNeal v. Braun*, (1892) 53 N. J. L. 617. — ⁶) *Benjamin on Sales*, sec. 703; 2 *Mechem on Sales*, sec. 1370. — ⁷) *Cream City Glass Co. v. Friedlander*, (1893) 84 Wis. 53, 59; *Kingman v. Watson*, (1897) 97 Wis. 596, (Buyer used machinery after knowledge of its defects). — ⁸) If, however, the buyer uses an unreasonable part of the goods in making his tests, he will be deemed to have accepted the goods. *Zipp Mfg. Co. v. Pasto-*

rino, (1904) 120 Wis. 176. — ⁹) *Lincoln v. Gallagher*, (1887) 79 Me. 189. — ¹⁰) *Jones v. Bloomgarden*, (1906) 143 Mich. 326. — ¹¹) *English v. Spokane Commission Co.*, (1891) 48 Fed. 196. — ¹²) Sales Act, sec. 47, subsec. 2. — ¹³) Sales Act, sec. 48. — ¹⁴) *Wolf v. Dietzsch*, (1874) 75 Ill. 205. — ¹⁵) *Brown v. Foster*, (1888) 108 N. Y. 387; *Dauphiny v. Red Poll Creamery Co.*, (1899) 123 Cal. 548. — ¹⁶) *Bascom v. Mfg. Co.*, (1897) 182 Pa. St. 427. — ¹⁷) *Moore Furniture Co. v. Sloane*, (1897) 166 Ill. 457. — ¹⁸) Sales Act, sec. 51, *Williston on Sales*, sec. 500. — ¹⁹) *Norrington v. Wright*, (1885) 115 U. S. 188; Sales Act, secs. 11, 41, 44, and 69.

often it would be a hardship upon the buyer as well as upon the seller to limit the buyer's remedy to rejection of the goods¹). It may be very convenient for him to use the goods delivered at once, and a great inconvenience to procure other goods²). May he in such cases accept the goods delivered, though insufficient in quantity and quality and delivered at an improper time, and nevertheless sue the seller for damages caused by his breach? Generally, where the breach of the seller is in respect to the quantity of goods delivered or the time of delivery, the authorities hold that the right to sue for damage survives acceptance³).

But with respect to the right to hold the seller for damages after having accepted goods of a different quality from those due under the contract, the various jurisdictions are in conflict. In Massachusetts, Illinois and perhaps in a majority of the States, the rule is that the right of action for damages survives acceptance⁴). In other States, the most notable of which is New York, the buyer is held to have waived the right to sue for damages by accepting a different quality of goods where the defect is one that might have been discovered on inspection⁵). The Sales Act adopts the prevailing doctrine⁶). It is worthy of remark that many of the jurisdictions which deny to the buyer the right to claim damages for breach as to quality, after acceptance, recognize his right in the case of breach as to quantity or as to time of delivery⁷). It is also important to notice that the same courts draw a distinction between implied warranties and express warranties, holding that where an express warranty as to quality is given by the seller, the remedy of damages for its breach survives the acceptance of the goods⁸). The prevailing rule which has been adopted in the Sales Act does not imply that in every case the right to sue for a breach of warranty of quality survives acceptance⁹). Not only would acceptance preclude further objection where the contract expressly provides that it shall be conclusive¹⁰), but the circumstances may show, in cases where is no such positive stipulation, that the buyer has accepted the insufficient delivery as a fulfillment of the contract. Such a circumstance would be the payment of the purchase price after notice of the defect or after a delivery insufficient in quantity or at an improper time¹¹). And even where there is no such positive circumstance as payment of the price, it has been frequently held that the jury may find a waiver of the right to sue for damages from the circumstance that the goods are retained by the buyer without objection for a considerable length of time after acceptance¹²). The Sales Act lays down a definite rule upon this matter to the effect that if the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor¹³). The result of this rule is, therefore, that the buyer has an election in the case of an insufficient tender either to reject the goods altogether, or to accept them and promptly give notice to the seller that he claims damages for the latter's breach of duty in tendering an insufficient delivery.

¹) *Industrial Works v. Mitchell*, (1897) 114 Mich. 29. Where the buyer of machinery must either accept or suffer great loss, the Court spoke of the acceptance as "practically an acceptance under compulsion." — ²) As stated in the text it may also be a hardship upon the seller. For example, if the goods are of a peculiar kind and not generally merchantable, it would be more advantageous for him if the buyer accept the goods and leave the question of the amount of damage to be subsequently adjusted. — ³) As to quantity, see *Kipp v. Meyer*, (1875) 5 Hun. (N. Y.) 111; *Avery v. Wilson*, (1880) 81 N. Y. 341. — ⁴) 2 *Mechem on Sales*, sec. 1393. Professor Mechem, although inclining to adopt the New York view, states that the Massachusetts view is the prevailing one, p. 1209. Underwood v. Wolf, (1890) 131 Ill. 425; *Taylor v. Cole*, (1873) 111 Mass. 363; *Polhemus v. Heiman*, (1873) 45 Cal. 573; *Holloway v. Jacoby*, (1888) 120 Pa. St. 583; *English v. Spokane Commission Co.*, (1893) 57 Fed. 451. But see *Carleton v. Jenks*, (1897) 80 Fed.

937; *Oakland Mill Co. v. Wolf*, (1902) 118 Fed. 239. — ⁵) *Snider v. Bleistein*, (1889) 115 N. Y. 316. — ⁶) *Sales Act*, sec. 49. — ⁷) As to time, see *Beger v. Heary Huber Co.*, (1906) 100 N. Y. Supp. 1029. As to quantity, see *Avery v. Wilson*, (1880) 81 N. Y. 314. — ⁸) *Fairbank Canning Co. v. Metzger*, (1889) 118 N. Y. 262. The same effect is given by the New York courts to a sale by sample. *Brigg v. Hilton*, (1885) 99 N. Y. 517. — ⁹) *Babcock v. Trice*, (1857) 18 Ill. 420. — ¹⁰) Thus, in *Osborne v. Baker*, (1894) 103 Mich. 247, the contract on the sale of a harvester provided that keeping the machine during harvest "shall be deemed conclusive evidence that the machine fills the warranty." — ¹¹) *Medart Pulley Co. v. Dubuque Mill Co.*, (1903) 121 Ia. 244. But see *Taylor v. Cole*, (1873) 111 Mass. 363, where giving a note for the purchase price did not have the effect of indicating a waiver of damages. — ¹²) *Morse v. Moore*, (1891) 83 Me 473, 13 L. R. A. 224. — ¹³) *Sales Act*, sec. 49 (last sentence).

Troublesome questions arise where part of the goods delivered are insufficient. In general, a buyer cannot select and retain the sufficient goods and reject the others¹). If the contract is severable — that is, if there are in fact several contracts — he may, however, reject the goods under one or more of the contracts and retain the others²). Very often where the contract is entire and a portion of the goods are unsatisfactory the seller and the buyer enter into negotiations which have the effect of making the contract, in fact, severable; the seller may by his conduct, in other words, recognize the right of the buyer to reject a portion of the goods, even while insisting that the goods are sufficient³). Unless there are facts, however, indicating either that new contractual rights have been created, or rights or remedies existing under the former contract have been waived, the general rule will prevail, which denies to the buyer the right to impose different obligations on the seller than those fixed by the contract, even where the seller is himself guilty of a breach.

As to the notice which the buyer must give, it seems that no particular form is in general required⁴). A mere notice that he rejects the articles without pointing out the precise defects in the goods has been held sufficient⁵). But if he undertakes to give notice of the defects and places his objections upon certain grounds, it seems he cannot afterwards rely upon other defects which might have been known to him when he gave the first notice⁶). Frequently, the contract provides for giving notice in a particular form, as in writing. Such stipulation is waived, however, where the seller or his authorized agent attempts to remedy the defect, or otherwise acts upon an informal notice, or where he absolutely refuses to take back the thing sold or remedy the defect under any circumstances⁷).

3. DUTIES OF THE BUYER WITH RESPECT TO GOODS IMPROPERLY DELIVERED. — Where the goods are properly rejected by the buyer, that is, where they are not of the kind, quantity, or quality that should be delivered under the contract, or where they are delivered too late to comply with the provisions thereof, the buyer fulfills his whole duty in regard to the goods when he notifies the seller that he refuses to accept them⁸). In other words there is no obligation on the buyer to take active steps, (in the absence of an agreement to that effect), for the purpose of returning the goods to the seller.

If the seller neglects for an unreasonable period to retake the goods, there is some warrant in the decisions for the authority on the buyer's part to sell the goods to save expense⁹). This right, however, must be confined within narrow limits, for, as the buyer owes no duties with respect to the goods, it is difficult to see upon what ground he can rightfully intermeddle with them. It is doubtless true that if the evidence shows that the goods would have perished if not sold, the seller cannot prove any damage by reason of the sale, but it is doubtful if his so-called right of resale has any higher ground than this¹⁰).

Where the buyer has rightfully refused acceptance of the goods, the buyer is released from further obligation, if the delivery were a condition precedent to his liability. Hence, a subsequent proper tender of delivery by the seller will not operate to restore the liability of the buyer once discharged. In other words, a second tender,

¹) *Clark v. Baker*, (1845) 5 Met. 452. This may be changed by usage, however. *s. c.* (1846) 11 Met. (Mass) 186. — ²) *Williston on Sales*, secs. 466, 493; 2 *Mechem on Sales*, sec. 1398. On severable contracts, see *Norris v. Harris*, (1860) 15 Cal. 226. — ³) As in *Russel v. Lilienthal*, (1899) 36 Oreg. 105, where the seller delivered and the buyer paid for a portion of the goods delivered without saying anything about the remainder. — ⁴) *Am. White Bronze Co. v. Gillette*, (1891) 88 Mich. 231. — ⁵) *Elliott v. Howison*, (1906) 146 Ala. 568. — ⁶) *Johnson v. Oppenheim*, (1873) 55 N. Y. 291; *Ginn v. W. C. Clark Co.*, (1906) 143 Mich. 84. This doctrine is criticized in *Williston on Sales*, sec. 495. — ⁷) As to acting on informal notice: *Briggs v. Reemby Co.*, (1895) 96 Ia. 202. As to repudiation: *Wood Machine Co. v. Calvert*, (1895) 89 Wis.

640. — ⁸) *Sales Act*, sec. 50. With respect to the notice that must be given, as has been said before, no particular form is necessary, but in *Bascom v. Danville Store Co.*, (1897) 182 Pa. St. 427, the Court held that a letter which said, "we fear we cannot use the patterns at all; we must either be paid for the extra cost or will return the patterns; please advise us what to do in the matter," was not an absolute refusal to accept. — ⁹) *Rubin v. Sturtevant*, (1897) 80 Fed. 930. — ¹⁰) *Professor Williston*, (*Sales*, sec. 489, note 83), cites *Smith*, *Mercantile Law* (10th Ed.) 660, to the effect that a sale by the buyer on behalf of the seller is "a dangerous course to pursue and never ought to be resorted to without necessity," and adds concerning the statement, "it is probably true."

after the first has proved insufficient, need not be accepted by the buyer¹). The terms of the rejection may, however, indicate that the buyer expects a correction of the tender, in which case, of course, his liability is not at an end, for he has not yet finally refused acceptance²). And it is very often the case that the contract allows the seller an opportunity to remedy defects in the delivery; the liability of the buyer continues in such a case until the seller has exercised his opportunity or until he has had a reasonable time in which to do so³).

4. PAYMENT OF THE PRICE. — The buyer's remaining duty, after acceptance of the goods, is to pay the price. As the payment is due forthwith upon the delivery of the goods, no demand for the price is necessary, but the seller may begin an action for it at once. Express agreement, or the conduct of the parties, or usage may, however, indicate that the sale is made on credit, in which event the price is not payable until the time for credit has expired⁴). And the fact that the seller has been induced to extend the credit to the buyer by reason of the latter's fraud, does not, in most jurisdictions, warrant the defrauded seller in suing at once for the price, although it does universally warrant him in rescinding the sale and recovering the goods from the dishonest vendee⁵).

From the fact that no demand is necessary for the price in the ordinary contract, and that therefore the buyer must seek out the seller to pay him, it follows that the place where payment should be made is wherever the seller may be found, or at his residence or place of business⁶). A limitation on this proposition appears to be that the buyer need not follow the seller beyond the limits of the state in order to tender payment⁷).

Unless a different medium of payment is provided for by the contract, payment must be made in the lawful money of the United States constituting legal tender under the Acts of Congress⁸). However, it is not uncommon to provide for payment of the price in the bill of exchange, check or other paper of the buyer, or in the negotiable paper of other persons, and even though there be no such provision in the contract, the seller may accept such paper, as, indeed, he may accept anything else, as substituted payment.

Where negotiable paper of the buyer or even of a third person is received by the seller, however, the presumption is that it is not received as absolute payment, but merely as conditional payment⁹). But this presumption merely alters the burden of

¹) *Hallwood Cash Register Co. v. Lufkin*, (1901) 179 Mass. 143; *McCormick Harvester Co. v. Russell*, (1892) 86 Ia. 556. The converse proposition is true, and after rejection the buyer has no right to test the goods. *Cream City Glass Co. v. Friedlander*, (1893) 84 Wis. 53. — ²) *Whitla v. Moore*, (1894) 164 Pa. St. 451.

— ³) As an example of a case where the seller had a right to remedy defects in the goods delivered, see *McCormick Harvester Co. v. Brower*, (1893) 88 Ia. 607. — ⁴) 2 *Mechem on Sales*, sec. 1410. — ⁵) That the seller cannot sue for the price before the term of credit has expired, even though it was procured by the fraud of the buyer, see *Kellogg v. Turpie*, (1879) 93 Ill. 265; *Jones v. Brown*, (1895) 167 Pa. St. 395. In New York, the courts rather illogically allow the seller to sue for the price in such case. *Heilbronn v. Herzog*, (1900) 165 N. Y. 98, and this doctrine is said to have been adopted in *Oklahoma and Kentucky*. 2 *Mechem on Sales*, sec. 1411, note 5. That the seller may rescind and sue for the goods themselves or for their value, either in tort or quasi contract see *Parker v. Simpson*, (1902) 180 Mass. 334, 343. — ⁶) *Gale v. Corey*, (1887) 112 Ind. 39. — ⁷) *Hale v. Patton*, (1875) 60 N. Y. 234. — ⁸) Legal tender is established by the laws of the United States as follows: I. Gold coin, standard silver dollars, and Treasury notes under the Act of 1890, are legal tender to any amount,

and United States Treasury ("greenbacks") are full legal tender, except for duties on imports and interest on the public debt. In important contracts for the payment of large sums however, it is usual to stipulate for payment in gold coin. II. Subsidiary silver coins, viz. half dollars, quarter dollars, and dimes, are legal tender for amounts not exceeding ten dollars. III. Nickel coins (the five cent piece) and bronze coins, (the one cent piece) are legal tender for amounts not exceeding twenty-five cents. The other currency of the United States, but which is not legal tender is, gold certificates issued against gold and silver bullion deposited in the United States Treasury, and silver certificates, issued against silver dollars deposited in the Treasury both of which, though not legal tender, are receivable for all public dues, and national bank notes, issued by national banks upon the security of United States bonds, deposited in the United States Treasury, which, though not legal tender, are also receivable for all public dues, except duties on imports, and must be accepted by all other national banks. *Huffcut, Elements of Business Law*, pp. 145—146. — ⁹) *Randolph, Commercial Paper* (2d Ed.) sec. 1509. It is said that the contrary presumption prevails in *Indiana, Louisiana, Maine, Massachusetts, and Vermont*. *Daniels, Negotiable Instruments*, (5th Ed.) sec. 1260. A circumstance

proof, and facts may be shown indicating that the seller intended to receive the paper in satisfaction of the price¹). Another consequence of the seller's right to have money in payment is that the buyer cannot tender in payment the seller's own negotiable paper, or offer to pay the price by cancelling an indebtedness due to him from the buyer²). If the buyer offers to satisfy his obligation in such manner, the seller may rescind the sale and retake the goods, if already delivered. But if the seller, instead of rescinding, sues the buyer for the price, the latter may use the seller's note or other obligation by way of set-off³).

Where payment is made to another person than the seller, for the account of the latter, as to the seller's agent, it is important to determine whether such person had power to receive payment, either actual or ostensible. Thus, a travelling salesman not entrusted with the possession of goods, would, ordinarily, not have authority to receive payment⁴), while a similar salesman having such possession would ostensibly have such power⁵). The agent cannot, unless specially authorized, accept anything except money in payment. Hence, if a collector or other agent, receives a check in payment, and the bank upon which it is drawn fails before the check is presented, the drawer of the check remains liable⁶). Proof of a custom on the part of the principal to permit the agent to receive checks in payment would, however, establish an implied authority on his part, or an ostensible authority might be shown by evidence that it was the custom in the trade to pay by check.

V. REMEDIES FOR NON-PERFORMANCE. — A. Classification of Remedies. —

The subject of remedies naturally divides itself into two parts: I. The remedies of the seller; and II. The remedies of the buyer.

The remedies of the seller are of two kinds: 1. remedies of the seller against the goods; and 2. remedies against the buyer personally. The seller's remedies of the first class are non-judicial; those of the second class are judicial. The remedies of the seller against the goods are, a) the seller's lien, b) stoppage in transitu, c) resale, and d) rescission. The remedies against the buyer personally, are, a) an action for the price, and b) an action for damages for non-acceptance⁷).

The remedies of the buyer in respect to the goods are, a) to take the goods, by his own act or by judicial remedies, and b) to rescind the sale for breach of warranty. His remedies against the seller personally, are, a) an action for damages for non-delivery, b) (in exceptional cases) specific performance of the contract, and c) an action for damages for breach of warranty⁸).

1. THE UNPAID SELLER'S LIEN. — Where the title has not passed and the seller retains possession of the goods, his security is ample. It is only where the title has passed that the question of security becomes important. In such case, where the unpaid seller has still possession of the goods, he may continue in general to retain such possession as security until payment or tender of the price. This is the usual case of the so-called unpaid seller's lien⁹). The lien, however, is somewhat more extensive than just stated. It extends also to the case where there has been a term of credit, (during which, of course, the buyer might have demanded possession of the goods), but the goods have remained in the seller's possession until the term has expired, and the price remains unpaid¹⁰). In such case, the buyer has lost his

that would seem to be important in cases where the paper of a third person is given is the indorsement by the person making payment in such paper. If he indorses the note or bill, he becomes liable upon it to the indorsee, and the giving of the note or bill is more naturally to be regarded as conditional. If the paper is not indorsed by the buyer, it may well be presumed to be given in absolute payment. Daniels, *Negotiable Instruments* (5th Ed.) sec. 1264; Randolph, *Commercial Paper*, (2d Ed.) sec. 1544.

¹) The evidence, it is generally said, must be clear to establish the fact that a note is accepted as absolute payment. See *Sebastian May Co. v. Codd*, (1893) 77 Md. 293. — ²) *Allen v. Hartfield*, (1875) 76 Ill. 358; *Wabash Elevator Co. v. First National Bank*, (1872) 23 Oh. St. 311. — ³) *Mechem on Sales*, sec. 1438.

— ⁴) *Law v. Stokes*, (1867) 32 N. J. L. 249.

— ⁵) *Seiple v. Irwin*, (1858) 30 Pa. St. 513; *Mechem on Agency*, secs. 336—343. —

⁶) *Harlan v. Ely*, (1886) 68 Cal. 522. The agent would also be liable to the principal, in such case, if the principal could not recover against the drawer of the check. — ⁷) *Sales Act*, sec. 53. — ⁸) *Sales Act*, secs. 66, 67, 68, and 69. — ⁹) *Arnold v. Delano*, (1849) 4 Cush. 33; *Sales Act*, sec. 54, subsec. 1; *California, Civil Code*, sec. 3049. — ¹⁰) Manifestly if the seller has sold the goods on credit, he can have no lien, for he is under obligation to deliver the goods to the buyer without prepayment of the price. This case of the unpaid seller's lien, therefore, arises only where the buyer permits the seller to retain possession until the period of credit has expired. *Sales Act*, sec. 54, subsec. 1b.

right of possession, and the seller's mere possession ripens at once into a right of possession. Another case where the unpaid seller's lien exists is where the buyer becomes insolvent before delivery of the goods to him¹). Although the goods may have been sold on credit and the term of credit has not expired, the seller in possession is not bound to deliver the goods to the buyer after the latter's insolvency. Such a financial condition on the buyer's part makes it improbable that payment will be made when it falls due, and it would be unjust to force the seller to surrender the goods and take in exchange a right of action which is probably worthless²).

Insolvency in reference to the seller's lien does not necessarily mean insolvency within the meaning of the Bankruptcy Act. By the definition in the Sales Act which expresses the general rule on the matter, a person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due³). Insolvency and even bankruptcy do not, however, discharge the contract. The trustee in bankruptcy may pay the price and become entitled to the possession of the goods, where the title has passed to the bankrupt prior to the filing of the petition — in other words, he occupies, in this respect, precisely the same position which the bankrupt occupied. The seller is not bound to surrender possession to the trustee without payment any more than he was bound to surrender possession to the bankrupt⁴).

The unpaid seller's lien avails even where he has given an order to the buyer to procure the goods, provided the latter has not actually taken possession of them before insolvency, or provided the warehouseman or bailee has not attorned to the buyer before that time⁵). Where the seller himself holds the goods as warehouseman for the buyer, even though he has issued to the buyer a non-negotiable warehouse receipt for the goods, he may assert his lien upon the insolvency of the purchaser⁶). Where a negotiable warehouse receipt or bill of lading has been issued to the buyer, the seller's lien becomes ineffective, for the warehouseman or carrier must surrender the goods to the holder of the receipt⁷). And, in general, the title and right of possession of goods follow the negotiable document of title⁸).

From what has been said in regard to payment in the last section, it follows that the seller's lien is only conditionally removed by the fact that he has taken negotiable paper in payment, and that it revives when the buyer becomes insolvent before delivery of possession of the goods⁹). If, in such a case, the paper is still in the seller's hands, it is clear that the case is only the usual one of the credit being destroyed by insolvency. If, however, he has sold the paper to a third person by indorsement, he may still assert the lien, for he is liable to subsequent holders of the paper by reason of his indorsement, and is practically, therefore, an unpaid vendor¹⁰). If, however, he has sold the paper without indorsement, as he may do where it was payable to bearer or indorsed in blank by the original payee, he can no longer be held liable upon it, and there is no reason why he should claim to be an unpaid vendor¹¹).

The expression "unpaid seller" embraces agents or factors who have themselves paid for the goods, or to whom the bill of lading has been indorsed¹²). Even if the factor has not actually paid for the goods as to which he asserts the lien, he is justified in his claim of lien, if he has bound himself to pay the price¹³).

Although a part of the purchase price has been paid, the seller may claim a lien upon all of the goods for the unpaid balance; in other words, the lien exists so long as any part of the price remains unpaid¹⁴). Conversely, though part of the goods

¹) *McElwee v. Metropolitan Lumber Co.*, (1895) 69 Fed. 302, (a leading case). —

²) *Southwestern Freight Co. v. Stantard*, (1869) 44 Mo. 34.; *Arnold v. Delano*, (1849) 4 Cush. 33; *Sales Act*, sec. 54, subsec. 1c. — ³) *Sales Act*, sec. 76, subsec. 3. 2 *Mechem on Sales*, secs. 1519—1520. — ⁴) *Williston on Sales*, sec. 662. — ⁵) 2 *Mechem on Sales*, sec. 1493. — ⁶) *Sales Act*, sec. 54, subsec. 2. — ⁷) *Walters v. Western, etc., R. R. Co.*, (1891) 56 Fed. 369, (1893), 63 Fed. 391. — ⁸) *Sales Act*, sec. 33. — ⁹) Ordinarily, taking paper payable at a future date is the usual method of extending credit, and the lien will be suspended, by taking

such paper but may subsequently be revived by the insolvency of the buyer. — ¹⁰) *Sales Act*, sec. 52, subsec. 1a; *McElwee v. Metropolitan Lumber Co.*, (1895) 69 Fed. 302. —

¹¹) *Daniels, Negotiable Instruments*, sec. 1264.

¹²) *Sales Act*, sec. 52, subsec. 2; *Newhall v. Vargas*, (1836) 13 Me. 93. — ¹³) 2 *Mechem on Sales*, sec. 1530. The rules are the same

as in regard to the right of stoppage in transitu. An agent who buys goods in his own name and consigns them to his principal cannot exercise such right. *Lake Shore, etc., Ry. Co. v. National Live Stock Bank*, (1899) 178 Ill. 506. — ¹⁴) *Sales Act*, sec. 55.

has been delivered, the seller may assert his lien on the remainder, unless the circumstances show a waiver of the lien¹).

The unpaid seller's lien is lost by delivery of the goods to the buyer or his agent, and when thus lost is not recovered by the subsequent redelivery to the seller for some special purpose²). The seller's right of possession, and consequently his lien, is not lost, however, by his parting with possession of the goods, where he does so by reason of the fraud of the buyer. He may recover the goods in such case from the buyer³). The seller also loses his lien by delivering the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right to possession of the goods, for the reason that the lien is dependent upon possession⁴).

The lien may also be waived by the seller⁵). Thus, if he sues out an attachment, and has the goods taken by the sheriff or other officer of the court, he loses his lien as seller⁶). Asserting that he is owner of the goods and wrongfully placing his refusal upon that ground and not claiming his lien will, so far at least as third persons are concerned, amount to a waiver of the lien⁷). It has been decided, and the Sales Act adopts the decision, that the lien is not waived by the seller's getting judgment for the purchase price⁸). An agreement with the buyer after the lien has attached or revived, that he may have further credit will, however, be a waiver of an existing lien⁹).

2. RIGHT OF STOPPAGE IN TRANSITU. — a) *In General*. — Like the unpaid seller's lien, of which it has been said to be an extension, the right of stoppage in transitu exists only in cases where the title to the goods has passed. It is the right which an unpaid seller has, after delivery to a carrier for transportation to the buyer, to resume possession of the goods at any time while they are in transit, in cases where the buyer is or becomes insolvent¹⁰). The purpose of the stoppage in transitu is to permit the seller to reassert his lien¹¹). It has been pointed out in an earlier section that the occasions for the exercise of this right have become less frequent by reason of the ease with which, under modern banking conditions, the *jus disponendi* may be effectually reserved, but the doctrine of stoppage in transitu is still of considerable importance¹²).

There seems to be no difference between the character of the persons who may exercise this right and those who may exercise the right of lien¹³), but there does seem to be some difference as to the occasions on which the rights respectively arise. The right of lien (where a credit has been given) attaches, or revives, upon the buyer's becoming insolvent; the right of stoppage in transitu exists under the words of the Sales Act where the buyer is or becomes insolvent¹⁴). The law, in most jurisdictions where the Sales Act has not been adopted, also recognizes the seller's right to stop goods in transit where the buyer was insolvent at the time the goods were bought, as well as where the insolvency occurs after the sale¹⁵). If, however, the seller knows of the buyer's insolvency at the time he sold the goods, he cannot exercise this right¹⁶).

The more difficult questions connected with the exercise of the right of stoppage in transitu arise out of the meaning of the word transit. If the transit has ended, the right is at an end; if it has not begun, there is no need for the exercise of this right,

¹) *Crummey v. Raudenbush*, (1893) 55 426. Minn. — ²) *Williston on Sales*, sec. 511. — ³) *Lamb v. Utley*, (1906) 146 Mich. 654. — ⁴) *Sales Act*, sec. 56, subsec. 1a. It has been said (2 *Mechem on Sales*, sec., 1496) that the lien is not lost where the carrier acts as the agent of the seller. It is believed that there should be no distinction between this case and the case where the buyer employs the carrier. The carrier is deemed to have an independent possession. The right of lien will be lost where a seller who has an order bill of lading transfers the bill to another person by indorsement. *Sales Act*, sec. 33. — ⁵) *Sales Act*, sec. 56, subsec. 1c. — ⁶) *Legg v. Willard*, (1835) 17 Pick. 140. — ⁷) *Crummey v. Raudenbush*, (1893) 55 Minn. 436. — ⁸) *Sales Act*, sec. 56, subsec. 2; *Wade v. Moffett*, (1859) 21 Ill. 110. — ⁹) 2 *Mechem on Sales*, sec. 1517. — ¹⁰) *Sales Act*, sec. 57;

California, Civil Code, secs. 3076—3080. — ¹¹) California, Civil Code, sec. 3080; "Stoppage in transit does not, of itself, rescind a sale, but is a means of enforcing the lien of the seller." — ¹²) See *ante* section on *Reservation of Jus Disponendi*. — ¹³) While an agent who has sold the goods in his own name may stop the goods in transit to the buyer, he may not do so when the goods are in course of delivery to his principal. A factor loses his lien by delivery to a carrier. *Gwyn v. Richmond, etc., R. R. Co.*, (1881) 85 N. C. 429. — ¹⁴) *Sales Act*, sec. 57. There is some authority to the contrary. *Rogers v. Thomas*, (1849) 20 Conn. 53. — ¹⁵) *Bayonne Knife Co. v. Umbenhauer*, (1895) 107 Ala. 496; California, Civil Code, sec. 3076. — ¹⁶) *Fenkhausen v. Fellows*, (1889) 20 Nev. 312. Sed quære.

for the seller's right of lien affords him ample protection¹). The transit begins at the instant the seller so parts with the goods that he loses his seller's lien, and continues until the time that the carrier or bailee delivers the goods to the buyer himself, or to an agent of the buyer whose duty is something more than merely to carry or deliver the goods to the buyer²). Thus, where the goods are delivered to one carrier to be by him delivered to a forwarding agent of the purchaser for transportation to a more distant point, the fact that the forwarding agent is employed by the buyer does not affect the right of stoppage in transitu³). On the other hand, if the agent to whom the delivery is made by the carrier is subject to general orders from the buyer as to the disposition of the goods, the transit is ended by the delivery to such agent⁴).

It is unimportant so far as the exercise of this right is concerned, whether the freight is paid by the seller or by the buyer⁵). The carrier although selected by the buyer, is entrusted with the goods for only one purpose, that of delivery to the buyer. But if the goods are shipped on the buyer's own vessel, the delivery to the master is a delivery to the buyer, for he is subject to the general directions of the owner of the vessel⁶). If the buyer is the charterer of the vessel instead of the owner, a delivery to the master is not necessarily or usually a delivery to a general agent of the charterer, for the master ordinarily is the employee of the owners and not of the charterer⁷). A delivery to the buyer's truckman or carter, is a delivery to the buyer, and ends the transit, but where the carrier to whom the seller has entrusted the goods for carriage is under obligation by his contract or by usage to deliver the goods at the buyer's residence or place of business, the transit continues until such delivery is accomplished⁸). It is to be noted that the transit may continue although the carriage has terminated, as where the goods are held by a warehouseman awaiting further shipment or where they are held by a carrier at their final destination awaiting the buyer's receipt⁹). Where the goods have come into the hands of customs officers and have been placed in a public warehouse, the transit is not terminated until the consignee has duly entered them, given bond for the payment of duties and received the warehouse receipt¹⁰). The right of stoppage sometimes survives even the actual tender of the goods. This is the case where the buyer refuses to receive them, and they remain in the possession of the carrier or other bailee¹¹). The fact that the seller has also refused to take the goods back is immaterial; he may, notwithstanding, assert the right of stoppage in transitu upon learning of the buyer's insolvency.

The right of stoppage in transitu may be defeated by the buyer or his assignee or subpurchaser. Thus, if before the right is exercised, the buyer, his assignee or subpurchaser, gets possession of the goods from the carrier, although they have not yet reached their destination, the transit is ended¹²). The seller cannot complain, for he has made no contract or reservation of title inconsistent with the carrier's act in delivering the goods. So, even though the buyer has not obtained actual possession from the carrier or bailee, yet if the latter has consented to hold the goods for the buyer, the seller's right of stoppage is gone¹³). While the carrier can thus defeat the right of stoppage in transitu, by a delivery to the buyer, before the destination is reached, he cannot enlarge that right by wrongfully refusing to deliver the goods to the buyer at the end of the transit¹⁴).

¹) As to when the transit ends, see *Brewer Lumber Co. v. Boston, etc.*, R. R. Co., (1901) 179 Mass. 228. — ²) Sales Act, sec. 58, subsec. 1a; California, Civil Code, sec. 3078: "The transit of property is at an end when it comes into the possession of the consignee or into that of his agent, unless such agent is employed merely to forward the property to his consignee." — ³) *Cabeen v. Campbell*, (1858) 30 Pa. St. 254; *Brooke Iron Co. v. O'Brien*, (1883) 135 Mass. 442; *Aguirre v. Parmalee*, (1853) 22 Conn. 473; *Markwald v. Creditors*, (1857) 7 Cal. 213; *Blackman v. Pierce*, (1863) 23 Cal. 508. — ⁴) *Aguirre v. Parmalee*, (1853) 22 Conn. 473. — ⁵) *Harris v. Pratt*, (1858) 17 N. Y. 249. Though both title and the risk of loss may be with the buyer, the right of stoppage may still exist. — ⁶) Williston on Sales, sec. 532.

— ⁷) 2 *Mechem on Sales*, sec. 1550; Williston on Sales, sec. 532. The question is affected by the character of the bill of lading issued; if an order bill of lading be given, the goods can only be delivered upon production of the bill. Williston on Sales, sec. 542; Sales Act, sec. 33. — ⁸) *Re Burke*, (1905) 140 Fed. 971. — ⁹) *Hutchinson on Carriers*, sec. 416. — ¹⁰) *Parker v. Byrnes*, (1871) 1 Lowell (U. S.) s. c. Fed. Cas. No. 1119; *Mottram v. Heyes*, (1846) 5 Denio (N. Y.) 629; *Harris v. Pratt*, (1858) 17 N. Y. 249. — ¹¹) Sales Act, sec. 58, subsec. 1b. — ¹²) *Poole v. Houston, etc.*, Ry. Co., (1882) 58 Tex. 134; Sales Act, sec. 58, subsec. 2a. — ¹³) Williston on Sales, sec. 528; Sales Act, sec. 58, subsec. 2b. — ¹⁴) *Benjamin on Sales*, (7th Am. Ed.) sec. 855; Sales Act, sec. 58, subsec. 3.

A partial delivery of the goods does not generally defeat the seller's right of stoppage in transitu. There may be circumstances, however, from which a jury might infer an agreement with the buyer to give up possession of all of the goods, and that the partial delivery was a symbolical delivery of the whole. The Sales Act provides for leaving this question of fact in the particular case¹). Partial payment of the price has no effect upon the right of stoppage in transitu, the right exists so long as any part of the price remains unpaid²).

The right of stoppage in transitu may be waived. If the seller purports to make claim to the possession of the goods under authority from the buyer, he manifestly cannot at the same time claim his right as an unpaid seller seeking to re-establish his lien³). An attachment levied by the seller constitutes a waiver of the right of stoppage in transitu⁴). So, beginning an action for the purchase price has been held to be a waiver of a right to give notice, but not a waiver of a notice previously given⁵).

b) *Effect of Stoppage in Transitu.* — The effect of stoppage in transitu is to revest the seller's lien⁶). Accordingly, after proper notice to the carrier, the latter becomes liable for the value of the goods, if he delivers them to the buyer in disregard of the notice⁷). The doctrine being originally of equitable origin, the courts look at the seller as equitably entitled to the goods until payment and regard his rights as paramount to the rights of persons who attempt to acquire liens upon the property. Hence, attachments or executions levied upon the goods by creditors of the buyer, even where they are levied before the right of stoppage is asserted by notice to the carrier, yield to the unpaid seller's rights⁸).

Much discussion by judges and text writers has been had upon the question as to the right of the unpaid seller to intercept the proceeds of the sale of goods made by the buyer to a bona fide purchaser during transit⁹). Where the view of negotiability of bills of lading is that adopted in the Sales Act prevailing as law in many jurisdictions and universally in commercial practice, the carrier is under obligation to deliver only to the holder of the indorsed bill of lading and is not justified in delivering the goods without the production of such bill¹⁰). It is impossible to recognise the right of the unpaid seller to stop the proceeds under any circumstances where the bill of lading is of this kind, and the same must be said of the seller's rights where the indorsed bill of lading has been pledged by the buyer. The seller's only remedy in case of a pledge to a bona fide pledgee would seem to be to pay the latter the amount of his advances and reacquire the bill of lading; and in the case of the second sale, even this remedy would seem impracticable, for the reason that the carrier would be justified in delivering the goods to the second purchaser, notwithstanding the notice, and the latter would have no defense to an action brought by the insolvent buyer against him for the price from the fact that notice had been given to the carrier. The better rule therefore would seem to be that the right of stoppage in transitu is destroyed by the negotiation of the bill of lading to a bona fide purchaser for value¹¹).

¹) Sales Act, sec. 58, subsec. 4. — ²) *Owens v. Weedman*, (1876) 82 Ill. 409. — ³) *Scholfield v. Bell*, (1817) 14 Mass. 40. — ⁴) *Woodruff v. Noyes*, (1843) 15 Conn. 335. — ⁵) 26 Am. & Eng. Encyc. Law, (2d Ed.), 1114; *Calahan v. Babcock*, (1871) 21 Oh. St. 281, 294. (The fact that the seller did not know that the transit was not ended when he began the action and that he abandoned the suit when he learned it prevented the waiver from operating in this case. Query, whether such waiver would exist in any event from the mere beginning of an action). — ⁶) Sales Act, sec. 57. — ⁷) *Jones v. Earl*, (1869) 37 Cal. 630. — ⁸) This doctrine is quite anomalous in the American system, so far at least as the law, in contradistinction to equity is concerned. It is probably the only exception to the rule that the priority of liens is determined by the order in which they attach. See *Blackman v. Pierre*, (1863) 23 Cal. 508; *Frame v. Oregon Liquor Co.*, (1906) 48 Oreg. 272. It is usually in cases when creditors have levied attachment that the seller exercises the right of stoppage.

— ⁹) A transfer made to a purchaser with notice, or a transfer made to an innocent purchaser without consideration has no effect upon the right of stoppage in transitu. *Mc. Elwee v. Metropolitan Lumber Co.*, (1895) 69 Fed. 302. The purchaser with notice and the transferee without consideration are always bound by rights availing against their transferor. — ¹⁰) Sales Act, sec. 33. — ¹¹) This is the view adopted in the Sales Act, sec. 62 (last paragraph). See *Williston on Sales*, sec. 542. It would, of course, be revived by his reacquiring the bill of lading. On the revival of the right of stoppage by paying the pledge, see *Chandler v. Fulton*, (Texas, 1853) 60 Am. Dec. 188. The transfer of a non-negotiable bill of lading would not, under the Sales Act, or under the practice of railroads or merchants affect the rights of stoppage. However, there are frequent statements, following the English cases to the effect that such a bill is a symbol of the goods and its transfer therefore would destroy the right of stoppage. *Porter, Bills of Lading*, (1891) secs. 496,

It has been held that the fact that the second purchaser knows that the original seller is unpaid does not necessarily destroy the good faith of the buyer; knowledge by the second purchaser when he buys the goods that the buyer is insolvent is, however, fatal to his claim of bona fides¹). If the goods have been destroyed before the notice is given, the seller cannot intercept the insurance money on the goods; the buyer or his assignee is entitled to the proceeds of any policies upon the goods in his favor²).

c) *Manner in which the Right of Stoppage may be Exercised.* — It is not always easy to determine to whom the notice must be given. A notice to the buyer himself is obviously insufficient³), but a notice to a carrier, as for example, to a shipowner when given at such a distance that he cannot, with reasonable diligence, prevent the delivery of the goods, may not be a reasonable notice⁴). If notice can be given to the agent or servant of the carrier in actual possession of the goods, it will be sufficient in any case⁵). The seller exercising the right of stoppage in transitu must pay the carrier's charges for the particular service, but is not obliged to discharge any lien which the carrier may have upon the goods for prior services rendered the buyer⁶). By the terms of the Sales Act, the carrier is not obliged to deliver or justified in delivering the goods to the seller unless the negotiable bill of lading issued for the goods is surrendered to the carrier⁷).

No particular formalities are required as to the form of notice⁸). It is not even necessary to refer in the notice to the insolvency of the buyer, though, of course, it is prudent to do so. The goods must however be described with reasonable certainty⁹).

The notice may be given by the unpaid seller or by an agent possessing the general authority to look after the collection or the securing of the purchase money; a cashier of a bank charged with the duty of collecting a draft for the purchase price has been held to be such an agent¹⁰). Original defects in an agent's power may be cured by subsequent ratification by the seller, provided the buyer has not in the meantime procured delivery of the goods¹¹). Thus, notice from a mere stranger is sufficient if ratified and adopted by the seller, provided that the stranger giving the notice purports to act for the seller.

3. EXERCISE OF RIGHT OF LIEN AND OF STOPPAGE IN TRANSITU AGAINST THIRD PERSONS. — A sale made by the buyer of goods, while the seller is in possession asserting his lien, does not affect the lien, and the same is true in regard to the right of stoppage in transitu, except in cases where the buyer has a negotiable bill of lading which he transfers to the buyer¹²). The Sales Act provides that neither of these rights is affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto, and specially covers the case of the negotiation of an order bill of lading by the statement that the negotiation of such a bill of lading prevents the exercise of the right of stoppage or the seller's lien, even though such negotiation be made after notice to the carrier or

532—547. See Sales Act, sec. 32, which provides that the indorsement of a non-negotiable document of title gives no additional right to the transferee. See also, *Hallgarten v. Oldham*, (1883) 135 Mass. 1. Compare 26 Am. and Eng. Encyc. Law, (2d Ed.) 1108; 2 *Mechem on Sales*, secs. 1563—1570.

¹) *Chandler v. Fulton*, (Texas, 1853) 60 Am. Dec., 188. (Notice that purchase price is unpaid does not defeat subpurchaser); *Stanton v. Eager*, (1835) 16 Pick., 467. (Notice of insolvency defeats subpurchaser's good faith.) — ²) *Williston on Sales*, sec. 538 (last sentence). — ³) *Rucker v. Donovan*, (1874) 13 Kas. 253, s. c. 19 Am. Rep. 84, with note. — ⁴) *Jones v. Earl*, (1869) 37 Cal. 630. (Notice should be given if possible to the person in actual possession.) If a sheriff or officer has taken the goods under attachment or execution, the notice should be given to him and not to the carrier. *Rucker v. Donovan*, *supra*; *French v. Transportation Company*,

(1883) 134 Mass. 288. (The carrier is not liable for not transmitting a notice which he receives to the officer.) — ⁵) *Jones v. Earl*, (1869) 37 Cal. 630. — ⁶) *Farrell v. Richmond, etc., Ry. Co.*, (1889) 102 N. C. 390; s. c. 11 Am. St. Rep. 760. (In this case the bill of lading expressly provided that the carrier should have a lien for all arrearages of freight due from the consignee, but this was insufficient to make the right of stoppage conditional on such payment.) — ⁷) Sales Act, secs. 33 and 59. — ⁸) *Rucker v. Donovan*, (1874) 13 Kas. 253, s. c. 19 Am. Rep. 84. — ⁹) *Allen v. Maine Central Ry. Co.*, (1887) 79 Me. 327, s. c. 1 Am. St. Rep. 310, with note. — ¹⁰) *Seymour v. Newton*, (1870) 105 Mass. 272; 26 Am. & Eng. Encyc. 1115. — ¹¹) *Durgy Cement Co. v. O'Brien*, (1877) 123 Mass. 12. — ¹²) *Eaton v. Cook*, (1859) 32 Vt. 58. But the consent of the original seller to such subsale waives the right of stoppage.

bailee of the seller's claim¹). The transfer of a non-negotiable bill of lading does not operate, under the provisions of the Sales Act, as a symbolical transfer of the goods, and hence does not affect the right of lien or of stoppage in transitu²). The English Sale of Goods Act gives a wider effect to non-negotiable bills of lading, — in fact, no distinction is made in the English common law between "order" bills and "straight" bills. By the English Act, the transfer of any bill of lading to a bona fide holder cuts off the seller's remedies against the goods³). Some of the American authorities use the same language in regard to the transfer of documents of title without noticing the differences in commercial practice. The Sales Act probably represents the prevailing view established by the decisions (apart from the language)⁴).

4. FURTHER REMEDIES OF UNPAID SELLER AGAINST THE GOODS.

— The unpaid seller's lien and its extension, the right of stoppage in transitu would prove very inadequate security if the seller simply had the right to detain the goods indefinitely. The unpaid seller, therefore, who has possession of the goods is given the right to resell the goods after waiting a reasonable time for the buyer to pay the price⁵). In the case of perishable goods, this sale may be made immediately⁶), but the question of reasonable time in other cases, (except, of course, where the contract does not itself define the matter) is a question of fact to be determined if the contract be written or if the decision does not involve doubtful questions of fact by the judge, or if the decision be doubtful by the jury⁷). The fact that the term of credit has not expired does not necessarily make a sale before that time wrongful, although the existence of the credit may bear upon the question of what is a reasonable time⁸). Such resale, if properly made, vests the title in the new buyer⁹), and the proceeds of the sale, even if there be a profit, belong to the seller, under a provision of the Sales Act¹⁰).

The sale may be made without notice to the original buyer of an intention to make it, according to a section of the Sales Act, which is well supported by authority¹¹). But there is a considerable number of decisions to the effect that such notice is necessary¹²).

Although there is much division of opinion on the last point, there seems to be none upon the question as to whether notice of the time and place of resale must be given. There is no such necessity¹³). The sale may be at either public or private sale, and in either event, must be fairly made and conducted¹⁴). If made at public auction, it has been held that the seller may himself buy the goods¹⁵). The fact that the seller exercised the remedy of resale does not prevent him from suing the original buyer for the difference between the contract price of the goods and the price procured at an honestly conducted resale¹⁶).

Whether the unpaid seller with the right of lien may, instead of selling the goods, rescind the sale and resume title to the goods is a question as to which textwriters

¹) Sales Act, sec. 62 (last sentence). The provision in the Sales Act that the negotiation of a negotiable bill of lading after notice to the carrier destroys the right of the unpaid seller in regard to stoppage in transitu is supported by one case only. *Newhall v. Central Pac. R. R.*, (1876) 51 Cal. 345, and the case has been criticized by Professor Mechem (Sales, sec. 1567), Professor Burdick (Sales, p. 236) and Mr. Hutchinson (Carriers, sec. 414). There seems to be no decision to the contrary, and as Professor Williston points out, (Sales, sec. 542) it is better that the seller suffer inconvenience than that the bona fide purchaser should be deprived of his purchase. — ²) Sales Act, sec. 31, Williston on Sales, secs. 285, 413, 542 and 558. — ³) Chalmers, Sale of Goods Act, sec. 47. — ⁴) See *ante*, section on *Reservation of Jus Disponendi*. — ⁵) This right has been compared with the right of a pledgee, with power to sell at private sale. *Tuthill v. Skidmore*, (1891) 124 N. Y. 148. — ⁶) *Diem v. Koblitz*, (1892), 49 Oh. St. 41; Sales Act, sec. 60, subsec. 1; California, Civil Code, sec. 1749. — ⁷) *Alden Speare's Sons Co. v. Hub-*

binger, (1904) 129 Fed. 538. — ⁸) *Diem v. Koblitz*, (1892) 49 Oh. St. 41. — ⁹) Sales Act, sec. 60, subsec. 2. — ¹⁰) Sales Act, sec. 60, subsec. 1 (last sentence); *Bridgford v. Crocker*, (1873) 60 N. Y. 627. — ¹¹) Sales Act, sec. 60, subsec. 3; *Wrigley v. Cornelius*, 162 Ill., 92. The Sales Act for practical purposes requires the notice, for the failure to give it, except in the case of perishable goods, is made a matter to be considered by the jury or court in determining whether an unreasonable time has elapsed. — ¹²) "The authorities seem to be in hopeless conflict." 2 Mechem on Sales, sec. 1633. Under the Civil Code of California, he must give notice of such intention. Secs. 1749, 3001, 3002 and 3049. — ¹³) *Van Brocklen v. Smeallie*, (1893) 140 N. Y. 70; Williston on Sales, sec. 549; Sales Act, sec. 60, subsec. 4. — ¹⁴) *Ackermann v. Rubens* (1901) 167 N. Y. 405. (Sale of a pleasure yacht.) Sales Act, sec. 60, subsec. 5. — ¹⁵) *Moore v. Potter*, (1898) 155 N. Y. 481. — ¹⁶) Sales Act, sec. 60, subsec. 1. The expense of a resale is a proper element of damage. *Hill v. McKay*, (1892) 94 Cal., 5.

differ, and which has been answered in the negative by the English courts¹). The weight of American authority, however, seems to indicate that the seller has such remedy²). He may, after the buyer has been in default an unreasonable time, rescind the sale, and sue the buyer for any loss occasioned by his breach. To constitute such rescission there must either be notice or at least some overt act which indicates that the seller intends to rescind³).

The rights of resale and rescission which avail to the unpaid seller after title has passed, it is almost needless to say, may be exercised by the seller under an agreement to sell where the buyer remains in default⁴).

C. Remedies of the Seller against the Buyer Personally. — The remedies of the unpaid seller are as follows in cases where the title has passed:

1. An action for the contract price⁵). This is universally allowed, although theoretical objections may be urged against it when the seller still retains possession of the goods⁶). For, conceivably, an insolvent seller may recover and collect a judgment for the entire price, and in the meanwhile sell the goods. No provision is made in the judgment requiring the seller to deliver possession as a condition of being paid the amount of the judgment.

2. Where he has not delivered possession, he may resell the goods under his seller's lien, and recover the balance due on the purchase price after deducting the proceeds of the resale⁶). This remedy is also general.

3. He may keep the goods, as his own, where they have not been delivered, rescind the contract and recover damages from the buyer. This right is given by the Sales Act⁷).

Where the title has not passed, the seller has, under the Sales Act, the following remedies:

1. He may sue for damages for breach of contract, when the buyer refuses acceptance of the goods. This remedy is universally allowed. The measure of damages in such case is normally the difference between the market price and the contract price at the time and place where acceptance should have been made. If the goods have no market price, he is entitled to the amount of the loss he has suffered⁸).

2. He is entitled to the remedy of resale and damages, when he has not yet delivered the goods. This is also universally recognized⁹).

3. He may rescind the contract in cases where the goods are not delivered, even in jurisdictions which deny this right to the seller when the title has passed¹⁰).

4. In many jurisdictions, he may at his election, instead of suing for damages for breach of the contract, sue for the price in the same manner as if the title had passed. The weight of authority, however, denies this remedy to the seller¹¹). The Sales Act allows the seller to sue for the price, although the title has not passed, in two cases: a) When the price is payable on a day certain, irrespective of delivery, or of transfer of the title, and the buyer wrongfully fails to pay the price at that day. In such case, however, if the seller has repudiated the contract or indicated his inability to perform, the buyer has a good defence to the action for the price; b) When the articles cannot readily be resold, and the buyer refuses to accept them¹²). If, however, the buyer has previously informed a seller who is manufacturing or altering

¹) Mechem on Sales, sec. 1681, and Burdick, Sales, p. 243, criticize the cases allowing the seller to rescind the executed sale. Williston, Sales, sec. 555, commends the rule. It is adopted by the Sales Act, sec. 61, subsec. 1. See also, California, Civil Code, sec. 1749. — ²) *Dustan v. McAndrew*, (1871) 44 N. Y. 72; Williston on Sales, sec. 555. — ³) Sales Act, sec. 61, subsec. 2. See also California, Civil Code, sec. 1691. — ⁴) Williston on Sales, sec. 546. — ⁵) Sales Act, sec. 63, subsec. 1. — ⁶) See ante, *Right of Resale*. — ⁷) Sales Act, sec. 65; see also sec. 61. Where the goods have been delivered he cannot rescind the contract merely because the price has not been paid. *Kramer v. Messner*, (1897) 101 Ia. 88. For opinions that the seller cannot rescind and recover for loss, see 2 Mechem on Sales, sec. 1681, Burdick, Sales, p. 243.

— ⁸) Sales Act, sec. 64, subssecs. 1, 2, and 3. When the buyer controls the market at the time and place of delivery, the damages are the difference between the contract and the market value at the nearest available market, less the cost of transportation to that market. *Poplar Lumber Co. v. Chapman*, (1896) 74 Fed. 444. If the market price exceeds the contract price, the seller is still entitled to nominal damages. *Foos v. Sabin*, (1877) 84 Ill. 564. — ⁹) See ante, section on *Right of Resale*. — ¹⁰) Sales Act, sec. 65. See 2 Mechem on Sales, sec. 1713. — ¹¹) See 24 Am. & Eng. Encyc. Law (2d Ed.) 1118—1119, for a reference to cases holding both ways. The matter is often confused in individual jurisdictions. — ¹²) Sales Act, sec. 63, subsec. 2 and 3. Williston on Sales, secs. 562—579.

goods, that he intends to abandon the contract, the labor and material furnished by the seller after such notice must be deducted from the price to be recovered¹).

Difficult questions arise in regard to the doctrine of anticipatory breach. The rule that has been adopted by the Supreme Court of the United States upon this subject, is that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from future performances, retaining the right to sue for any damages he may have suffered from its breach. But he has an option to wait until the time when the act was to be done and hold the contract binding until that time²).

D. Remedies of the Buyer. — The following are the remedies of the buyer for breach of the seller's obligations.

1. An action to recover possession of the goods or their value, in cases where the title has passed to the buyer, but the seller refuses or neglects to deliver the goods. The buyer has the same right as any other owner of goods to sue for their conversion or wrongful detention. A demand will ordinarily be necessary before such action can be maintained³).

2. An action to recover damages for failure to deliver goods, where the property has not yet passed to the buyer⁴). The damages recoverable in this action usually consist in the difference between the contract price, at the time and place where delivery should have been made, and the price which the buyer would be forced to pay for similar goods⁵). In cases where the goods are not procurable in the market no more definite rule can be laid down than that the measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract⁶). Even though he can show no actual damages, the buyer may always recover nominal damages in case the seller has broken his contract⁷). In cases where the buyer has paid the whole or part of the purchase price, and there is a failure of consideration, he may recover the amount of the consideration paid by him⁸). Where the buyer had in view a special or unusual use of the thing agreed to be sold, which may reasonably be supposed to have been known by the seller, he should recover such damages in addition to the usual damages. Such damages are called special damages, because they must be claimed by the plaintiff, or they are deemed to have been waived⁹).

3. In some cases, the buyer may have the equitable remedy of specific performance of the contract¹⁰). That is, the seller will be ordered by a decree of the court of equity to convey the title to specific personal property to the buyer, and will then be obliged to convey at the risk of incurring imprisonment for contempt of court. This remedy is not allowed except where the damages at law will prove inadequate¹¹). Thus, a contract to sell a rare painting or an article possessing a sentimental value

¹) Sales Act, sec. 64, subsec. 4. — ²) *Roehm v. Horst*, (1900) 178 U. S. 1. See a discussion of this matter in *Williston on Sales*, secs. 584—590. — ³) Sales Act, sec. 66; 2 *Mechem on Sales*, secs. 1786—7. The measure of damages is ordinarily the value of the goods at the time of conversion, with interest. In some jurisdictions, in the case of sales of stock and other personal property of fluctuating value, the seller may recover the highest market price between the date of conversion and the time within which the buyer might reasonably have bought other goods or stocks of the same kind. — *Galinger v. Jones*, (1888) 129 U. S. 193. In California, the measure of damages while ordinarily the value of the goods at the time of conversion, with interest, may be the highest market value between that time and the verdict, where the action is pursued with reasonable diligence. California, Civil Code, sec. 3336. — ⁴) Sales Act, sec. 67, subsec. 1; 2 *Mechem on Sales*, sec. 1784. — ⁵) Sales Act, sec. 67, subsec. 3. 2 *Mechem on Sales*, secs. 1785, 1736—1755, California, Civil Code, sec. 3308. — ⁶) Sales Act, sec. 67, subsec. 2. Where the price has

been fully paid by the purchaser, he may universally recover that amount. Under the Civil Code of California, he may also recover damages as in cases of conversion. Sec. 3309. — ⁷) *Long v. Conklin*, (1874) 75 Ill. 32. —

⁸) The right to recover the purchase price would be in addition to his right to recover the ordinary damages for breach of the contract. *Hill v. Smith*, (1859) 32 Vt. 433. —

⁹) On special damages, see 2 *Mechem on Sales*, secs. 1756—1780; *Griffin v. Colver* (1858) 16 N. Y. 489. — ¹⁰) Sales Act, sec. 68. —

¹¹) Ordinarily the damages for breach of contract are deemed adequate compensation where the contract is in respect to personal property. On the other hand, contracts for the sale of real estate will be specifically enforced. California, Civil Code, sec. 3387 provides, in accordance with the general rule "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved."

will be specifically enforced, for the manifest reason that money would not repair the breach¹). For the same reason, a contract to sell a patent or a copyright will be specifically enforced²). Contracts for sales of shares of stock in corporations where the stock is not readily securable in the market are also generally allowed in the United States, although the English rule is quite different³). In some cases it has been supposed that the insolvency of the seller should entitle the buyer to specific performance, because it is said the remedy by action in damages is inadequate⁴). But the inadequacy of damages must, it is believed, relate to the thing sold as it existed at the time of sale and these cases are generally disapproved⁵).

4. In cases where there is a breach of warranty by the seller, there is much difference of opinion as to the remedies which are open to the buyer. The Sales Act provides the following remedies: a) The buyer may accept the goods and set up by way of recoupment in diminution of the price in an action brought by the seller the breach of warranty; b) He may accept the goods and sue for damages for breach of warranty; c) He may refuse to accept the goods, if the property therein has not passed and sue for damages; d) He may rescind the contract to sell and refuse to accept the goods or return them, if they have been delivered, but the title has not yet passed; e) He may rescind the sale, where the title has passed, and refuse to accept the goods when tendered; f) He may rescind the sale where the title has passed, even after receipt of the goods, and offer to return them to the seller. In cases d), e) and f), he may recover from the seller any part of the price which he may have paid⁶).

In many jurisdictions the courts do not allow the right to sue for damages for breach of warranty as to quality of the goods to survive acceptance of the goods, and in the same jurisdictions and perhaps in others, the right to rescind for any breach of warranty is limited to cases where the title to the goods has not yet passed⁷). The court which has given strongest expression to the view that the buyer cannot rescind for breach of warranty after the title has passed is that of New York⁸). The contrary rule, that which is embodied in the Sales Act, has been called the Massachusetts doctrine, because it was first clearly enunciated by the Supreme Court of that State⁹). It is often difficult to determine which doctrine a particular State has adopted; thus, California has been claimed by the advocates of either doctrine¹⁰). On principle there would seem to be no good reason why the buyer should not rescind, irrespectively of the passing of title, where he can restore the property in the condition in which he received it¹¹).

¹) *Wilkinson v. Stitt*, (1900) 175 Mass. 581 (a prize cup); *Onondaga Nation v. Thacher* (1900) 65 N. Y. Supp. 1014 (belts of wampum).

— ²) *Adams v. Messinger*, (1888) 174 Mass. 185. Though there be no patent, yet where the seller controls the market, the contract will be specifically enforced. *Gloucester Glue Co. v. Russia Cement Co.*, (1891) 154 Mass. 92 (agreement to sell particular kind of fish skins to make glue). — ³) *Northern Railway Co. v. Walworth*, (1899) 193 Pa. St. 207.

— ⁴) *Parker v. Garrison*, (1871) 61 Ill. 250.

— ⁵) *Pomeroy, Specific Performance of Contracts*, sec. 26. — ⁶) The statements in the text are based on Sales Act, sec. 68, subsec. 1, and also sec. 49, and the discussion in Williston on Sales, sec. 485—489, and sec. 608. — ⁷) See discussion on the subject of Rescission for Breach of Warranty between Professor Williston and Professor Burdick, contained in the following law reviews: — 16 *Harvard Law Review*, 465 (Williston); 4 *Columbia Law Review*, 1 (Burdick); 4 *Columbia Law Review*, 195 (Williston); 4 *Columbia Law Review*, 264 (Burdick). A resumé of the discussion is given in 17 *Harvard Law Review*, pp. 363 and 500. — ⁸) According to Professor Williston, the following States follow the New York rule (which is also the English rule,

Sale of Goods Act, sec. 53): Connecticut (now changed by adoption of Sales Act), Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, New York, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Washington. Williston on Sales, sec. 608, p. 1011, note. — ⁹) The jurisdictions which it is claimed adopt the view expressed in the Sales Act are: Alabama, Arkansas, California, Delaware, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, North Dakota, Ohio, and Wisconsin. To this list should be added, because of the adoption of the Sales Act: Arizona, Connecticut, New Jersey, and Rhode Island. Williston on Sales, sec. 608, p. 1011, and note. The Federal Courts are said to apply either doctrine which is locally in force, but the cases do not state that the matter is one of local law; and the United States Supreme Court has adopted the New York view in two decisions, while the lower courts have adopted the Massachusetts view in three cases. Williston on Sales, sec. 608, pp. 1013—1014, note. — ¹⁰) See California, Civil Code, sec. 1886, and *Hoult v. Baldwin*, (1885) 67 Cal. 610. — ¹¹) 16 *Harvard Law Review*, 465.

It is universally conceded that to entitle a buyer to rescind, he must return whatever benefits he has received under the contract, and must offer to return the goods as he received them. Hence, if the goods are injured or destroyed, the right of rescission is lost, and the buyer must rely upon his action for damages¹).

Where the contract or sale is rescinded for breach of warranty, it is not enough, as it is in the case where the goods are not those described in the contract that the buyer should notify the seller of that fact. He must where he is relying on the remedy of rescission, either return the goods or offer to return them²). It is important to notice that the buyer who elects to rescind waives the right to sue for damages, and, conversely the buyer who seeks damages for breach of warranty waives the right to rescind the sale for the same cause³). The buyer cannot recoup his damages in an action for the price and thereafter bring an action for damages⁴).

The damages, where the buyer elects to sue upon the breach of warranty, are such as ordinarily result in the usual course of events from the breach of warranty⁵). This is, in general, in cases where the breach is in regard to quality, the difference between the value of the articles furnished and the value of those which should have been furnished⁶). There should be no difference in the damages whether the plaintiff elects to sue in contract or in tort for fraudulent representations⁷). The important authority of the United States Supreme Court, however, confines the damages in an action of deceit to the value of what the buyer paid, less the value of what he received⁸), but the weight of authority seems to recognize the broader rule⁹). At what time the right of action for breach of the implied warranty of title arises has been the subject of diverse views. Some cases hold the warranty is broken as soon as made, and allow full damages to be collected immediately¹⁰). Other cases, hold that no right of action arises until the buyer has been disturbed in possession by the true owner or the person having the incumbrance¹¹). Other cases hold that while the breach occurs at once, only nominal damages may be collected, and that the right to recover full satisfaction arises only after disturbance of possession¹²). Moreover, there exists much difference in opinion as to whether the buyer in cases where the title fails absolutely should recover the price paid or the actual value of the goods, provided that be more than the price¹³). Where the value test is adopted, a further question arises as to whether the value to be fixed is the value at the time of the sale or at the time of dispossession¹⁴). The rules upon these matters are, indeed, so much the subject of controversy, that it is practically impossible to state which rules have the weight of authority; the questions can usually be answered only after a diligent examination of the local law¹⁵).

VI. CIRCUMSTANCES AFFECTING VALIDITY OF SALES. — A. In General. —

Certain circumstances collateral to the contract have important effects upon contracts to sell and sales. The most important of these circumstances are fraud, mistake, duress, impossibility of performance, bankruptcy, and illegality. The Sales Act does not attempt a codification on these matters, but section 76 of that Act expressly omits to state the law and leaves it unaltered in respect to these matters.

¹) Sales Act, sec. 69, subsec. 3. Other conditions imposed by this section and by the law generally upon the right to rescind are that the rescission cannot be had where the buyer knew of the breach of warranty when he accepted the goods, and that the buyer cannot rescind unless he promptly notifies the seller of his election to rescind. See also, California, Civil Code, sec. 1691. — The early cases required great strictness in regard to the return of the thing received. Thus, an attempted rescission of a sale of worthless lime was held insufficient because the casks in which the lime was originally contained, were not returned; Conner v. Henderson, (1818) 15 Mass. 319. See also, Morse v. Brackett, (1867) 98 Mass. 205, s. c. (1870) 104 Mass. 494. (A sack covering a rejected bale of cotton was not returned.) This extreme rigor has been somewhat relaxed. 2 Mechem on Sales, sec. 619. — ²) Cp. sec. 69, subsecs. 1 and 4, with sec. 50 of the Sales

Act. See also Milliken v. Skillings, (1896) 89 Maine, 180. — ³) Sales Act, sec. 69, subsec. 2; Gilmore v. Williams, (1894) 162 Mass. 351. — ⁴) Watkins v. American Bank, (1904) 134 Fed. 36. — ⁵) Sales Act, sec. 69, subsec. 6. — ⁶) McDonald v. Kansas City Bolt Co., (1906) 149 Fed. 360; Sales Act, sec. 69, subsec. 7; California, Civil Code, sec. 3313. — ⁷) See cases cited in Williston on Sales, sec. 613, note 15. — ⁸) Smith v. Bolles, (1889) 132 U. S. 125. — ⁹) Williston, *ubi supra*. — ¹⁰) Parkins v. Whelan, (1875) 116 Mass. 542. — ¹¹) Barnum v. Cochrane, (1904) 143 Cal., 642; California, Civil Code, sec. 3312. — ¹²) Burt v. Dewey, (1869) 40 N. Y. 283. — ¹³) Gross v. Hennessy, (1866) 13 Allen, 389, allows full value though the buyer was not dispossessed. — ¹⁴) Williston on Sales, sec. 615. The solution of this question depends upon the view taken as to when the right of action accrues. — ¹⁵) 2 Mechem on Sales, secs. 1793—1798; Williston on Sales, sec. 615.

B. Fraud. — 1. NATURE OF FRAUD. — Fraud is of two kinds: 1. It may induce a person to do an act thinking he is doing some other act, in which event the transaction is void, or 2. It may induce him to do an act which he would not otherwise have done, in which case the sale is merely voidable, or is valid until set aside¹). An illustration of the first case of fraud is where the seller is induced to send goods on credit in response to an order by mail, from A, who falsely represents himself to be B. In such a case, no title passes to A, and the sale is absolutely void. A transfer by A to an innocent purchaser does not prevent the defrauded person from recovering the goods²). On the other hand, if A came to the seller personally, and representing himself to be B, induced the seller to let him have the goods on credit, there is an actual sale, though one that may be avoided. If, before avoidance, the swindler sells the property to a bona fide purchaser, the latter will be entitled to hold it³). The reason for the distinction is that in the latter case the seller intended to pass title to the person with whom he actually dealt; in the first case, he did an act that he did not intend to do at all.

In order to constitute fraud, which may be the basis for an action for damages, the following elements must exist: 1. A misrepresentation; 2. As to a material fact (as opposed to mere opinion or statement of law); 3. Of an existing fact, (at least it must not be a mere promise which the promisor does not keep); 4. False to the knowledge of the party making it, or at least made with a reckless disregard of the truth, as where one states as a fact that of which he has no knowledge; 5. Reliance by the injured party on the misrepresentation, and 6. Loss by means of the misrepresentation. The fourth and sixth elements are not necessary to constitute the fraud which will warrant the injured party in rescinding the contract or sale. In such cases it is immaterial that the misrepresentation was innocently made or that loss has not yet been sustained. It may also be stated that the law is coming more and more to the view that matters of opinion may constitute misrepresentations under certain circumstances, and is also coming to disregard the distinction between representation of future facts and of present facts, though of course, a wide distinction is still preserved between fraud and mere breach of contract⁴).

2. FRAUD ON THE SELLER. — The frauds committed on the seller are most usually in connection with false representations as to solvency or business rating. Such a misrepresentation constitutes fraud for which the seller may rescind the contract, or sue for damages⁵). Active concealment is considered the equivalent of positive misrepresentation in this respect, as it is generally⁶). Under certain circumstances, perhaps, even mere silence should have the same effect, as where the buyer is insolvent and, nevertheless, buys the goods without disclosing that fact⁷). But the law does not seem to have taken this last step, and the cases hold that silence as to the fact of insolvency, will not give the seller the right to avoid a sale⁸).

Most often the cases in regard to misrepresentation as to solvency are cases where false statements have been made to commercial agencies, which have later commu-

¹) Williston on Sales, sec. 625. — ²) See Samuel v. Cheney, (1883) 135 Mass. 278. —

³) Hickey v. McDonald, (1907) 151 Ala. 497, 13 L. R. A. (N. S.) 413, and note. But where the swindler falsely represents himself to be the agent of a responsible person and thus gets possession of the goods, the sale is held to be void. Rodliff v. Dallinger, (1886) 141 Mass. 21; 2 Mechem on Sales, sec. 887; Williston on Sales, sec. 635. Another class of frauds brings out a somewhat similar distinction. If a swindler induces the owner to part with possession, merely intending to convert the goods to his own use, no title will pass to a bona fide purchaser, and the swindler will be guilty of larceny. If the swindler induces the seller to transfer the property to him by means of his fraud, the sale will be only voidable, not void. — ⁴) The statements in this paragraph are based on Williston on Sales, secs. 627—635, and 2 Mechem on Sales, secs. 866—874. — ⁵) Atlas Shoe v. Bechard, (1906) 102 Me. 197, 10 L. R. A. (N. S.) 679. — ⁶) Newell v. Ran-

dall, (1884) 32 Minn. 171. (The buyer stated his means correctly, but said nothing about owing two-thirds as much as he had.) Fecheimer v. Baum, (1889) 37 Fed. Rep. 167. (Buyer stated there were no mortgages on his stock without mentioning that he had agreed to give a mortgage; stated that his stock was insured but did not mention that the insurance had been pledged.) — ⁷) Professor Williston very forcibly points out that the purchase of goods itself implies a representation that the buyer intends to pay for the goods. Williston on Sales, sec. 637. See also, Talcott v. Henderson, (1877) 31 Oh. St. 162. — ⁸) Where, however, the insolvency is coupled with an intention not to pay for the goods, the sale may be avoided. 2 Mechem on Sales, sec. 903. And the same would be the case if the intention not to pay could be shown, even though the circumstance of insolvency did not exist. The statement in the text is supported by Consolidated Milling Co. v. Fogo, (1899) 104 Wis. 92.

nicated them to the seller. As it makes no difference to whom the representation is made, so long as it is intended to be repeated to the seller, or may reasonably be expected to be repeated to him, the buyers have been held liable for damages in such cases, where the seller has suffered loss relying upon such false statements, and, a fortiori, the sellers have been held entitled to rescind the contract or sale for fraud¹). The buyer will be held responsible for the misrepresentations of his agent, who is charged with the duty of furnishing statements concerning his business standing to the same extent as if he had made the statements himself²).

3. FRAUD ON THE BUYER. — The questions arising out of fraud committed on the buyer are closely connected with those arising out of breach of warranty³). Indeed, since the abolition of forms of action, the remedies for breach of warranty and for fraud upon the buyer by reason of the seller's misrepresentation as to the quality, character, or value of the thing sold are tending to become identical. There are still, however, many cases in which a statement that would not constitute a warranty may amount to a fraudulent representation. This is particularly the case where the seller uses active concealment to cover up a defect which the buyer might otherwise have discovered⁴). False statements as to the price paid for an article, or as to the price paid by other persons for the same article, while they do not constitute warranties, do, according to the better line of authorities, constitute misrepresentations as to matters of fact for which the buyer may have an action of damages, or, at his election, may rescind the contract or sale⁵). It is pretty generally conceded, however, that mere statements as to value, when there is no confidential relation existing between the parties, is mere "dealer's talk," or matter of opinion, upon which the buyer can hardly have relied in making the contract of purchase⁶).

4. FRAUD UPON CREDITORS. — Sales or transfers of goods may be avoided by creditors upon the ground of fraud in three classes of cases:

1. A sale or transfer may be presumed to be fraudulent against creditors by virtue of the failure to transfer possession. This matter has already been referred to⁷).

2. A transfer or sale may be in fact fraudulently made with intention on the part of the seller or transferor of the goods to defraud his creditors. This class of transfers was rendered illegal by the Statute of 13 Elizabeth chap. 5, which has been held to be a part of the common law of the States⁸). Legislation based upon the Statute of Elizabeth has, however, been passed in all of the States, which serves to explain and qualify the original Statute⁹). Under these Statutes it makes no difference that the property is actually sold for a valuable consideration. If the sale is part of a scheme to convert the debtor's property into cash for the purpose of concealing it, it could be avoided by the creditors¹⁰). Usually, however, such conveyances are made without consideration. The absence of a consideration does not, in most States, render the transfer void, any more than its presence prevents the transfer from being avoided¹¹). The test in each case is: Was the transfer actually made with the fraudulent intention

¹) *Genesee Savings Bank v. Michigan Barge Co.*, (1883) 52 Mich. 164. — ²) *Schram v. Strouse*, (Texas, 1894) 28 S. W. 262. — ³) See *ante* section on *Express Warranty*. — ⁴) *Croyle v. Moses* (1879) 90 Pa. St. 250; *Beasley v. Huyett, etc., Mfg. Co.*, (1893) 92 Ga. 273; *Stewart v. Wyoming Ranch Co.*, (1888) 128 U. S. 383. — ⁵) *Moline Plow Co. v. Carson*, (1895) 72 Fed. 387; *Fairchild v. McMahon*, (1893) 139 N. Y. 290. — ⁶) *Ellis v. Andrews*, (1874) 56 N. Y. 83. — ⁷) See *ante* section on *Sales by a Person not the Owner; Seller in Possession*. — ⁸) 2 Mechem on Sales, sec. 944. — ⁹) The authority for this statement is Professor Mechem, *ubi supra*. A type of these statutes is sec. 3439 Civil Code, California, which reads: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves

in trust for the benefit of others than the debtor." Though the word "void" is used, it is not to be construed in the strictest sense. Thus, 1. the conveyance is valid between the parties and against all other persons than those mentioned in the contract; 2. the bona fide purchaser from the transferee will be protected; 3. the transaction requires the creditor to take some steps to avoid it. At the same time, the conveyance has not the force, e. g., of a conveyance from the seller to a swindling purchaser. The creditors may levy upon the property as the property of the debtor, notwithstanding the conveyance. — ¹⁰) *Henney Buggy Co. v. Ashenfelter*, (1900) 60 Neb. 1, s. c. 83 Am. St. Rep. 503. — ¹¹) Formerly the prevailing rule rendered any gift by a debtor voidable at the suit of a creditor, without regard to the debtor's means. The rule which generally obtains at the present time does not permit such transfers to be attacked unless the debtor was insolvent at the time. Williston, Sales, sec. 641.

of hindering, delaying, or defrauding creditors? This question is ultimately one of fact, but, of course, inferences may be used in arriving at the conclusion. Thus, the fact that property is given away without consideration by an insolvent person, is proof of fraud, and in some jurisdictions is conclusive proof of that fact¹). When a transfer made for value is sought to be set aside, the creditors must not only show the fraud of the seller, but also of the buyer²).

As to the creditors who may take advantage of the fraudulent conveyance, it is pretty generally the rule that only those who have obtained judgments can avoid the sale³). It is not, however, necessary that they should be judgment creditors at the time of the conveyance. All that seems to be necessary is that they should have claims, either arising out of contract or tort at the time the transfer was made⁴). Whether subsequent creditors may in any case attack conveyances made before they became creditors is a subject involved in dispute. The rule is stated in many jurisdictions, that such creditors may set aside the conveyance where the fraud was actual, but not when it was merely constructive⁵).

3. A third class of sales which, under Statutes, is presumed to be void as to creditors, is the class known as "sales in bulk." These Statutes prohibit dealers in merchandize from selling all of their goods at once, unless a notice is given to creditors or a record of the sale made⁶). The purpose is to prevent frauds by merchants who may sell out their stocks secretly and abscond without paying their creditors. The constitutionality of such acts has been sustained by the United States Supreme Court⁷).

C. Illegality. — The discussion of matters connected with mistake, duress, and impossibility, belongs more properly to the subject of Contracts⁸), while the discussion of sales as affected by the bankruptcy belongs to the subject of Bankruptcy⁹).

A few words should, however, be said upon the subject of illegality. Many sales are forbidden either by common law or statutes¹⁰). Thus, contracts to sell things which are detrimental to the public health or morals; contracts made to violate the laws of the State or of another State or Nation; sales to an enemy in times of war; contracts for sale made in restraint of trade are instances of contracts or sales which are invalid without statutory prohibition¹¹).

A few instances of sales forbidden by Statute in various States are: sales of "futures" in grain or stocks; sales on Sunday; sales in violation of license laws; sales

¹) California, Civil Code, sec. 3442: "Any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." The first part of the same section provides that the question of fraudulent intent is always of fact. — ²) 2 Mechem on Sales, sec. 953. — ³) Wait on Fraudulent Conveyances, sec. 73. — ⁴) Bongard v. Block, (1876) 81 Ill. 186. — ⁵) Ruby v. Austin, (1892) 56 Ark. 73, s. c. 35 Am St. Rep. 85. Compare California, Civil Code, sec. 3439, which makes transfers with intent to defraud, void as to "all creditors" with sec. 3442 which makes them void as to "existing" creditors. — ⁶) The following are the States in which such statutes have been passed with reference to the published collection of laws where they may be found: California, Civil Code, (1909) sec. 3440; Colorado, Laws of 1903, c. 110; Connecticut, (1902) Gen. Stat. secs. 4868, 4869; Delaware, Laws of 1903, c. 387; District of Columbia, (1905) U. S., Statutes at Large, 58th Congress, chap. 1809; Florida, Act of May 27, 1907; Georgia, Act of 1903, sec. 457; Idaho, Act of 1903, pp. 11—12; Illinois, Acts of 1905, p. 284 (declared unconstitutional); Indiana, Burns Ann. St., vol. 4, sec. 6637a (held unconstitutional); Kansas, Acts of 1904, p. 72; Kentucky, Acts of 1904,

chap. 22; Louisiana, Acts of 1896, No. 94; Maine, Acts of 1905, p. 119; Maryland, Acts of 1906, c. 421; Massachusetts, Acts of 1903, c. 415; Michigan, Acts of 1905, No. 223; Minnesota, Rev. Laws, sec. 3503 (held unconstitutional); Mississippi, Act of March 6, 1908; Montana, Act of March 7, 1907; Nebraska, Act of March 4, 1907; Nevada, Act of March 20, 1907; New Jersey, Acts of 1907, c. 237; New York, Acts of 1907, c. 722; North Carolina, Act of March 5, 1907; North Dakota, Act of March 8, 1907; Ohio, Act of April 30, 1908; Oklahoma, Act of May 26, 1908; Oregon, Annotated Codes and Statutes, secs. 4623—4626; Pennsylvania, Acts of 1905, No. 44, p. 62; Rhode Island, Acts of 1909, c. 387; South Carolina, Acts of 1906, p. 1; Tennessee, Acts of 1901, c. 133; Utah, Compiled Laws, (1907) title 71; Vermont, Virginia, Code (1904), sec. 2460a; Washington, Acts of 1901, p. 222, and Wisconsin, Laws of 1901, c. 463. — ⁷) Larmieux v. Young, (1909) 211 U. S. 489; Kidd, etc., Co. v. Musselmann Grocery Co. (1910) 217 U. S. 461. — ⁸) See article on Contracts. — ⁹) See Bankruptcy. — ¹⁰) The distinction is not important. Formerly there was thought to be a difference between *mala prohibita* and *mala in se*, but the distinction has been reputiated. 2 Mechem on Sales, sec. 1015; Williston on Sales, sec. 668. — ¹¹) Williston on Sales, sec. 674.

of liquors; sales requiring goods to be marked or labelled in a certain way; sales of "oleomargarine" or imitations of butter. Where these sales are prohibited by statutes, the seller cannot recover the price. So, where the seller is obliged to take out a license before he can sell certain articles, he will generally be unable to sue for the price of goods sold, where he has failed to procure the license¹⁾. An exception to this rule, however, exists in cases where the license is imposed solely for the purpose of revenue and not for the purpose of police regulations²⁾. The laws which have been passed in most of the States requiring foreign corporations doing business in the State to comply with certain conditions, have given rise to a great number of questions. Their consideration, however, more properly belongs to the subject of Corporations³⁾. It has been held under the Sherman Anti-Trust Law, that a corporation doing business in violation of that Act could not recover the price of goods sold, but it should be noticed that the transaction which was involved was one directly in violation of that Act⁴⁾.

Statutes on Sales.

Introductory.

The law of sales is codified in the states and territories that have adopted the uniform sales act, namely, Arizona, Connecticut, Maryland, Massachusetts, New Jersey, Ohio, and Rhode Island, in California, and the states that have adopted, with slight modifications, the California civil code, namely, Idaho, Montana, North Dakota, and South Dakota, in Georgia, and in Louisiana. In practically all of the states there are statutory provisions relating to conditional sales, with special provisions, in some cases, in regard to sales of railroad equipment. The sale of goods in bulk is also regulated by statute in a number of states. The principal statutes are reprinted below.

The statutes are reprinted in the following order: the uniform sales act; the codifications other than the uniform act; the statutes relating to conditional sales; the statutes relating to sales in bulk; miscellaneous statutes.

I. Uniform Sales Act.

Arizona,⁵⁾ Connecticut,⁶⁾ Maryland,⁷⁾ Massachusetts,⁸⁾ New Jersey,⁹⁾ Ohio,¹⁰⁾ and Rhode Island.^{11) 12)}

An Act to make Uniform the Law of Sales of Goods.¹³⁾

Part I. Formation of the contract.

Sec. 1. Contracts to sell and sales. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price; 2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price; 3. A contract to sell or a sale may be absolute or conditional; 4. There may be a contract to sell or a sale between one part owner and another.

The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale. The phrase "contract of sale" used in the English act has been discarded. An explanation of the reasons on which this and the other sections of the act are based may be found in Williston on Sales.

1) Williston on Sales, sec. 669. — 2) Williston on Sales, sec. 670; 2 Mechem on Sales, sec. 1046. — 3) See article on *Corporations*. — 4) *Continental Wall Paper Co. v. Voigt*, (1909) 212 U. S. 227. — 5) Laws, 1907, c. 99. — 6) Acts, 1907, c. 212. — 7) Laws, 1910, c. 346. — 8) Acts, 1908, c. 237. — 9) Laws, 1907, c. 132. — 10) Laws, 1908, p. 413. — 11) Laws, 1908, c. 1548.

— 12) During 1911 this act was adopted in New York and Wisconsin. — 13) The title varies in the several states, as does also the numbering of the sections. The annotations are reprinted, by permission, from the copy of the draft act published by the Commissioners for Uniform State Laws.

Sec. 2. Capacity. Liabilities for necessities. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

This section states the prevailing though not wholly uniform, doctrine of the existing law. *Mechem on Sales*, sec. 122 et seq. The section follows verbatim sec. 2 of the English act except that the words "the sale and" which precede the last word in the section are omitted as introducing a possible ambiguity.

Formalities of the contract.

Sec. 3. Form of contract or sale. Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

This follows the first part of sec. 3 of the English act. That act contains the following proviso, which was omitted as unnecessary: "Provided that nothing in this section shall affect the law relating to corporations."

Sec. 4. Statute of frauds. 1. A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf; 2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply; 3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Ohio, \$ 2500.00; Connecticut, \$ 100.00. Subsection (1) of this section follows sec. 4 (1) of the English act with the exceptions stated below. The words of the section of the English act are somewhat altered from those of the seventeenth section of the Statute of Frauds, but the changes are such as to express more accurately the construction previously given by Lord Tenterden's Act and by the courts to the Statute of Frauds. See *Chalmers* (5th ed.) 16. In the United States a provision corresponding to the seventeenth section of the Statute of Frauds exists in all the states but Alabama, Arizona, Delaware, Illinois, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia. The words "or choses in action" have been inserted to settle a doubt whether such property is within the statute. Similar words or the broad term "personal property" are found in the Statutes of Frauds now in force in about twenty of the states. *Mechem on Sales*, sec. 287. The limit of price or value varies considerably in this country, fifty dollars is the commonest limit. Subsection (2) is intended to reproduce the rule laid down by *Shaw, C. J.*, in *Mixer v. Howarth*, 21 Pick. 205, and by *Ames, J.*, in *Goddard v. Binney*, 115 Mass. 450, which has found most support in this country. *Mechem*, sec. 326. Subsection (3) differs from the corresponding English provision, but represents the American rule, as well as the early English rule. See *Mechem*, sec. 357 et seq.

Subject matter of contract.

Sec. 5. Existing and future goods. 1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods"; 2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen; 3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

This section follows sec. 5 of the English act except that contract to sell is here as elsewhere substituted for "contract of sale" and "contract for the sale." Also in subsection (3) "parties

purport" is substituted for "seller purports." As the intention of the buyer is as important as that of the seller, the substituted expression is the more accurate.

Sec. 6. Undivided shares. 1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares; 2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass, and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

These provisions are new, and 6 (2) at least probably does not express the English law. It expresses the doctrine of *Kimberly v. Patchim*, 19 N. Y. 330, which is supported by the weight of recent American authority, though there are adverse decisions. See *Mechem*, sec. 704 et seq.

Sec. 7. Destruction of goods sold. 1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void; 2. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale: a) As avoided, or b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Subsection (1) corresponds to sec. 6 of the English Act. The English section does not seem to cover the contingency of deterioration or partial destruction, and subsection (2) has been added for that purpose.

Sec. 8. Destruction of goods contracted to be sold. 1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided; 2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract: a) As avoided, or b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

Subsection (1) corresponds to sec. 7 of the English Act. Subsection (2) is added to cover the case of deterioration or partial destruction.

The price.

Sec. 9. Definition and ascertainment of price. 1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties; 2. The price may be made payable in any personal property; 3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply; 4. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Subsections (1) and (4) are substantially the same as sec. 8 of the English act. Subsection (2) is changed from the English law which in sec. 1 (1) requires a "money consideration."

Sec. 10. Sale at a valuation. 1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor; 2. Where such third person is prevented from fixing the price

or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act. Slightly varied from sec. 9 of the English act.

Conditions and warranties.

Sec. 11. Effect of conditions. 1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty; 2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Sec. 11 of the English Act authorizes not only the waiver of a condition, but the election to treat any condition to be fulfilled by the seller as a breach of warranty. The use of condition as including promise or warranty does not seem happy. It is very unfortunate if the distinction between conditions and promises should become obliterated, for the legal ideas are distinct and should have distinct names.

Sec. 12. Definition of express warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The English act does not define when language amounts to warranty. There is considerable division of authority on the point. On theory the fundamental basis for liability on warranty is the justifiable reliance on the seller's assertions. Whether the buyer was justified in his reliance depends not on the intent of the seller, but on the natural tendency of his acts. As a practical matter, the section as drawn does not seem to set up an unreasonably high standard of morality. The tendency of the courts has been distinctly in the direction of greater strictness against seller's statements. See Mechem, p. 1072, note 1.

Sec. 13. Implied warranties of title. In a contract to sell or a sale, unless a contrary intention appears, there is: 1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass; 2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale; 3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made; 4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

This section is copied from the English sec. 12, except (4), which is an addition. There are a few American decisions and more dicta that there is no warranty of title where the vendor is out of possession. But the weight of recent authority is against this distinction. See Mechem, sec. 1302. (4) represents the English as well as the American law.

Sec. 14. Implied warranty in sale by description. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

This section is identical in meaning with sec. 13 of the English act.

Sec. 15. Implied warranties of quality. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose; 2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower

or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality; 3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed; 4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose; 5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade; 6. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

This section follows sec. 14 of the English act.

Sale by sample.

Sec. 16. Implied warranties in sale by sample. In the case of a contract to sell or a sale by sample: a) There is an implied warranty that the bulk shall correspond with the sample in quality; b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3); c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

This follows substantially sec. 15 of the English act.

Part II. Transfer of property as between seller and buyer.

Sec. 17. No property passes until goods are ascertained. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

This section follows sec. 16 of the English act, except for the addition of the clause beginning "but," etc. See under sec. 6 for explanation, of the difference between English and American law on the point referred to.

Sec. 18. Property in specific goods passes when parties so intend. 1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred; 2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Follows sec. 17 of the English act.

Sec. 19. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. 1. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revert the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time. 2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer: a) When he signifies his approval or acceptance to the seller does any other act adopting the transaction; b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. 1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are uncondi-

tionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made; 2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

This section follows sec. 18 of the English act with some changes. The first rule is altered by omitting from the end the words "and the buyer has notice thereof." The insertion of these words in the English act changed the English law, which had never required notice (see Chalmers, p. 46), in order to make it conform to the Scotch law. There seems no good reason for postponing the transfer of title to this extent. There is no American authority for it. The English Rule 3 which is omitted is as follows: "Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done." This rule of presumption, is artificial and has been discarded in New York and some other states. See Mechem, sec. 515 et seq. Rule 3 (1) is not in the English act. In that act, a "sale or return" is included in the provision corresponding to Rule 3 (2) of this act (sec. 18, Rule 4 of English act), thereby making the same presumption apply to such sales as to sales on trial. The distinction between a sale with a right to return and a sale to take effect on approval has not been taken in the English decisions, though Chalmers notices it in his annotation. 9 Harv. Law Rev. 110, n. 3. The distinction has been taken in this country (Mechem, sec. 657 et seq., sec. 675 et seq.), and it seems proper to indicate it in this act. Rule 3 (2) is the same as Rule 4 of the English act, except that the words "on trial or on satisfaction" are substituted for "on sale or return." In Rule 4 (2) the last sentence is not in the English act. It settles a disputed question in accordance with the weight of authority. See 4 Columbia Law Rev., 541; Mechem, secs. 733, 741. Rule 5 is not in the English act, but it represents the existing law.

Sec. 20. Reservation of right of possession or property when goods are shipped.

1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer. 2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract. 3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer. 4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of the exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Subsection (1) follows with some change of expression, sec. 19 of the English act except that for the somewhat loose phrase "right of disposal" is substituted "possession of property." The first sentence of subsection (2) is in the English act, except that "property in the goods" is substituted for "right of disposal." The remainder of the subsection is new. Subsection (3) is not in the English act, but is thought to be warranted by the existing law. Subsection (4) substantially follows the English act as far as the words "If, however." The proviso beginning "If, however," is not in the English act. It expresses, nevertheless, the English law, because of the last Factors Act. *Cahn vs. Packet Co.*, (1899) 1 Q. B. 643. It undoubtedly is in accordance with mercantile understanding and convenience. The seller has trusted the buyer with the possession of the document of title and should bear the consequences. See *Mechem*, sec. 166.

Sec. 21. Sale by auction. In the case of sale by auction: 1. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale; 2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve; 3. A right to bid may be reserved expressly by or on behalf of the seller; 4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

This follows sec. 58 of the English act, and is believed to express the existing law.

Sec. 22. Risk of loss. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that: a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery; b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

The exception (a) is not contained in the English act. Otherwise the section is in substance the same as sec. 20 of the English act. The new exception represents the weight of authority and seems sound on principle. The principal situation at which it is aimed is where a conditional sale has been made, the goods, delivered to the buyer, and very likely in use by him. The title is retained instead of taking a mortgage back, as would be done in the case of real estate. The beneficial interest is in the buyer, and the risk should be on him. See 9 *Harv. Law Rev.* 109: *Mechem*, sec. 635. Where goods are sent in compliance with an order, but marked "C. O. D.," even though the effect of this were to withhold the title (as to which, however, see section 19, Rule 4 [2],) the risk would be thrown on the buyer. See *Mechem*, sec. 740, note (p. 616).

Transfer of title.

Sec. 23. Sale by a person not the owner. 1. Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. 2. Nothing in this act, however, shall affect: a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

This follows sec. 21 of the English act, except in (2) (a) "recording acts" has been added.

Sec. 24. Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

This follows sec. 23 of the English act. Sec. 22 of that act relates to sales in market overt and is omitted here.

Sec. 25. Sale by seller in possession of goods already sold. Where a person having sold goods continues in possession of the goods, or of negotiable documents

of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

This follows sec. 25 (1) of the English act. It is comparatively new to the English law, being first enacted in the Factors Act of 1889. But, so far as purchasers are concerned, it states in effect the principle commonly laid down in this country, that delivery is not necessary between the parties, but is as against third persons. The rights of creditors are dealt with in the next section.

Sec. 26. Creditors' rights against sold goods in seller's possession. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Sec. 27. Definition of negotiable documents of title. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

This definition, following as it does the definition of negotiable promises to pay money, represents the mercantile understanding in regard to documents of title.

Sec. 28. Negotiation of negotiable documents by delivery. A negotiable document of title may be negotiated by delivery: a) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the bearer, or b) Where by the terms of the document the carrier, warehouseman, or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Here too both mercantile practice and the analogy of bills and notes are followed.

Sec. 29. Negotiation of negotiable documents by indorsement. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 30. Negotiable documents of title marked not "negotiable." If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

It has been until recently the custom of the railroads to stamp upon bills of lading, even though running to order or assigns, the words "not negotiable." How far the carrier is justified in attempting to limit his liability by such a device may be questioned, but as this act is concerned not with the liability of the carrier but with the rights of the various holders of the bill of lading as against each other, it provides merely that as between those parties the words "not negotiable" do not change the legal effect of the document.

Sec. 31. Transfer of non-negotiable documents. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

The distinction between warehouse receipts and bills of lading negotiable in form and those which are not does not seem to be observed in the English decisions; but it is observed in this country both in the usages of warehousemen and carriers and in the decisions of the courts. See *Hallgarten v. Oldham*, 135 Mass. 1; *Gill v. Frank*, 12 Oreg. 507; *Forbes v. Boston & Lowell R. R.*, 133 Mass. 154; *Litchfield Bank v. Elliot*, 83 Minn. 469.

Sec. 32. Who may negotiate a document. A negotiable document of title may be negotiated: a) By the owner thereof, or b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

By this section a negotiable document of title is not given the full negotiability of a bill of exchange, inasmuch as neither a thief nor a finder is within the terms of the section. In the uniform bills of lading act, however, the Commissioners on Uniform State Laws adopted the principle of full negotiability.

Sec. 33. Rights of person to whom document has been negotiated. A person to whom a negotiable document of title has been duly negotiated acquires thereby: a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

This section follows the custom of merchants. It makes the document represent the depositor's right in the goods, so that a purchaser of the document, if he acquires a good title thereto, acquires not simply the rights of his vendor, but whatever property the original depositor had, that being what the document represented. 32 (b) makes the obligation of the warehouseman in regard to the goods negotiable. Many states already have statutes making warehouse receipts negotiable, *Mohun on Warehousemen*, 944; and some states have statutes in regard to bills of lading, *ibid.* 848, but these statutes have generally been so brief and general in terms that they have been variously construed and have to some extent failed of their purpose. See *Shaws v. Railroad Co.*, 101 U. S. 557.

Sec. 34. Rights of person to whom document has been transferred. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

This section states the right of any purchaser of bailed goods. One who purchases, therefore, a non-negotiable document of title would gain nothing from the transfer of the document except evidence.

Sec. 35. Transfer of negotiable document without indorsement. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

This follows the analogy of bills and notes. *Crawford, Neg. Inst. Law*, sec. 79.

Sec. 36. Warranties on sale of document. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants: a) That the document is genuine; b) That he has a legal right to negotiate or transfer it; c) That he has knowledge of no fact which would impair the validity or worth of the document, and d) That he has a right to trans-

fer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

This section except (d) follows the negotiable instruments law. Crawford sec. 115.

Sec. 37. Indorser not a guarantor. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfil their respective obligations.

Mercantile usage in regard to documents of title differs from that in regard to bills and notes in the matter to which this section relates. It states the existing law, even in jurisdictions where statutes have made documents of title negotiable. *Shaw v. Railroad Co.*, 101 U. S. 557; *Mida v. Geissmann*, 17 Ill. App. 207.

Sec. 38. When negotiation not impaired by fraud, mistake, or duress. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

This section merely elaborates for the sake of clearness certain special cases within the terms of sec. 32.

Sec. 39. Attachment or levy upon goods for which a negotiable document has been issued. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

If the mercantile theory of documents of title, such as bills of lading and warehouse receipts, were carried to its logical extent, no attachment of the goods represented by the document or levy upon them could be permitted while the negotiable document was outstanding. The act does not take the extreme position that no attachment, garnishment, or levy could be made on property for which a negotiable document was outstanding, but covers the essential practical point by making it a condition of the validity of such seizure that the negotiation of the document be enjoined or the document impounded. The following section expressly gives the court full power to aid, by injunction and otherwise, a creditor seeking to get at a negotiable document and the property covered thereby.

Sec. 40. Creditors' remedies to reach negotiable documents. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

As the right of legal garnishment of bailed property is limited by the preceding section, sec. 40 gives the creditor such rights as are included under the heads of bills of equitable attachment or in aid of execution.

Part III. Performance of the contract.

Sec. 41. Seller must deliver and buyer accept goods. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

This follows sec. 26 of the English act.

Sec. 42. Delivery and payment are concurrent conditions. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

This follows sec. 27 of the English act.

Sec. 43. Place, time, and manner of delivery. 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question

depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery; 2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time; 3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods; 4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact; 5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

This the same as sec. 29 of the English act, except that the second half of subsection (3) has been added.

Sec. 44. Delivery of wrong quantity. 1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received; 2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate; 3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole; 4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

This follows sec. 30 of the English act, and is in accordance with the weight of authority. See *Mechem*, sec. 1157 et seq.

Sec. 45. Delivery in instalments. 1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. 2. Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

This section is slightly altered from section 31 of the English act. The English act, following prior English decisions, makes repudiation by one party the test of the right of the other to refuse to go on. The section here given makes the materiality of the breach the test. This is in accord with the weight of American authority. *Norrington v. Wright*, 115 U. S. 188, 14 Harv. Law Rev. 323.

Sec. 46. Delivery to a carrier on behalf of the buyer. 1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears; 2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself,

or may hold the seller responsible in damages; 3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

These paragraphs follow with slight changes sec. 32 of the English act. (2) and (3) are probably in accordance with the business usage, but there is little in the way of positive law on the subject. See Chalmers (5th ed.) p. 73.

Sec. 47. Right to examine the goods. 1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract; 2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract; 3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Sec. 47 (1) and (2) follow sec. 34 of the English act, and state the American law also. Mechem, sec. 1375 et seq. Subsection (3) states the actual practice of the large express companies and probably states the common law. *Wiltse v. Barnes*, 46 Ia. 210.

Sec. 48. What constitutes acceptance. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

This follows sec. 35 of the English act, and represents the American law also. Mechem, sec. 1379 et seq.

Sec. 49. Acceptance does not bar action for damages. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

This section is not contained in the English act, but sec. 11 (1) (a) of that act seems to authorize the buyer to accept goods and nevertheless hold the seller liable in damages. The latter half of the section in this act imposes a qualification sanctioned by good business practice and to some extent by law, both in this country and in Europe. The law in this country is in great conflict. See Mechem sec. 1388 et seq.

Sec. 50. Buyer is not bound to return goods wrongly delivered. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

This follows sec. 36 of the English act. Such American decisions as there are are in accord. Mechem, sec. 1403.

Sec. 51. Buyer's liability for failing to accept delivery. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

This follows substantially sec. 37 of the English act, except for the addition of breach of the entire contract as an equivalent of repudiation. See note to sec. 45.

Part IV. Rights of unpaid seller against the goods.

Sec. 52. Definition of unpaid seller. 1. The seller of goods is deemed to be an unpaid seller within the meaning of this act: a) When the whole of the price has

not been paid or tendered; b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise. 2. In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

This follows sec. 38 of the English act, except that in (1) (b) "has been broken" is substituted for "has not been fulfilled" and "the insolvency of the buyer" has been inserted.

Sec. 53. Remedies of an unpaid seller. 1. Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has: a) A lien on the goods or right to retain them for the price while he is in possession of them; b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them; c) A right of resale as limited by this act; d) A right to rescind the sale as limited by this act. 2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

This follows sec. 39 of the English act, except for the insertion of 1 (d), which is in conformity with the American law and with business usage. *Mechem*, sec. 1682.

Unpaid seller's lien.

Sec. 54. When right of lien may be exercised. 1. Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: a) Where the goods have been sold without any stipulation as to credit; b) Where the goods have been sold on credit, but the term of credit has expired; c) Where the buyer becomes insolvent. 2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

This follows sec. 41 of the English act.

Sec. 55. Lien after part delivery. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

This follows sec. 42 of the English act.

Sec. 56. When lien is lost. 1. The unpaid seller of goods loses his lien thereon: a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof; b) When the buyer or his agent lawfully obtains possession of the goods; c) By waiver thereof. 2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

This substantially follows sec. 43 of the English act.

Stoppage in transitu.

Sec. 57. Seller may stop goods on buyer's insolvency. Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

This follows sec. 44 of the English act with two exceptions. In the last clause the English act reads, "and may retain them until payment or tender of the price." But the seller under such circumstances has also the right to resell, and under this act the right to rescind the sale. In the second line the words "is or" have been inserted, so as to make it clear that the seller's right exists even though the buyer were insolvent at the time of the sale. See *Mechem*, sec. 1541.

Sec. 58. When goods are in transit. 1. Goods are in transit within the meaning of section 57: a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his

agent in that behalf, takes delivery of them from such carrier or other bailee; b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back. 2. Goods are no longer in transit within the meaning of section 57: a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination; b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer; c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf. 3. If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer. 4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

This follows sec. 45 of the English act, but with considerable changes in wording and arrangement.

Sec. 59. Ways of exercising the right to stop. 1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer. 2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

This follows sec. 46 of the English act, except the final proviso. The carrier should be liable to a bona fide transferee of its bill of lading, and unquestionably would be at common law if the transferee took for value before the stoppage. Even though the transferee took after the notice of stoppage, he is protected by sec. 62. The carrier therefore ought not to be obliged or allowed to surrender the goods unless the document of title is surrendered.

Resale by the seller.

Sec. 60. When and how resale may be made. 1. Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale; 2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer; 3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made; 4. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer; 5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

This section differs considerably from sec. 48 of the English act. Sec. 48 (2) of the English act seems to provide that the resale, whether rightly made or not, so long as it is made by a seller having a lien, gives a good title, and sec. 8 of the Factors Act of 1889,

providing that any seller in possession has power to make a valid sale or pledge, squares with this; but the provision seems somewhat drastic for this country. See *Mechem*, sec. 1644. The requirements as to delivery and change of possession in this act would generally protect the purchaser on the resale if he got delivery, and this seems far enough to go. The point covered by (3) is much disputed. The English law requires notice where the goods are not perishable, and some cases so hold in this country. Others reach a contrary result. See *Mechem*, sec. 1633. On the one hand, it seems undesirable to make a resale invalid under all circumstances for lack of notice. The lapse of time or other circumstances might make it highly unjust to allow the buyer later, when perhaps market prices had risen, to make such a claim. On the other hand, it seems desirable that notice should generally be given.

Rescission by the seller.

Sec. 61. When and how the seller may rescind the sale. 1. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. 2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

This section is not contained in the English Act, and the remedy for which the section provides is not allowed by English law. It is allowed in this country, and seems fully justified by mercantile custom and convenience. *Mechem*, secs. 1681, 1682; *Burdick*, p. 243.

Sec. 62. Effect of sale of goods subject to lien or stoppage in transitu. Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser or value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

This section is based on sec. 47 of the English act. The second paragraph is, however, made more far reaching than in the English act in order to cover a case which does not seem to have arisen or to have been considered in England, namely, where a bill of lading is transferred to an innocent purchaser for value after notice to stop has been given. The only case is *Newhall v. Central Pac. R. R.*, 51 Cal. 345, which properly protects the purchaser.

Part V. Actions for breach of the contract.

Remedies of the seller.

Sec. 63. Action for the price. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods; 2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it. 3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

(1) and the first half of (2) follow the English act. The addition to (2) beginning "but," etc., is believed to be justified by the weight of American authority. (3) is not law in England, nor is it in a number of American states. On the other hand, the New York court, in an often quoted passage, allows the remedy to an unpaid vendor generally without any qualification as to the nature of the goods. It is also allowed in the civil law. The rule suggested goes as far as convenience requires, for if the goods can readily be resold, the action for damages affords adequate relief. See *Mechem*, sec. 1694.

Sec. 64. Action for damages for non-acceptance of the goods. 1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance; 2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract; 3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept; 4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

This follows sec. 50 of the English act, except (4), which is added. (4) is not law in England, but it is in this country, except in Illinois. See 14 *Harv. Law Rev.* 422; *Mechem*, sec. 1700 et seq. The provision does not require the seller to cease performance in every case. There may be cases where the damage caused by stopping performance would be greater than that caused by finishing the necessary work. See *Southern Cotton Oil Co. v. Heflin*, 99 *Fed.* 339. In such a case the seller might complete performance, and recover damages based on completed performance.

Sec. 65. When seller may rescind contract or sale. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Sec. 61 allows the seller to rescind the transfer of title in the cases there covered. The rescission of all contractual obligation between the parties—a more extensive right—is covered by this section.

Remedies of the buyer.

Sec. 66. Action for converting or detaining goods. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

This section, which is not contained in the English act, allows trover, replevin, equitable or other relief, as the local law may warrant.

Sec. 67. Action for failing to deliver goods. 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery; 2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract; 3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

This follows sec. 51 of the English act.

Sec. 68. Specific performance. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree

may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

This follows, with slight changes in wording, sec. 52 of the English act.

Sec. 69. Remedies for breach of warranty. 1. Where there is a breach of warranty by the seller, the buyer may, at his election: a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price; b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty; c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. 2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. 3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale. 4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price; 5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53; 6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. 7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

This section differs materially from the corresponding section of the English act, sec. 53. This act allows rescission as a remedy for breach of warranty. The English law does not. In defence of the remedy of rescission, see an article by Professor Williston in 16 Harv. Law Rev. 465. Further, the English act, following *Mendel v. Steel*, 8 M. & W. 858, allows the buyer to recoup his damages in an action for the price and thereafter to bring an action for damages. This seems erroneous. See *Watkins v. American Bank*, 134 Fed. 36 (C. C. A.), and has been changed in this act.

Sec. 70. Interest and special damages. Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

This follows sec. 54 of the English act.

Part VI. Interpretation.

Sec. 71. Variation of implied obligations. Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

This follows sec. 55 of the English act.

Sec. 72. Rights may be enforced by action. Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

This follows sec. 57 of the English act.

Sec. 73. Rule for cases not provided for by this act. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Sec. 74. Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it.

The rule in this section obviously states a proper principle in regard to a statute the primary object of which is to make the law uniform. The same provisions will be found in the uniform transfer of stock act, uniform warehouse receipts act and the uniform bills of lading act. The courts of last resort have applied this rule to the uniform negotiable instruments act. This principle was long ago recognized in *Swift v. Tyson*, (1842) 16 Pet. 1.

Sec. 75. Provisions not applicable to mortgages. The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

This follows sec. 60 (2) of the English act, except for the words "unless so stated."

Sec. 76. Definitions. 1. In this act, unless the context or subject matter otherwise requires: "Action" includes counterclaim, set-off and suit in equity. "Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person. "Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted. "Delivery" means voluntary transfer of possession from one person to another. "Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation. "Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document. "Fault" means wrongful act or default. "Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit. "Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale. "Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. "Order" in sections of this act relating to documents of title means an order by indorsement on the document. "Person" includes a corporation or partnership or two or more persons having a joint or common interest. "Plaintiff" includes defendant asserting a right of set-off or counterclaim. "Property" means the general property in goods, and not merely a special property. "Purchaser" includes mortgagee and pledgee. "Purchases" includes taking as a mortgagee or as a pledgee. "Quality of goods" includes their state or condition. "Sale" includes a bargain and sale as well as a sale and delivery. "Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person. "Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made. "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor. 2. A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not. 3. A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not. 4. Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

The only one of these definitions requiring comment is that of value, which follows the weight of authority at common law and the provision of the uniform negotiable instruments act as intended by its framers. In regard to property other than negotiable instruments

the law of many states does not regard an antecedent debt as value; but it seems desirable to have a single rule for what constitutes valuable consideration, and mercantile convenience support the one adopted. It is supported, moreover, by the law of England and a few of our states. See Williston on Sales, sec. 619.

Sec. 76a. Act does not apply to existing sales or contracts to sell. None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act.

This section was added by the commissioners in 1909 primarily to avoid a question which was raised in Massachusetts where the act was passed without this section. It was questioned whether sec. 4 of the act as it related to the enforcement of a sale, or contract to sell, rather than to its original validity, did not apply to any litigation arising after the passage of the act without reference to when the sale or contract to sell which was the subject of the litigation, arose. See Williston on Sales p. 1042. A similar section is found in all the other uniform acts.

Sec. 76b. No repeal of uniform warehouse receipt act or uniform bills of lading act. Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the act to make uniform the law of warehouse receipts, or of the act to make uniform the law of bills of lading.

This section was added by the commissioners in 1909 especially to avoid the possible effect of section 32 of the uniform sales Act upon sec. 31 of the Uniform Bills of Lading Act.

Sec. 77. Inconsistent legislation repealed. All acts or parts of acts inconsistent with this act are hereby repealed except as provided in section 76b.

[Sec. 78. Relates to commencement of act.]

Sec. 79. Name of act. This act may be cited as the Uniform Sales Act.

II. General Codifications.

California.

Civil Code.

Division III. Obligations.

Part IV. Obligations arising from particular transactions.

Title I. Sale.

Chap. I. General Provisions. Articles I—III. §§ 1721—1741. Chap. II. Rights and Obligations of the Seller. Articles I—III. §§ 1748—1778. Chap. III. Rights and Obligations of the Buyer. §§ 1784—1786. Chap. IV. Sale by Auction. §§ 1792—1798.

Chapter I. General provisions.

Article I. Sale.

Sec. 1721. Sale, what. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.

Sec. 1722. Subject of sale. The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.

Article II. Agreement for sale.

Sec. 1726. Agreement for sale. An agreement for sale is either: 1. An agreement to sell; 2. An agreement to buy; or 3. A mutual agreement to sell and buy.

Sec. 1727. Agreement to sell. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

Sec. 1728. Agreement to buy. An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing.

Sec. 1729. Agreement to sell and buy. An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.

Sec. 1730. What may be the subject of the contract. Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not.

Article III. Form of the contract.

Sec. 1739. Contract for sale of personal property. No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless: 1. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent; or, 2. The buyer accepts and receives part of the thing sold, or when it consists of a thing in action, part of the evidences thereof, or some of them; or, 3. The buyer, at the time of sale, pays of part of the price.

Sec. 1740. Contract to manufacture. An agreement to manufacture a thing, from materials furnished by the manufacturer, or by another person, is not within the provisions of the last section.

*Chapter II. Rights and obligations of the seller.**Article I. Rights and duties before delivery.*

Sec. 1748. When seller must act as depositary. After personal property has been sold, and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

Sec. 1749. When seller may resell. If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price, in the manner prescribed by the title on liens.

Article II. Delivery.

Sec. 1753. Delivery on demand. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand unless he has a lien thereon.

Sec. 1754. Delivery, where made. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced.

Sec. 1755. Expense of transportation. One who sells personal property must bring it to his own door, or other convenient place, for its acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

Sec. 1756. Notice of election as to delivery. When either party to a contract of sale has an option as to the time, place, or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

Sec. 1757. Buyer's directions as to manner of sending thing sold. If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or if, in the absence of special directions he uses ordinary care in forwarding the thing, it is at the risk of the buyer.

Sec. 1758. Delivery to be within reasonable hours. The delivery of a thing sold can be offered or demanded only within reasonable hours of the day.

Article III. Warranty.

Sec. 1763. Warranty, what. A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future.

Sec. 1764. No implied warranty in mere contract of sale. Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.

Sec. 1765. Warranty of title to personal property. One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unencumbered title thereto.

Sec. 1766. Warranty on sale by sample. One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample.

Sec. 1767. When seller knows that buyer relies on his statements, etc. One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact

concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

Sec. 1768. Merchandise not in existence. One who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care.

Sec. 1769. Manufacturer's warranty against latent defects. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

Sec. 1770. Thing bought for particular purpose. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.

Sec. 1771. When thing cannot be examined by buyer. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable.

Sec. 1772. Trade-marks. One who sells or agrees to sell any article to which there is affixed or attached a trade-mark, thereby warrants that mark to be genuine and lawfully used.

Sec. 1773. Other marks. One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured, or prepared, thereby warrants the truth thereof.

Sec. 1774. Warranty on sale of written instrument. One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

Sec. 1775. Warranty of provisions for domestic use. One who makes a business of selling provisions for domestic use warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome.

Sec. 1776. Warranty on sale of good-will. One who sells the good-will of a business thereby warrants that he will not endeavor to draw off any of the customers.

Sec. 1777. Warranty upon judicial sale. Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.

Sec. 1778. Effect of general warranty. A general warranty does not extend to defects inconsistent therewith of which the buyer was then aware, or which were then easily discernible by him without the exercise of peculiar skill; but it extends to all other defects.

Chapter III. Rights and obligations of the buyer.

Sec. 1784. Price, when to be paid. A buyer must pay the price of the thing sold on its delivery, and must take it away within a reasonable time after the seller offers to deliver it.

Sec. 1785. Right to inspect goods. On an agreement for sale, with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it; and may rescind the contract if the seller refuses to permit him to do so.

Sec. 1786. Rights in case of breach of warranty. The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition.

Chapter IV. Sale by auction.

Sec. 1792. Sale by auction, what. A sale by auction is a sale by public outcry to the highest bidder on the spot.

Sec. 1793. Sale, when complete. A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

Sec. 1794. Withdrawal of bid. Until the announcement mentioned in the last section has been made, any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

Sec. 1795. Sale under written conditions. When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.

Sec. 1796. Rights of buyer upon sale without reserve. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void.

Sec. 1797. By-bidding. The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase.

Sec. 1798. Auctioneer's memorandum of sale. When property is sold by auction, an entry made by the auctioneer, in his sale-book, at the time of the sale, specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer, binds both the parties in the same manner as if made by themselves.

Title II. Exchange.

Sec. 1804. Exchange, what. Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.

Sec. 1805. Form of contract. The provisions of section seventeen hundred and thirty-nine apply to all exchanges in which the value of the thing to be given by either party is two hundred dollars or more.

Sec. 1806. Parties have rights and obligations of sellers and buyers. The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

Sec. 1807. Warranty of money. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Title XIV. Lien.

Chapter VII. Stoppage in Transit.

Sec. 3076. When consignor may stop goods. A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof.

Sec. 3077. What is insolvency of consignee. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so.

Sec. 3078. Transit, when ended. The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee.

Sec. 3079. Stoppage, how effected. Stoppage in transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof.

Sec. 3080. Effect of stoppage. Stoppage in transit does not, of itself, rescind a sale, but is a means of enforcing the lien of the seller.

Division IV.

Part I. Relief.

Title II. Compensatory relief.

Chapter II. Measure of damages.

Sec. 3308. Breach of agreement to sell personal property, not paid for. The detriment caused by the breach of a seller's agreement to deliver personal property,

the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled.

Sec. 3309. Breach of agreement to sell personal property paid for. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has been fully paid to him in advance, is deemed to be the same as in case of wrongful conversion.

Sec. 3310. Breach of agreement to pay for personal property sold. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price.

Sec. 3311. Breach of agreement to buy personal property. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: 1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or, 2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it.

Sec. 3312. Breach of warranty of title to personal property. The detriment caused by the breach of a warranty of the title of personal property sold, is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner.

Sec. 3313. Breach of warranty of quality of personal property. The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

Sec. 3314. Breach of warranty of quality for special purpose. The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose.

Georgia.

Code, 1911.

Sec. 4106. Essentials of a sale. Three elements are essential to a contract of sale: 1. An identification of the thing sold; 2. An agreement as to the price to be paid; 3. Consent of the parties.

Sec. 4107. Sales by auction. In case of sales by auction, the auctioneer shall be considered agent of both parties, so far as to dispense with any further memorandum in writing than his own entries.

Sec. 4108. Purchaser to pay for papers. Without an express stipulation to the contrary, a purchaser must pay the costs of the conveyance.

Sec. 4109. Sales to defraud creditors and purchasers. Every sale made with intent to defraud either creditors of the vendor, or prior or subsequent purchasers, if such intention be known to the vendee, shall be absolutely void as against such creditors or purchasers.

Sec. 4110. Protection of bona fide purchasers. Every voluntary deed or conveyance made by any person, shall be void as against subsequent bona fide purchasers for value, without notice of such voluntary conveyance.

Sec. 4111. Fraudulent purchase by insolvent. Where one who is insolvent purchases goods, and, not intending to pay therefor, conceals his insolvency and intention not to pay, the vendor may disaffirm the contract and recover the goods, if no innocent third person has acquired an interest in them.

Sec. 4112. Duress or fraud voids sale. Fraud or duress, by which the consent of a party has been obtained to a contract of sale, voids the sale.

Sec. 4113. What is fraud. Fraud may exist from misrepresentation by either party, made with design to deceive, or which does actually deceive the other party; and in the latter case such misrepresentation voids the sale, though the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by any artifices designed to mislead. A misrepresentation, not acted on, is not ground for annulling a contract.

Sec. 4114. Concealment, when fraud. Concealment of material facts may in itself amount to a fraud: 1. When direct inquiry is made, and the truth evaded. 2. When, from any reason, one party has a right to expect full communication of the facts from the other; 3. Where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keep silence. 4. Where the concealment is of intrinsic qualities of the article which the other party, by the exercise of ordinary prudence and caution, could not discover.

Sec. 4115. Mistake. Mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale. Mistake of a material fact may, in some cases, justify a rescission of the contract; mere ignorance of a fact will not.

Sec. 4116. Duress. Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will.

Sec. 4117. Possibility cannot be sold. A bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling, to a future benefit; so a contract for the sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party.

Sec. 4118. Title conveyed. The seller can convey no greater title than he has himself. The bona fide purchaser of a negotiable paper not dishonored, or of money, or bank-bills, or other recognized currency, will be protected in his title, though the seller had none. There is no "market overt" in Georgia.

Sec. 4119. Agent in possession and with apparent right to sell. Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title.

Sec. 4120. Purchaser without notice, protected. A title obtained by fraud, though voidable in the vendee, will be protected in a bona fide purchaser without notice.

Sec. 4121. Contracts entire or divisible. The contract of sale may be entire or divisible. If entire, a failure in part voids the whole; if divisible, the voidance is only in proportion and to the extent of the failure. The intention of the parties determines the question for entirety or divisibility.

Sec. 4122. Deficiency in sale of lands. In a sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or entire body, a deficiency in the quantity sold cannot be apportioned. If the quantity is specified as "more or less" this qualification will cover any deficiency not so gross as to justify the suspicion of wilful deception, or mistake amounting to fraud; in this event the deficiency is apportionable; the purchaser may demand a rescission of the sale or an apportionment of the price according to relative value.

Sec. 4123. Loss must fall on the owner. Where property is sold and delivered, but title is not to pass until payment in full of the purchase-money, and the property is lost, damaged or destroyed without the vendee's fault, he is entitled to a rescission of the contract or to an abatement in the price, unless it is otherwise agreed in the contract of sale.

Sec. 4124. Purchaser losing land, rights of. If the purchaser loses part of the land from defect of title, he may claim either a rescission of the entire contract, or a reduction of the price according to the relative value of the land so lost.

Sec. 4125. Delivery of goods essential. Generally, the delivery of goods is essential to the perfection of a sale. The intention of the parties to a contract may dis-

pense therewith; delivery need not be actual; constructive delivery may be inferred from a variety of facts. Until delivery is made or dispensed with, the goods are at the risk of the seller.

Sec. 4126. Title in certain articles not to pass until paid for. Cotton, corn, rice, crude turpentine, spirits turpentine, rosin, pitch, tar, or other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer: Provided, that in cases where the whole or any part of the property has been delivered to the buyer, the right of the seller to collect the purchase-money shall not be affected by its subsequent loss or destruction.

Sec. 4127. Sales of articles being manufactured. When the sale is of goods to be manufactured and delivered at a future time, the question of risk will depend upon the fact, to be ascertained in each case, whether the parties stipulate for a particular article in course of construction, or an article filling the specification of the contract. In the former case the title passes to the vendee before delivery; in the latter it does not.

Sec. 4128. Consideration. A valuable consideration is essential to a sale; it must either be definite, or an agreement made by which it can be made certain; if its ascertainment becomes impossible, there is no sale.

Sec. 4129. Inadequacy, effect of. Inadequacy of price is no ground for rescission of a contract of sale, unless it is so gross as combined with other circumstances to amount to a fraud.

Sec. 4130. Purchase price, when due. Unless credit is specifically agreed on, or is the custom of the trade, the purchase-money is due immediately, and the seller may demand payment before delivering the goods.

Sec. 4131. Remedy of seller on default of buyer. If a purchaser refuses to take and pay for goods bought the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee and sue him for the entire price.

Sec. 4132. Stoppage in transitu. If the goods are delivered before the price is paid, the seller cannot retake because of failure to pay; but until actual receipt by the purchaser, the seller may at any time arrest them on the way and retain them until the price is paid. If credit has been agreed to be given, but the insolvency of the purchaser is made known to the seller, he may still exercise the right of stoppage in transitu.

Sec. 4133. Purchaser without notice not affected. A bona fide assignee of the bill of lading of goods for a valuable consideration, and without notice that the same were unpaid for, and the purchaser insolvent, will be protected in his title against the seller's right of stoppage in transitu.

Sec. 4134. Bill of lading with draft attached. When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be.

Sec. 4135. Implied warranty. If there is no express covenant of warranty, the purchaser must exercise caution in detecting defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants: 1. That he has a valid title and right to sell. 2. That the article sold is merchantable, and reasonably suited to the use intended. 3. That he knows of no latent defects undisclosed.

Sec. 4136. Effect of breach. A breach of warranty, express or implied, does not annul the sale if executed, but gives the purchaser a right to damages. It may be pleaded in abatement of the purchase-money. If the sale be executory, it is a good reason for the purchaser to refuse to accept possession of the goods.

Sec. 4137. Acceptance, presumption of quality. After acceptance of goods purchased, the presumption is that they are of the quality ordered, and the burden is on the buyer to prove the contrary. Partial payment, with knowledge of the defective condition, will not estop the buyer from pleading partial failure of consideration.

Sec. 4138. Good faith required. Covenants of warranty should be so construed as to require and encourage the utmost good faith in all contracting parties.

Sec. 4139. Latent defects. Any vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and imperfect that it is reasonable to suppose that the purchaser would not have contracted had he knowledge of its existence, is such a latent defect as good faith requires the seller to disclose.

Sec. 4140. Patent defects. Patent defects are not covered by a general express warranty, unless intended to be so covered. In proof of this intention, parol evidence is admissible.

Sec. 4141. Barter and exchange. Contracts of barter or exchange stand upon the same footing with private sales, so far as the same principles can be applied to them.

Sec. 4142. Who may be vendue-master. Any citizen of Georgia shall have the right to exercise all the privileges, powers, and functions of a vendue-master, or auctioneer, in any city or town in this state, by paying such license and giving such bond as may be demanded or required by the by-laws, rules or ordinances of the town or city in which said person may wish to exercise the calling of a vendue-master or auctioneer.

Sec. 4143. Sale of property. Any vendue-master who may sell or dispose of any horse or mule shall be held responsible to the purchaser for damages, in the event that it be shown and proven that the horse or mule so sold by him was stolen.

Louisiana.

Civil Code.

Title VII. Of Sale.

Chapter I. Of the nature and form of the contract of sale.

Art. 2438. In all cases, where no special provision is made under the present title, the contract of sale is subjected to the general rules established under the title: Of Conventional Obligations.

Art. 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price, and the consent.

Art. 2440. All sales of immoveable property shall be made by authentic act or under private signature. Except as provided in article 2275, every verbal sale of immoveables shall be null, as well as for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted.

Art. 2441. The verbal sale of all moveable effects, whatever may be their value, is valid; but its testimonial proof must be made agreeably with what is directed in the title: Of Conventional Obligations.

Art. 2442. The sale of any immoveable made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered according to law, and the actual delivery of the thing sold took place. But this defect of registering shall not be pleaded between the parties who shall have contracted in such act, their heirs or assigns, who are as effectually bound by a sale made under private signature, as if it were by an authentic act.

Art. 2443. He who is already the owner of a thing cannot validly purchase it. If he buys it through error, thinking it the property of another, the act is null, and the price must be restored to him.

Art. 2444. The sales of immoveable property made by parents to their children may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immoveable sold, at the time of the sale.

Chapter II. Of persons capable of buying and selling.

Art. 2445. All persons may buy and sell, except those interdicted by law.

Art. 2446. A contract of sale, between husband and wife, can take place only in the three following cases:

1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.

Saving, in these three cases, to the heirs of the contracting parties, their rights if there exist any indirect advantage.

Art. 2447. Public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, can not purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest.

Chapter III. Of things which may be sold.

Art. 2448. Any effects of commerce may be sold, when there exists no particular law to prohibit the traffic thereof.

Art. 2449. Not only corporeal objects, such as moveables and immoveables, live stock, and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, the rights, titles and interests to an inheritance, or to any part thereof, as servitude, or any other rights.

Art. 2450. A sale is sometimes made of a thing to come: as of what shall accrue from an estate, of animals yet unborn, or such like other things, although not yet existing.

Art. 2451. It also happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it; and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught.

Art. 2452. The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person.

Art. 2453. The thing claimed as the property of the claimant cannot be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property, and does not prevent him from being put in possession by virtue of such judgment. Nor shall it be lawful for debtors or third possessors of property, subject to a mortgage of any kind, to transfer or alienate such property, pending an action to enforce the mortgage, and any transfer or alienation made in contravention of the provisions of this article shall have no effect as against the plaintiff, or plaintiffs in such pending action.

Sec. 1. On and after January 1, 1905, the pendency of an action in any court, state or federal, in the state of Louisiana, affecting the title or asserting a mortgage or lien upon immoveable property, shall not be considered or construed as notice to third persons not parties to such suits, unless a notice of pendency of such action shall have been made, filed or registered, in compliance with this act.

Sec. 2. The notice above referred to shall be in writing, signed by the plaintiff or his attorney, stating the name of the court in which the suit has been filed, the title and number of the suit, date of filing the same, the object of the suit and the description of the property sought to be affected thereby, and said notice shall be recorded in the mortgage office of the parish where the property to be affected is situated, and shall have effect from the date of filing.

Sec. 3. In the rendition of judgment in such suit or action, if judgment be given against plaintiff's claim, it shall provide for the cancellation of said notice at plaintiff's expense and as part of the costs of the suit. Acts, 1904, No. 22.

Art. 2454. The succession of a living person cannot be sold.

Art. 2455. If, at the moment of the sale, the thing sold is totally destroyed, the sale is null; if there is only a part of the thing destroyed, the purchaser has the choice, either to abandon the sale, or to retain the preserved part, by having the price thereof determined by appraisement.

Chapter IV. How the contract of sale is to be perfected.

Art. 2456. The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid.

Art. 2457. The sale may be made purely and simply, or under a condition either suspensive or resolute. The object of the sale may also be two or more

alternative things. In all these cases, its effects are regulated by the principles laid down in the title: Of Conventional Obligations.

Art. 2458. When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted, or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract.

Art. 2459. If, on the contrary, the goods, produce, or other objects, have been sold in a lump, the sale is perfect, though these objects may not have been weighed, counted, or measured.

Art. 2460. Things, of which the buyer reserves to himself the view and trial, although the price be agreed on, are not sold, until the buyer be satisfied with the trial, which is a kind of suspensive condition of the sale.

Art. 2461. The sale of a thing includes that of its accessories, and of whatever has been destined for its constant use, unless there be a reservation to the contrary.

Art. 2462. A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immoveables is in writing, so far amounts to a sale as to give either party the right to enforce specific performance of same. One may purchase the right, or option, to accept or reject, within a stipulated time, an offer or promise to sell. After the purchase of such option, for value, such offer or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract, or agreement, to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.

Art. 2463. But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit: he who has given the earnest, by forfeiting it; and he who has received it, by returning the double.

Art. 2464. The price of the sale must be certain, that is [to] say, fixed and determined by the parties. It ought to consist of a sum of money, otherwise it would be considered as an exchange. It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid. It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

Art. 2465. The price, however, may be left to the arbitration of a third person; but if such person cannot, or be unwilling to make the estimation, there exists no sale.

Art. 2466. The expenses of the act or other incidental cost of sale, are chargeable to the buyer, unless some agreement be made to the contrary.

Chapter V. At whose risk the thing is, after the sale is completed.

Art. 2467. As soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications.

Art. 2468. Until the thing sold is delivered to the buyer, the seller is obliged to guard it as a faithful administrator; and if, through want of this care, the thing is destroyed, or its value diminished, the seller is responsible for the loss.

Art. 2469. The seller is released from this degree of care, when the buyer delays obtaining the possession; but he is still liable for any injury which the thing sold may sustain, through gross neglect on his part.

Art. 2470. If it is the seller who delays to deliver the thing, and it be destroyed, even by a fortuitous event, it is he who sustains the loss, unless it appear certain that the fortuitous event would equally have occasioned the destruction of the thing in the buyer's possession, after delivery.

Art. 2471. A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition. If the thing be destroyed before this happens, the loss is sustained by the seller. If the thing be only deteriorated, when the condition is accomplished, the buyer has the choice either to take it in the state in which it is, or to dissolve the contract. If it has undergone any improvement without the agency of the seller, the buyer has the advantage of this improvement, without having to pay any increase of price.

Art. 2472. In alternative sales, whether the choice be left to the seller, or be expressly granted to the buyer, the first of the two things which perishes after the contract is a loss to the seller, and he must give up that which remains. But if that which remains also perish, it is the buyer's loss, and he must pay the price of it.

Art. 2473. In the case specified in the above article, when the choice is reserved to the buyer, he may recede from the contract, if one of the things has perished, provided he has not delayed to be put in possession.

Chapter VI. Of the obligations of the seller.

Art. 2474. The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him.

Art. 2475. The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells.

Art. 2476. The warranty respecting the seller has two objects: the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices.

Sec. 1. Of the tradition or delivery of the thing sold.

Art. 2477. The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer.

Art. 2478. The tradition or delivery of moveable effects takes place either by their real tradition, or by the delivery of the keys of the buildings in which they are kept; or, even by the bare consent of the parties, if the things cannot be transported at the time of sale, or if the purchaser had them already in his possession under another title.

Art. 2479. The law considers the tradition or delivery of immoveables, as always accompanying the public act, which transfers the property. Every obstacle which the seller afterwards interposes to prevent the taking of corporal possession by the buyer, is considered as a trespass.

Art. 2480. In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale.

Art. 2481. The tradition of incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser, with the consent of the seller.

Art. 2482. When the object sold is out of the vendor's possession, he must redeem it at his cost, and deliver it to the buyer, unless it be differently agreed between the parties, or unless it evidently appears from the contract that the buyer himself has undertaken to reclaim it.

Art. 2483. The costs of delivery are chargeable to the seller, and those of removing are to be supported by the buyer, if there has been no stipulation made to the contrary.

Art. 2484. The delivery must be made on the place where the thing, which is the object of the sale, was at the time of such sale, if not otherwise agreed upon.

Art. 2485. If the seller fails to make the delivery at the time agreed on between the parties, the buyer will be at liberty to demand, either a canceling of the sale, or to be put into possession, if the delay is occasioned only by the deed of the seller.

Art. 2486. In all cases, the seller is liable to damages, if there result any detriment to the buyer, occasioned by the non-delivery at the time agreed on.

Art. 2487. The seller is not bound to make a delivery of the thing, if the buyer does not pay the price, and the seller has not granted him any term for the payment.

Art. 2488. Neither shall he be obliged to the delivery, even if he has granted term for the payment, if since the sale the buyer is become a bankrupt, or is in a state of insolvency, so that the seller would be in imminent danger of losing the price of the same, unless the buyer should give him security to pay at the time agreed on.

Art. 2489. The thing must be delivered in the same state in which it was at the time of the sale, that is to say, without any change occasioned by the act or fault of the seller. From the day of sale all the profits belong to the purchaser.

Art. 2490. The obligation of delivering the thing includes the accessories and dependencies, without which it would be of no value or service, and likewise everything that has been designed to its perpetual use.

Variance in extent of immoveable.

Art. 2491. The seller is bound to deliver the full extent of the premises, as specified in the contract, under the modifications hereafter expressed.

Art. 2492. If the sale of an immoveable has been made with indication of the extent of the premises at the rate of so much per measure, the seller is obliged to deliver to the buyer, if he requires it, the quantity mentioned in the contract, and if he cannot conveniently do it, or if the buyer does not require it, the seller is obliged to suffer a diminution proportionate to the price.

Art. 2493. If, on the other hand, there exists an extent of more than what is specified in the contract, the buyer has a right, either to give the supplement of the price, or to recede from the contract, should the overplus be upwards of a twentieth part of the extent which is declared.

Art. 2494. In all other cases, whether the sale be of a certain and limited body, or of distinct and separate objects, whether it first set forth the measure, or the designation of the object, followed by its measure, the expression of the measure gives no room to any supplement of price, in favor of the seller, for the overplus of the measure; neither can the purchaser claim a diminution of the price on a deficiency of the measure, unless the real measure comes short of that expressed in the contract, by one-twentieth part, regard being had to the totality of the objects sold; provided there be no stipulation to the contrary.

Sale per aversionem.

Art. 2495. There can be neither increase nor diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary.

Art. 2496. In the case where there is room for an augmentation of price for the surplus of the measure, the buyer has the option to give the supplement, or to recede from the contract.

Art. 2497. In all cases where the buyer has a right to recede from the contract, the seller is bound to make him restitution not only of the price, if already received, but also of the expenses occasioned by the contract.

Art. 2498. The action for supplement of the price on the part of the seller, and that for diminution of the price or for the canceling of the contract on the part of the buyer, must be brought within one year from the day of the contract, otherwise it is barred.

Art. 2499. If two pieces of ground have been sold by one and the same contract, with the expression of the measure for each, and there be found a less quantity in one, and a larger one in the other, the deficiency of the one is supplied by the overplus of the other, as far as it goes, and the action, either in supplement or in abatement of the price, takes place only according to the rules above established.

Sec. 2. Of the warranty in case of eviction from the thing sold.

Art. 2500. Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, occasioned by the right or claims of a third person.

Art. 2501. Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and against the charges claimed on such thing, which were not declared at the time of the sale.

Art. 2502. That the warranty should have existence, it is necessary that the right of the person evicting shall have existed before the sale. If, therefore, this right before the sale was only imperfect, and is afterwards perfected by the negligence of the buyer, he has no claim for warranty.

Modifications of warranty.

Art. 2503. The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty.

Art. 2504. Although it be agreed that the seller is not subject to warranty, he is, however, accountable for what results from his personal act; and any contrary agreement is void.

Art. 2505. Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk.

Liability of warrantor.

Art. 2506. When there is a promise of warranty, or when no stipulation was made on that subject, if the buyer be evicted, he has a right to claim against the seller:

1. The restitution of the price.
2. That of the fruits or revenues, when he is obliged to return them to the owner who evicts him.
3. All the costs occasioned, either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

4. The damages, when he has suffered any, besides the price that he has paid.

Art. 2507. When, at the time of the eviction, the thing sold has lost any of its value, or is considerably impaired, either through the neglect of the buyer, or by any providential acts or unforeseen accidents, the seller is still bound to the restitution of the full price.

Art. 2508. If, however, the thing sold was impaired by the buyer and he has reaped some benefit therefrom, the seller has a right to retain on the price, the amount to which such damages may be estimated in favor of the owner who evicts him.

Art. 2509. The seller is bound to reimburse, or cause to be reimbursed, to the buyer, by the person who evicts him, all useful improvements made by him on the premises.

Art. 2510. If the seller, knowingly and dishonestly, has sold the property of another person, he shall be obliged to reimburse to the buyer all expenses, even of embellishments of luxury, that the buyer has been at improving the premises.

Art. 2511. If the buyer be evicted from a part only of the thing sold, and it be of such consequence relatively to the whole, that the buyer would not have purchased it without the part from which he is evicted, he may have the sale canceled.

Art. 2512. Not only eviction from part of the thing sold, but eviction from that which proceeds from it, is included in the warranty.

Art. 2513. But if the thing sold be succession rights, the eviction which the buyer might suffer from any particular thing found among the property of the succession, does not give rise to the warranty, because in this case the thing sold is only the succession right, which includes only such things as belong really to the succession.

Art. 2514. If in case of eviction from a part of the thing, the sale is not canceled, the value of the part from which he is evicted, is to be reimbursed to the buyer according to its estimation, proportionably to the total price of sale.

Art. 2515. If the inheritance sold be incumbered with non-apparent servitudes, without any declaration having been made thereof, if the servitudes be of such importance that there is cause to presume that the buyer would not have contracted, if he had been aware of the incumbrance, he may claim the canceling of the contract, should he not prefer to have an indemnification.

Art. 2516. Other questions arising from a claim for damages, resulting from the non-execution of the contract of sale, shall be decided by the general rules established under the title: Of Conventional Obligations.

Art. 2517. The purchaser threatened with eviction, who wishes to preserve his right of warranty against his vendor, should notify the latter in time of the interference which he has experienced. This notification is usually given by calling in the vendor to defend the action which has been instituted against the purchaser.

Art. 2518. In the absence of this notification, or if it has not been made within due time, that is, in time for the vendor to defend himself, the warranty is lost: provided, however, that the vendor shall show that he possessed proofs, which would have occasioned the rejection of the demand, and which have not been employed, because he was not summoned in time.

Art. 2519. When the purchaser is himself obliged to commence judicial proceeding against a person disturbing his possession, he ought to notify his vendor of the action which he is commencing, and the vendor, whether he undertake to conduct the suit for him or not, is obliged to indemnify him fully in case of condemnation.

Sec. 3. Of the vices of the thing sold.

§ 1. *Of the vices of the thing sold, which give occasion for the redhibitory action.*

Art. 2520. Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

Art. 2521. Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices.

Art. 2522. The buyer cannot institute the redhibitory action, on account of the latent defects which the seller has declared to him before or at the time of the sale. Testimonial proof of this declaration may be received.

Art. 2523. With regard to inanimate things, the latent defects which give rise to the redhibitory action are in general all such as are comprised in the definition expressed at the commencement of this paragraph.

Art. 2524. The latent defects of animals are divided into two classes: vices of body, and vices of character.

Art. 2525. The vices of body are distinguished into absolute and relative. Absolute vices are those of which the bare existence gives rise to the redhibitory action. Relative vices are those which give rise to it only in proportion to the degree in which they disable the object sold.

Art. 2526. The absolute vices of horses and mules are short wind, glanders, and founder.

Art. 2527. The other vices of body in animals are included in the definition given at the commencement of this paragraph.

Art. 2528. The vices of character which give rise to the redhibition of animals are comprised in the definition given at the commencement of this paragraph.

Art. 2529. A declaration made in good faith by the seller that the thing sold has some quality which it is found not to have, gives rise to a redhibition, if this quality was the principal motive for making the purchase.

Art. 2530. The buyer who institutes the redhibitory action must prove that the vice existed before the sale was made to him. If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale.

Art. 2531. The seller who knew not the vices of the thing is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy those expenses.

Art. 2532. If the thing affected with the vices has perished through the badness of its quality, the seller must sustain the loss.

Art. 2533. If it has perished by a fortuitous event, before the purchaser has instituted his redhibitory action, the loss must be borne by him. But if it has perished, even by a fortuitous event, since the commencement of the suit, it is for the seller to bear the loss.

Art. 2534. The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale. This limitation does not apply, where the seller had knowledge of the vice and neglected to declare it to the purchaser. Nor where the seller, not being domiciliated in the state, shall have absented himself before the expiration of the year following the sale; in which case the prescription remains suspended during his absence.

Art. 2535. The redhibition of animals can only be sued for within two months immediately following the sale.

Art. 2536. The redhibitory action may be commenced after the loss of the object sold, if that loss was not occasioned by the fault of the purchaser.

Art. 2537. Redhibition does not take place in the cases of the sales made under a seizure by order of a court of justice.

Art. 2538. The redhibitory action is not divisible among the heirs of the purchaser, that is to say, they must all concur in it, and no one of them can bring it for his part only.

Art. 2539. The redhibitory action may be brought against the heirs of the vendor collectively, or against one of them, at the choice of the purchaser.

Art. 2540. The redhibitory vice of one of several things sold together, gives rise to the redhibition of all, if the things were matched, as a pair of horses, or a yoke of oxen.

§ 2. Of the vices of the thing sold which occasion a reduction of the price.

Art. 2541. Whether the defect in the thing sold be such as to render it useless and altogether unsuited to its purpose, or, whether it be such as merely to diminish the value, the buyer may limit his demand to the reduction of the price.

Art. 2542. The buyer may also content himself with resorting to this action, when the quality, which the thing sold has been declared to possess and which it is found to want, is not of such importance as to induce him to demand a redhibition.

Art. 2543. The purchaser who has contented himself with demanding a reduction of the price, cannot afterwards maintain the redhibitory action. But in a redhibitory suit, the judge may decree merely a reduction of the price.

Art. 2544. The action for a reduction of price is subject to the same rules and to the same limitations as the redhibitory action.

§ 3. Of the vices of the things sold which the seller has concealed from the buyer.

Art. 2545. The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages.

Art. 2546. In this case, the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice. This discovery is not to be presumed; it must be proved by the seller.

Art. 2547. A declaration made by the seller that the thing sold possesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: Of Conventional Obligations. It may, according to circumstances, give rise to the redhibition, or to a reduction of the price, and to damages in favor of the buyer.

Art. 2548. The renunciation of warranty, made by the buyer, is not obligatory, where there has been fraud on the part of the seller.

Chapter VII. Of the obligations of the buyer.

Art. 2549. The obligations of the buyer are:

1. To pay the price of sale.
2. To receive delivery of the thing and to remove it, if it be an object which requires removal, and to indemnify the seller for what he has expended in preserving it for him.

Art. 2550. The price ought to be paid on the day and at the place mentioned in the sale. If no stipulations have been made on that point, at the time of the sale, the buyer must pay at the time and at the place where the delivery is to be made.

Art. 2551. On failure of the buyer to pay the price, the seller may compel him to do it, by offering to deliver the thing to him, if that has not been already done.

Art. 2552. If, after the contract, and before the seller has been required to deliver the thing, it ceases to be susceptible of delivery, without his fault, the buyer is still bound to pay him the price.

Art. 2553. The buyer owes interest on the price of the sale, until the payment of the capital, in the three following cases:

1. If it has been so agreed at the time of the sale.
2. If the thing sold produces fruits, or any other income.
3. From the date of the sale when the price is then due.

Art. 2554. When the seller has granted to the buyer a term for the payment the interest begins to run from the end of that term.

Art. 2555. The purchaser who neglects to obtain delivery of the thing sold, after having been put in default, is answerable to the vendor for the damage which

he may sustain on that account, and for the reimbursement of the expense which may have been incurred for the preservation of the thing.

Art. 2556. The seller may even obtain authority where moveables have been sold, and the custody of them is inconvenient to him, for putting them out of his house at the risk of the purchaser, on giving him notice of the day and hour at which he will put them out.

Art. 2557. If the buyer is disquieted in his possession, or has just reason to fear that he shall be disquieted by an action of mortgage, or by any other claim, he may suspend the payment of the price, until the seller has restored him to quiet possession or caused the disturbance to cease, unless the seller prefer to give security. There is an exception to this rule when the buyer has been informed, before the sale, of the danger of eviction.

Art. 2558. In the case mentioned in the preceding article, the seller who cannot receive the price from being unable to give security, may compel the buyer to deposit the price, subject to the order of the court, to await the decision of the suit.

Art. 2559. The purchaser may also require the deposit, to relieve himself from the payment of interest.

Art. 2560. If the purchaser has paid before the disturbance of his possession, he can neither demand a restitution of the price, nor security during the suit.

Art. 2561. If the buyer does not pay the price, the seller may sue for the dissolution of the sale.

Art. 2562. The dissolution of the sale of immoveables is summarily awarded, when there is danger that the seller may lose the price and the thing itself. If that danger does not exist, the judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months. This term being expired without the buyer's yet having paid, the judge shall cancel the sale.

Art. 2563. If, at the time of the sale of immoveables, it has been stipulated that, for want of payment of the price within the term agreed on, the sale should be of right dissolved, the buyer may nevertheless make payment after the expiration of the term, as long as he has not been placed in a state of default, by a judicial demand, but after that demand, the judge can grant him no delay.

Art. 2564. In matters of sale of moveable effects, the dissolution of the sale shall take place of right, if demanded, without its being in the power of the judge to grant any delay, except that fixed by law.

Art. 2565. If, on account of delay in the payment of the price, the seller is obliged to retain or to resume the thing sold, and its value is diminished, the buyer is bound to make good this diminution to the amount of the price which has been agreed upon.

Chapter VIII. Of the resolution and of the rescission of the sale.

Art. 2566. Besides the causes of nullity or dissolution of the sale already mentioned in this title, and those which are common to all agreements, the contract of sale may be canceled by the use of the power of redemption, and by the effect of the lesion beyond moiety.

Sec. 1. Of the power or right of redemption.

Art. 2567. The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it.

Art. 2568. The right of redemption cannot be reserved for a time exceeding ten years. If a term exceeding that has been stipulated in the agreement, it shall be reduced to the term of ten years.

Art. 2569. The time fixed for the redemption must be rigorously adhered to, it cannot be prolonged by the judge.

Art. 2570. If that right has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold.

Art. 2571. The delay runs against any person, not excepting minors, who cannot be relieved against it.

Art. 2572. A person, having sold a thing with the power of redemption, may exercise the right against a second purchaser, even in case such right should not have been mentioned in the second sale.

Art. 2573. The person, having purchased an estate under a condition of redemption, is entitled to all the rights possessed by the vendor, he may prescribe against the true owner, as well as against those having claims or mortgages on the thing sold.

Art. 2574. He may oppose the plea of discussion to the creditors of his vendor.

Art. 2575. The fruits are his until the vendor exercises his right of redemption.

Art. 2576. He becomes absolute owner of the natural augmentation which the thing receives by accession, and is not bound to restore them. But if these augmentations are of such a nature that they cannot be separated from the thing sold without injury to it, the person exercising the right of redemption may insist that they shall be yielded to him for a fair price.

Art. 2577. With regard to the augmentations which the purchaser, under a condition of redemption, may have produced at his own expense, he has a right to an indemnity for them, as is hereafter stated or to take them away, if the removal can be effected in such a way that the thing sold shall be placed in its original condition.

Art. 2578. The thing sold shall be restored to the seller who exercises the right of redemption, in the state in which it is at the moment. If it has been deteriorated without the fault of the buyer, the loss must be borne by the seller; nor can he, in this case, claim any reduction of the price to be reimbursed. If it has been deteriorated by the fault or neglect of the buyer, though this be but slight, he must make good the loss to the seller.

Art. 2579. If the purchaser of an undivided portion of an estate sold with the power of redemption has become the purchaser of the whole, at an auction ordered in a judicial proceeding against him, he may oblige the vendor to redeem the whole if the latter wishes to avail himself of the redemption.

Art. 2580. If several persons have jointly sold by a single contract a joint estate, each one of them can individually exercise the right of redemption for that share only which belonged to him.

Art. 2581. The same principle governs when a person, having sold an estate leaves several co-heirs; each of these co-heirs can only exercise the right of redemption for the portion of the estate which falls to his share.

Art. 2582. But in the cases provided for in the two preceding articles, the purchaser may require, if he deem it proper, that all the co-vendors and co-heirs may be made parties to the suit, for the purpose that they may agree together on the redemption of the whole estate; and in case the co-vendors or co-heirs should not agree, the purchaser shall be hence dismissed.

Art. 2583. If an estate, belonging to several persons, has not been sold by them jointly, and if each co-proprietor has only sold individually his share of that estate, they may separately exercise the right of redemption on the respective portions which belonged to each of them; and in that case the purchaser cannot compel him, who thus exercises the right of redemption, to redeem the whole estate.

Art. 2584. If the purchaser has left several heirs, the right of redemption can only be exercised against them individually, for the portion belonging to each of them respectively, whether the estate has already been divided between them or not. But if a partition has already taken place, by which the thing subject to redemption has fallen to the share of only one of the co-heirs, the action of redemption may be brought against this heir for the whole estate.

Art. 2585. The creditors of the vendor cannot make use of the right of redemption which such vendor may have reserved to himself.

Art. 2586. When a vendor exercises the right of redemption, he becomes entitled to all the fruits not yet gathered, from the day in which he has either reimbursed or consigned the money paid by the purchaser, unless the contrary has been stipulated.

Art. 2587. The vendor who exercises the right of redemption is bound to reimburse to the purchaser, not only the purchase money, but also the expenses resulting from necessary repairs, those which have attended the sale, and the price of the improvements which have increased the value of the estate, up to that increased value.

Art. 2588. When a vendor recovers the possession of his inheritance by virtue of the power of redemption, he recovers it free from any mortgages or incumbrances created by the purchaser, provided such possession be recovered within the ten years, as provided by article 2568. If after the expiration of these ten years, the vendor recover his estate with the consent of the purchaser, the estate remains liable for every mortgage and incumbrance laid upon it by the purchaser.

Sec. 2. Of the rescission of sales on account of lesion.

Art. 2589. If the vendor has been aggrieved for more than half the value of an immoveable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave to the purchaser the surplus of the thing's value.

Art. 2590. To ascertain whether there is a lesion beyond moiety, the immoveable must be estimated according to the state in which it was, and the value which it had at the time of the sale.

Art. 2591. If it should appear that the immoveable estate has been sold for less than one-half its just value, the purchaser may either restore the thing and take back the price which he has paid, or make up the just price and keep the thing.

Art. 2592. Should the purchaser prefer to keep the thing by making up the just price, he must pay the interest of the additional price from the day when the rescission was demanded. If he chooses rather to restore the thing and to receive the purchase money, he shall be liable to restore the fruits of the estate from the day of the demand, but the interest of his money shall also be paid to him from the same time.

Art. 2593. The rescission for lesion beyond moiety cannot take place in favor of the purchaser.

Art. 2594. Rescission for lesion beyond moiety is not granted against sales of moveables and produce, nor when rights to a succession have been sold to a stranger, nor in matter of transfer of credits, nor against sales of immoveable property, made by virtue of any decree or process of a court of justice.

Art. 2595. Actions for rescission of sales on account of lesion beyond moiety must be commenced within four years. These four years, with respect to minors, begin only from the day they become of age. With respect to persons of full age, they begin from the day of the sale.

Art. 2596. This delay runs with and is not suspended by that granted for redemption.

Art. 2597. The seller who demands the rescission on account of lesion beyond moiety must resume the possession of the thing, in the state in which it is. The buyer, in this case, is not bound for the injury sustained through his fault before the demand. He is only bound to make reimbursement for such injuries as he has turned to his own profit.

Art. 2598. The buyer is entitled to repayment for ameliorations which he has effected, although they be merely for pleasure and convenience.

Art. 2599. They may remain in possession of the thing sold until the seller has restored the price which he paid, together with his expenses.

Art. 2600. The provisions contained in the preceding section relative to the case where several co-proprietors have sold a thing, either jointly or separately, and to that where the vendor, or the buyer, has left several heirs, must likewise be applied to the exercise of the action of rescission for lesion beyond moiety.

Chapter IX. Of sales by auction, or public sales.

Art. 2601. The sale by auction is that which takes place when the thing is offered publicly to be sold to whoever will give the highest price.

Art. 2602. This sale is either voluntary or forced: voluntary when the owner himself offers his property for sale in this manner; forced, when the law prescribes this mode of sale for certain property, such as that of minors.

Art. 2603. The sale by auction, as it is made by officers of justice, is treated of separately, under the chapter on judicial sales.

Art. 2604. The sale by auction, whether made at the will of the seller, or by direction of the law, is subjected to the rules hereafter mentioned.

Art. 2605. It cannot be made directly by the seller himself, but must be made through the ministry of a public officer, appointed for that purpose.

Art. 2606. This officer, after having received in writing, from the seller, the conditions of the sale, must proclaim them, in a loud and audible voice, and afterwards propose that a bid shall be made for the property thus offered.

Art. 2607. When the highest price offered has been cried long enough to make it probable that no higher will be offered, he who has made the offer is publicly declared to be the purchaser, and the thing sold is adjudicated to him.

Art. 2608. This adjudication is the completion of the sale; the purchaser becomes the owner of the article adjudged, and the contract is, from that time, subjected to the same rules which govern the ordinary contract of sale.

Art. 2609. If the adjudication be made on condition that the price shall be paid in cash, the auctioneer may require the price immediately, before delivering possession of the thing sold.

Art. 2610. If the object adjudged is an immoveable for which the law requires that the act of sale shall be passed in writing, the purchaser may retain the price, and the seller the possession of the thing, until the act be passed. This act ought to be passed within twenty-four hours after the adjudication, if one of the parties require it; he who occasions a further delay is responsible to the other in damages.

Resale for non-compliance with bid.

Art. 2611. In all cases of sale by auction, whether of moveables or immoveables, if the person to whom adjudication is made does not pay the price at the time required, agreeably to the two preceding articles, the seller at the end of ten days, and after the customary notices, may again expose to public sale the thing sold, as if the first adjudication had never been made; and if at the second crying, the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor, for the deficiency and for all the expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess.

Art. 2612. At this second crying, the first purchaser cannot be allowed to bid, either directly or through the intervention of another person.

Art. 2613. When a thing is exposed to public sale, with notice that the buyer shall give indorsed notes for the price, he is bound, immediately after the sale, if required, to acquaint the auctioneer or the seller with the name of the person whom he offers for indorser, and if this indorser does not suit the seller, or in his absence the auctioneer, the adjudication is considered as not having been made.

Art. 2614. The refusal by the seller to receive the indorser whom the purchaser offers renders him responsible in damages to the latter, if it be proved that the indorser proposed is good and solvent.

Art. 2615. The adjudication can only be made to a bidder present, or properly represented. The person who bids in the name of another, without sufficient authority to bind him, is considered as having bought on his own account, and is answerable for all the consequences of the adjudication.

Chapter X. Of judicial sales.

Art. 2616. Sales which are made by authority of law are of two kinds:

1. Those which take place when the property of a debtor has been seized by order of a court, to be sold for the purpose of paying the creditor.
2. Those which are ordered in matters of succession or partition.

Art. 2617. Judicial sales are subject to the rules laid down above for public sales in general, in all such things as are not contrary to the formalities expressly prescribed for such sales, and with the modifications contained hereafter.

Sec. 1. Of sales on seizure or execution.

Art. 2618. The sale on seizure is made at public auction by the sheriff or other officer charged with the execution of the judgment.

Art. 2619. Whatever may be the vices of the thing sold on execution, they do not give rise to the redhibitory action; but the sale may be set aside in the case of fraud, and declared null in cases of nullity.

Art. 2620. This sale on execution transfers the property of the thing to the purchaser as completely as if the owner had sold it himself; but it transfers only the rights of the debtor such as they are.

Art. 2621. The purchaser evicted from property purchased under execution shall have his recourse for reimbursement against the debtor and creditor, but, upon the judgment obtained jointly for that purpose, the purchaser shall first take execution against the debtor, and upon the return of such execution no property found, then he shall be at liberty to take out execution against the creditor.

Sec. 2. Of the judicial sale of the property of successions.

Art. 2622. The judicial sale of succession property is ordered by the judge of the court to which this jurisdiction is specially confided. Representatives of successions shall have the right to cause sales of the property administered by them to be made either by the sheriff or an auctioneer, or to make it themselves, but in the event of making the sales themselves, they shall receive no commission therefor.

Art. 2623. The adjudication made and recorded by the sheriff, auctioneer, or representative of the succession, is a complete title to the purchaser, and needs not be followed by an act passed before a notary.

Art. 2624. All the warranties to which private sales are subject exist against the heir in judicial sales of the property of successions.

Art. 2625. Heirs may purchase the property of the succession to the amount of their proportion, and are not obliged to pay the purchase money, until a liquidation is had, by which it is ascertained what balance there is in their favor or against them.

Title VIII. Of exchange.

Art. 2660. Exchange is a contract by which the parties to the contract give to one another one thing for another, whatever it be, except money; for in that case it would be a sale.

Art. 2661. An exchange takes place by the bare consent of the parties.

Art. 2662. If one of the exchangers, after having received the thing given to him in exchange, learn that the other exchanger is not the proprietor of that thing, he cannot be compelled to deliver that which he had promised to give in exchange; he is only bound to return the thing which he has received.

Art. 2663. The exchanger who is evicted by a judgment of the thing he has received in exchange has his choice either to sue for damages or for the thing he gave in exchange.

Art. 2664. The rescission of the contract on account of lesion is not allowed in contracts of exchange, except in the following cases.

Art. 2665. The rescission on account of lesion, beyond moiety, takes place when one party gives immoveable property to the other in exchange for moveable property; in that case, the person having given the immoveable estate may obtain a rescission, if the moveables which he has received are not worth more than the one-half of the value of the real estate. But he who has given moveable property in exchange for immoveable estate cannot obtain a rescission of the contract, even in case the things given by him were worth twice as much as the immoveable estate.

Art. 2666. The rescission on account of lesion beyond moiety may take place on a contract of exchange, if a balance has been paid in money or immoveable property, and if the balance paid exceeds by more than one-half the total value of the immoveable property given in exchange by the person to whom the balance has been paid; in that case it is only the person who has paid such balance who may demand the rescission of the contract on account of lesion.

Art. 2667. All the other provisions relative to the contract of sale apply to the contract of exchange. And in this last contract each of the parties is individually considered both as vendor and vendee.

III. Statutes relating to Conditional Sales.

Alabama.

Code of 1907.

Sec. 3393. Contracts for conditional sale of railroad rolling stock. Contracts for the conditional sale of railroad equipment or rolling stock, by the terms of which

the vendor retains the title until payment of the purchase money, and the purchaser obtains possession, are void against the judgment creditors of the purchaser without notice, or purchasers from him for a valuable consideration without notice, unless such contracts are in writing, and, within three months after the making thereof, recorded in the office of the judge of probate of the county in which such corporation may have its principal office or place of business; and if it has not in this state a principal office or place of business, then in the office of the secretary of state; and in addition, all cars or engines so sold must have thereon, plainly marked, the name of the vendor.

Sec. 3394. Conditional sales, leases, etc., to be recorded. All other contracts for the conditional sale of personal property, by the terms of which the vendor retains the title until payment of the purchase money and the purchaser obtains possession of the property, and all contracts for the lease, rent, or hire of personal property, by the terms of which the property is delivered to another on condition that it shall belong to him whenever the amount paid shall be a certain sum, or the value of the property, the title to remain in the other party until such sum or value shall have been paid, are, as to such condition, void against purchasers for a valuable consideration, mortgagees and judgment creditors without notice thereof, unless such contracts are in writing and recorded in the office of the judge of probate of the county in which the party so obtaining possession of the property resides, and also in the county in which such property is delivered and remains; and if, before the payment of the purchase money or the sum or value stipulated, the property is removed to another county, the contract must be again recorded, within three months from the time of such removal, in the county to which it is removed; and if any such property is brought into this state while subject to such condition, the contract of sale, lease, hire, or rent must within three months thereafter, be recorded in the county into which the property is brought and remains and all local or special laws in conflict herewith are expressly repealed.

California.

Civil Code.

[See *infra* under IV. Sales in bulk.]

Connecticut.

Gen. Stats., 1902, c. 285. Sales of Personal Property on Condition.

Sec. 4864. Conditional sales of personal property to be recorded. All contracts for the sale of personal property conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing, describing the property and all conditions of said sale, and shall be acknowledged before some competent authority and recorded within a reasonable time in the town clerk's office in the town where the vendee resides; but the provisions of this section shall not apply to household furniture, musical instruments, bicycles, or to property exempt from attachment and execution.

Sec. 4865. Conditional sales held absolute sales when. All conditional sales of personal property not made in conformity with the provisions of sec. 4864 shall be held to be absolute sales except as between the vendor and vendee or their personal representatives, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee, in the same manner as any other property not exempted by law.

Sec. 4866. Conditional sale of railway equipment to be recorded. In any contract for the sale of railroad or street railway equipment, or rolling stock, it shall be lawful to agree that the title to the property sold, or contracted to be sold, although possession thereof may be delivered immediately or at any time or times subsequently shall not vest in the vendee until the purchase price shall be fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money. In any

contract for the leasing or hiring of such property it shall be lawful to stipulate for a conditional sale thereof, at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; provided that no such contract shall be valid as against any subsequent attaching creditor, or any subsequent bona fide purchaser for value and without notice, unless the same be evidenced by an instrument executed and duly acknowledged by the parties thereto before some person authorized by law to take acknowledgment of deeds, and in the same manner as deeds are acknowledged, and duly recorded in the office of the secretary of state, nor unless each locomotive engine, or car, so sold, leased, or hired, or contracted to be sold, leased or hired, as aforesaid, shall have the name of the vendor, lessor, or bailor, plainly marked on each side thereof, followed by the word "owner," or "lessor," or "bailor," as the case may be.

Sec. 4867. Performance of conditions; record of release. The contracts authorized by sec. 4866 shall be recorded by the secretary of state in a book of records to be kept for that purpose. On payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect, or a proper quitclaim deed shall be made, executed, and acknowledged by the vendor, lessor, or bailor, or his or its assignee, and recorded in the office of the secretary of state. For such services the secretary shall be entitled to receive the same fees as in case of railroad mortgages.

District of Columbia.

Code, 1906.

Sec. 547. Conditional sales. No conditional sale of chattels in virtue of which the property is delivered to the purchaser, but by the terms of which the title is not to pass until the price of said chattels is fully paid, where the purchase price exceeds one hundred dollars, shall be valid as against third persons acquiring title to said property from said purchaser without notice of the terms of said sale, unless the terms of said sale are reduced to writing and signed by the parties thereto and acknowledged by the purchaser and recorded in the same manner as a chattel mortgage, as hereinabove provided; and said writing shall be indexed as if the purchaser were a mortgagor and the seller a mortgagee of such chattels and shall be operative as to third persons without actual notice of it from the time of being so recorded.

Georgia.

Code, 1911.

Sec. 3318. Conditional sales, how executed. Whenever personal property is sold and delivered with the condition affixed to the sale, that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid, and may be enforced whether evidenced in writing or not.

Sec. 3319. How recorded. Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages.

Illinois.

Laws, 1893, p. 166. An Act concerning Contracts for the Conditional Sale or Lease of Railroad Street Car Equipment and Rolling stock and providing for the Record thereof (approved June 20, 1893).

Sec. 1. Contract to be in writing. Whenever any railroad or street car equipment or rolling stock shall hereafter be sold, leased, or loaned on the condition that the title to the same notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor, or bailor, until the terms of the contract, as to the payment of the installments, amounts or rentals payable or the performance of other obligations thereunder, shall have been fully complied with, but also providing that title thereto shall pass to the vendee, lessee, or bailee on full performance of said terms, such contract shall be invalid as to any subsequent judgment creditor or any subsequent purchaser for a valuable consideration without notice, unless:

First. The same shall be evidenced by writing, duly acknowledged by the vendee, lessee, or bailee before some person authorized by law to take acknowledgments of deeds and in the form proper for acknowledgments of deeds.

Second. Such writing shall be recorded, or a copy thereof filed, in the office of the secretary of state, who shall be entitled to receive one dollar for each such copy filed by him.

Third. Each locomotive or car so sold, leased or loaned shall have the name of the vendor, lessor, or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, vendor, or bailor, as the case may be.

Sec. 2. Contract not to invalidate prior contract. This act shall not be held to apply to or invalidate any contract heretofore made of the character described in the first section, but the same shall be and remain valid if recorded according to the provisions of this act within ninety days from the time this act takes effect.

Indiana.

Burns' Ann. Stat. 1908.

Sec. 7470. Sale of goods without delivery. Every sale made by a vendor, of goods in his possession or under his control, unless the same be accompanied by immediate delivery, and be followed by an actual change of the possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, unless it shall be made to appear that the same was made in good faith and without any intent to defraud such creditors or purchasers.

Massachusetts.

Rev. Laws, 1902, c. 198. Of Mortgages, Conditional Sales and Pledges of, and Liens upon, Personal Property.

Sec. 11. Redemption in case of default. If a contract for the sale of personal property is made on condition that the title thereto shall not pass until the purchase money has been fully paid and the vendor upon default takes from the vendee possession of the property, the vendee may, within fifteen days after such taking, redeem the property so taken by paying to the vendor the full amount then unpaid, with interest and all lawful charges and expenses due to the vendor.

Sec. 12. Conditional sales of furniture, etc. Such contracts for the sale of furniture or other household effects in the form of a lease or otherwise shall be in writing and a copy thereof shall be furnished to the vendee by the vendor at the time of such sale; and all payments made by or in behalf of the vendee and all charges in the nature of interest or otherwise, as they accrue, shall if the vendee so requests, be

indorsed by the vendor or his agent upon such copy. A failure of the vendor through negligence to comply with any of the provisions of this section shall suspend his rights under the contract while the failure continues. His refusal or wilful or fraudulent failure so to comply shall be a waiver by him of the condition of the sale.

Sec. 13. Foreclosure of. Thirty days at least before taking possession of said furniture or effects for default of the vendee, the vendor shall demand in writing of the vendee or other person in charge of said furniture or effects the balance then due, and shall furnish to said vendee or other person an itemized statement of the account showing the amount due thereon. If said vendee or other person can by the exercise of reasonable care and diligence be found by the vendor, the fifteen days during which his right of redemption exists under the provisions of section eleven shall not begin to run until said demand has been made, said statement furnished, and said thirty days have expired. If seventy-five per cent or more of the contract price has been paid by a vendee whose right of redemption has expired, the furniture or effects shall, if the vendee or his legal representative in writing so requests the vendor, be sold by public auction after due advertisement, which shall be published at least three days prior to the sale in one of the principal newspapers, if any, published in the city or town, otherwise in one of the principal newspapers published in the county in which the furniture or effects are situated. If the vendor refuses or neglects to make the sale as provided herein, the right of redemption shall not be foreclosed. If a balance of the proceeds of the sale remains after deducting the actual expenses of the sale by auction and paying from said proceeds to the vendor the balance of the contract price due him, it shall be paid to the vendee or his legal representative.

Acts 1906, c. 463. An Act relative to Railroad Corporations and Street Railway Companies.

Sec. 59. Conditional sale of rolling stock. A contract for the sale of railroad or street railway rolling stock may stipulate that the title to the property sold or contracted to be sold shall not vest in the purchaser until the purchase price is fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money although possession thereof may be delivered immediately or at any subsequent time, and a contract for the leasing or hiring of such property may stipulate for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received thereunder, may as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee. No such contract shall be valid as against any subsequent attaching creditor or any subsequent bona fide purchaser for value and without notice unless it is in writing executed by the parties and acknowledged by the vendee, lessee or bailee before a magistrate authorized to take acknowledgments of deeds, and in the same manner as deeds are acknowledged and recorded in the office of the secretary of the commonwealth; nor unless each locomotive, engine or car so sold, leased, or hired, or contracted to be sold, leased, or hired as aforesaid, shall have the name of the vendor, lessor, or bailor plainly marked on each side thereof, followed by the word "owner," "lessor," or "bailor," as the case may be. The provisions of chapter one hundred and ninety-eight of the revised laws shall not apply to such contract.

Sec. 60. Record of contract, and fees. A contract authorized by the preceding section shall be recorded by the secretary of the commonwealth in a book to be kept for that purpose, and upon payment in full of the purchase money and the performance of the terms and conditions stipulated in such contract, a declaration in writing thereof may be made by the vendor, lessor, or bailor, or his assignee on the margin of the record of the contract, attested, or it may be made by a separate instrument, acknowledged by the vendor, lessor, or bailor, or his assignee, and recorded as aforesaid. A fee of five dollars shall be paid to the secretary of the commonwealth for recording such contract or declaration, and a fee of one dollar for noting such declaration on the margin of the record.

Minnesota.

Rev. Laws, 1905.

Sec. 2903. Rolling stock, etc. Lien for purchase money. In any contract for the purchase and sale of railroad equipment or rolling stock, whether deliverable at once or at future stated times, by the terms of which the purchase money is to be paid wholly or partly after such delivery, it may be agreed that the title to such property shall not pass to the vendee until the purchase price shall have been fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money, notwithstanding delivery thereof: Provided, that the term of credit for purchase money, shall not exceed ten years from the execution of the contract.

Sec. 2904. Railroad equipment. In any contract for the leasing of railroad equipment or rolling stock, the parties may stipulate for a conditional sale thereof at the termination of such lease, that the rentals, as paid or when paid in full, may be treated and applied as purchase money, and that the title to such property shall not vest in the lessee or vendee until the purchase money shall have been fully paid, subject, however, to the proviso in sec. 2903.

Sec. 2905. Requisites of validity. Every such contract shall be acknowledged by the vendee or lessee as in the case of a conveyance of land, and shall be filed for record with the secretary of state and with the register of deeds of the county in which, at the time of its execution, the principal office or place of business of the vendee or lessee is situated in this state. Each locomotive, engine, or car so sold or leased shall have the name of the vendor or lessor plainly marked on each side, or be otherwise so marked as to indicate the ownership thereof. And upon compliance with this section, such contract shall be valid and effectual, both in law and equity, against all purchasers and creditors.

Sec. 3476. When void unless filed. Every promissory note or contract of sale, conditioned that the title to the property for or on account of which the same was given shall remain in the vendor, shall be void as to creditors of the vendee and subsequent purchasers and mortgagees of such property in good faith, unless the note or contract, or a copy thereof, or if the contract be oral, a memorandum, signed by the purchaser and expressing its terms and conditions, be filed as in the case of a chattel mortgage.

Sec. 3477. Notice, limit of time. Every such note, contract, copy, or memorandum so filed shall be notice to all parties interested of the existence and conditions thereof, until the expiration of six years from date of filing thereof.

Sec. 3478. Satisfaction. When any such contract has been fully performed on the part of the vendee, the vendor, his representatives or assigns, shall give duplicate satisfactions thereof, one of which he shall deliver to the person entitled thereto, and the other he shall file, at his own expense, with the officer having custody of the instrument so satisfied. Thereupon such officer shall deliver up the note, contract, memorandum, or copy to which the satisfaction relates. Such satisfaction need not be witnessed or acknowledged.

New Hampshire.

Pub. St. 1901, c. 140.¹⁾

Sec. 23. Lien invalid unless sale in writing and recorded. No lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser, except a lien upon household goods created by a lease thereof, containing an option in favor of the lessee to purchase the same at a time specified, shall be valid against attaching creditors, or subsequent purchasers, without notice, unless the vendor of such property takes a written memorandum, signed by the purchaser, witnessing the lien, the sum due thereon, and containing an affidavit provided in the following section, and causes such memorandum to be recorded in the town clerk's office of the town: I. where the purchaser resides, if within this state; or II.

¹⁾ Conditional sales of railroad equipment are regulated by Laws, 1893, c. 25.

where the vendor resides, if within this state, and the purchaser does not reside in the state; or III. where the property is situated if neither purchaser nor vendor resides in the state.

Sec. 24. Oath of vendor and vendee. Each vendor and purchaser shall make and subscribe an affidavit in substance as follows: "We severally swear that the foregoing memorandum is made for the purpose of witnessing the lien and the sum due thereon as specified in said memorandum, and for no other purpose whatever, and that said lien and the sum due thereon were not created for the purpose of enabling the purchaser to execute said memorandum, but said lien is a just lien, and the sum stated to be due thereon is honestly due thereon and owing from the purchaser to the vendor."

Sec. 25. When copartners and corporations are parties. When copartners or corporations are parties to such a memorandum, the affidavit may be made and subscribed as in case of mortgages of personal property.

Sec. 26. Record, effect of. If the record required by section twenty three is made within twenty days after the property is delivered, the lien reserved shall be valid against all attaching creditors and purchasers; but if it is not made until after the expiration of twenty days, it shall be valid against those attaching creditors and purchasers only who become such after the record.

New Jersey.

Laws, 1898, c. 232. An Act respecting Conveyances.

Sec. 71. Conditional sale of goods and chattels void against creditors having no notice. In every contract for the conditional sale of goods and chattels hereafter made, which shall be accompanied by an actual delivery and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until said goods and chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against the judgment creditors not having notice thereof, and subsequent purchasers and mortgagees in good faith not having notice thereof, whose deeds or mortgages shall have been first duly recorded, from the person so contracting to buy the same, and as to them the sale shall be deemed absolute, unless such contract for sale with such conditions and reservations therein be recorded as directed in the seventy-second section of this act.

Sec. 72. Instruments, where recorded. The instruments mentioned in the seventy-first section of this act shall be recorded in the office of the clerk of the court of common pleas of the county wherein the party contracting to buy, if a resident of this state, shall reside at the time of the execution thereof and if not a resident of this state then in the said clerk's office of the county where the property so conditionally bought shall be at the time of the execution of such instrument.

Sec. 73. Contract of sale valid against creditor of person contracting to buy. Every contract of sale hereafter recorded pursuant to the provisions of the seventy-first and seventy-second sections of this act shall be valid against the creditors of the person contracting to buy, and against his subsequent purchasers and mortgagees from the time of the recording thereof until the same be cancelled of record in the manner now provided by law for canceling of mortgages of real estate.

New York.

Cons. Laws, 1909, c. 45. An Act relating to Personal Property constituting c. 41 of the Consolidated Laws.

Sec. 60. Definitions. The term "conditional vendor," when used in this article, means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person, until such goods and chattels are

fully paid for or until the occurrence of any future event or contingency; the term "conditional vendee," when so used, means the person to whom such goods and chattels are so sold.

Sec. 61. Conditional sale of railroad equipment and rolling stock. Whenever any railroad equipment and rolling stock is sold, leased, or loaned under a contract which provides that the title to such property, notwithstanding the use and possession thereof by the vendee, lessee, or bailee, shall remain in the vendor, lessor, or bailor, until the terms of the contract as to the payment of installments, amounts, or rentals payable, or the performance of other obligations thereunder, are fully complied with, and that title to such property shall pass to the vendee, lessee, or other bailee on full payment therefor, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee, or bailee for a valuable consideration, without notice, unless: 1. Such contract is in writing, duly acknowledged and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of such vendee, lessee, or bailee; and unless 2. Each locomotive or car so sold, leased, or loaned, has the name of the vendor, lessor, or bailor, or of the assignee of such vendor, lessor, or bailor, plainly marked upon both sides thereof, followed by the word owner, lessor, bailor, or assignee, as the case may be.

Sec. 62. Conditions and reservations in contracts for the sale of goods and chattels. Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees, or mortgagees, in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article, and unless the other provisions of the lien law applicable to such contracts are duly complied with. Every such contract for the conditional sale of any goods and chattels attached, or to be attached, to a building, shall be void as against subsequent bona fide purchasers or incumbrancers of the premises on which said building stands, and as to them the sale shall be deemed absolute, unless, on or before the date of the delivery of such goods or chattels at such building, such contract shall have been duly and properly filed and indexed as directed in this article and unless said contract shall contain a brief description, sufficient for identification, of the premises which said building occupies, or upon which said building stands, and if in a city or village its location by street number, if known, and if in a city or county where the block system of recording and indexing conveyances is in use, the section and block within which it is located.

Sec. 63. Where contract to be filed. Such contracts, except contracts for the conditional sale of goods and chattels supplied for a building and attached or to be attached thereto, shall be filed in the city or town where the conditional vendee resides, if he resides within the state at the time of the execution thereof, and if not, in the city or town where such property is at such time. Such contract shall be filed in the city of New York, as follows, namely: in the borough of Brooklyn in said city, such instrument shall be filed in the office of the register of the county of Kings; in the borough of Queens in said city, in the office of the clerk of Queens county; in the borough of Richmond in said city, in the office of the clerk of the county of Richmond, and in the borough of Manhattan and the borough of the Bronx in said city, in the office of the register of the county of New York; in every other city or town of the state, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it shall be filed in such office. But all such contracts for the conditional sale of goods and chattels, attached or to be attached to a building, shall be filed with the register of the city or county or with the county clerk of the county, in case there is no register of such county, in which the premises whereon the said building stands are located.

Sec. 64. Indorsement, entry, refileing, and discharge of conditional contracts. The provisions of article ten of the lien law relating to chattel mortgages apply to the indorsement, entry, refileing, and discharge of contracts for the conditional sale of goods and chattels, except contracts for the conditional sale of goods and

chattels, attached or to be attached to a building. The officers with whom such first mentioned contracts are filed shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract and the time when due. The name of the conditional vendor shall be entered in the column of "mortgagees," and the name of the conditional vendee in the column of "mortgagors." Where such contracts are for goods and chattels, attached or to be attached to a building, the following provisions apply to the indorsement, entry, refiling and discharge thereof. The above named officers, with whom such contracts are directed to be filed, shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract, and the time when due, and shall file every such contract presented to them for that purpose, and indorse thereon its number and time of receipt; they shall enter in a book provided for that purpose, in separate columns, the names of all the parties to each contract so filed, arranged in alphabetical order, under the head of "vendees" and "vendors," the number of such contract and the date of the filing thereof, and under a column head "property," they shall enter a brief description sufficient for identification of the land upon which said building stands, and if in a city or village, its location by street and number, if known, and if in a city or county where the block system of recording and indexing conveyances is in use, the section and block in which the said land is situated. The said officers shall also keep an index, so as to afford correct and easy reference to the books containing the entries in regard to such last named contracts. In all cities and counties where the block system of recording and indexing conveyances is in use, the index shall be arranged according to the block numbers. A contract for the conditional sale of goods and chattels, attached or to be attached to a building, shall be invalid as against creditors of the conditional vendee and against subsequent purchasers or mortgagees in good faith of such goods and chattels or of the premises upon which the said building stands, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless: 1. Within thirty days preceding the expiration of such term a statement containing a description of such contract, the names of the parties, the time when and place where filed, the interest of the conditional vendor or of any person who has succeeded to his interest in the property, claimed by virtue thereof; or 2. A copy of such contract and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the conditional vendor or of any person who has succeeded to his interest in the contract, is filed in the office where the contract was originally required to be filed; and the officer with whom such contract was originally filed shall enter, in a separate column, in the book above provided for, in a column headed "date of refiling," the date of the refiling of the said contract. The officers performing services under this article are entitled to receive the same fees as for like services relating to chattel mortgages. Upon the title to the goods and chattels affected by any such last mentioned contract becoming absolute in the conditional vendee or his successor in interest by the payment of the full consideration for which any such contract was made, the conditional vendor, his assignee or legal representative, upon the request of the conditional vendee or of any person interested in the property covered by such contract, must sign and acknowledge a certificate setting forth such payment. The officer with whom such contract is filed must, on receipt of such certificate, file the same in his office and write the word "discharged" in the book where the contract is entered, opposite the entry thereof, and the contract is thereby discharged.

Sec. 65. Sale of property retaken by vendor. Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest, may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the

amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof.

Sec. 66. Notice of sale. Not less than fifteen days before such sale, a printed or written notice shall be served personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if not within such county, or he can not be found therein, such notice must be mailed to him at his last known place of residence. Such notice shall state: 1. The terms of the contract; 2. The amount unpaid thereon; 3. The amount of expenses of storage; 4. The time and place of the sale, unless such amounts are sooner paid.

Sec. 67. Disposition of proceeds. Of the proceeds of such sale, the vendor or his successor in interest may retain the amount due upon his contract, and the expenses of storage and of sale; the balance thereof shall be held by the vendor or his successor in interest, subject to the demand of the vendee or his successor in interest and a notice that such balance is so held shall be served personally or by mail upon the vendee or his successor in interest. If such balance is not called for within thirty days from the time of sale, it shall be deposited with the treasurer or chamberlain of the city or village, or the supervisor of the town where such sale was held, and there shall be filed therewith a copy of the notice served upon the vendee or his successor in interest and a verified statement of the amount unpaid upon the contract, expenses of storage and of sale and the amount of such balance. The officer with whom such balance was deposited shall credit the vendee or his successor in interest with the amount thereof and pay the same to him on demand after sufficient proof of identity. If such balance remains in possession of such officer for a period of five years, unclaimed by the person legally entitled thereto, it shall be transferred to the funds of the town, village, or city, and be applied and used as other moneys belonging to such town, village, or city.

Ohio.

Gen. Code, 1910.

Sec. 8568. Conditional sales of personal property. When personal property is sold to a person to be paid for in whole or part in installments, or is leased, rented, hired, or delivered to another on condition that it will belong to the person purchasing, leasing, renting, hiring, or receiving it, when the amount paid is a certain sum, or the value of the property, the title to it to remain in the vendor, lessor, renter, hirer, or deliverer thereof, until such sum or the value of the property or any part thereof has been paid, such condition, in regard to the title so remaining until payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors unless the conditions are evidenced by writing, signed by the purchaser, lessee, renter, hirer, or receiver thereof, and also a statement thereon, under oath, made by the person so selling, leasing, or delivering the property, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that it is a copy, be deposited with the county recorder of the county where the person signing the instrument resides at the time of its execution, if a resident of the state, and if not such resident, then with the county recorder of the county in which the property is situated at the time of the execution of the instrument.

Sec. 8570. Vendor may not retake possession without repaying certain part of price; exception. When such property except machinery, equipment, and supplies for railroads and contractors, for manufacturing brick, cement, and tiling, and for quarrying and mining purposes, is so sold or leased, rented, hired, or delivered, the person who sold, leased, rented, hired, delivered or his assigns or the agent or servant of either or their agent or servant shall not take possession of such property, without tendering or refunding to the purchaser, lessee, renter, or hirer thereof, or any party receiving it from the vendor, the money so paid after deducting therefrom a reasonable compensation for the use of such property, which in no case shall exceed fifty per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in the contract or not, unless such property has been broken, or actually damaged, when a reasonable compensation for such breakage or damage shall be allowed. But the vendor shall not be required to tender or refund any part of the amount so paid unless it exceeds twenty-five per cent. of the contract price of the property.

Oklahoma.**Comp. Laws, 1909.¹⁾**

Sec. 7911. Instruments evidencing conditional sale must be recorded. That any and all instruments in writing, or promissory notes now in existence or hereafter executed, evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds in and for the county wherein the property shall be kept, and when so deposited shall be subject to the law applicable to the filing of chattel mortgages; and any conditional, verbal sale of personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value.

Texas.**Sayles' Civ. Stats., 1897.**

Sec. 3327. Reservations of title; mortgages, and to be recorded. All reservations of the title to or property in chattels as security for the purchase-money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages; provided that nothing in this law shall be construed to contravene the landlord and tenant act.

Sec. 3328. All instruments intended to operate as liens to be recorded. Every chattel mortgage, deed of trust, or other instrument of writing, intended to operate as a mortgage of or lien upon personal property which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then of the county of which he shall at that time be a resident; provided that written contracts for the conditional sale, lease, or hire of railroad equipments and rolling-stock, by which the purchase-money is therein agreed to be paid at any time or times after the date of such contract, with a reservation of title or lien in the vendor, lessor, or bailor until the same has been fully paid shall be recorded in the office of the secretary of state, in a book of records to be kept by him for that purpose; and on payment in full of the purchase-money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor, or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument to be acknowledged by the lessor, vendor, or bailor, or his or its assignee, and recorded as aforesaid, and for such services the secretary of state shall be entitled to a fee of five dollars for recording each of said contracts and each of said declarations, and a fee of one dollar for entering such declaration on the margin of the record.

Washington.**Rem. & Bal. Code, 1910.**

Sec. 3670. Contracts to be filed, when. All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, en-

¹⁾ There are also in force special regulations governing the sale of railroad and street railway equipment.

cumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides.

Sec. 3671. Auditor to index. It shall be the duty of the county auditor wherein any such memorandum is presented to him for that purpose, to file all such instruments upon payment of proper fees therefor, indorse thereon the time of reception the number thereof, and he shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto and exclusively for that purpose, ruled into separate columns with appropriate heads, "The time of filing", "Name of vendor", "Name of vendee", "Date of instrument", "Amount of purchase price", and "Date of release". An index of said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this chapter the sum of twenty-five cents for each instrument, and the money so collected shall be accounted for as other fees of his office. Such instrument shall remain on file for the inspection of the public until full payment has been made thereon, and shall be satisfied or canceled in the same manner and upon payment of same fees as chattel mortgages are satisfied or canceled.

Sec. 3672. Fraudulent disposition of personal property. Any purchaser or lessee of personal property obtaining the possession of such property under a contract providing that the title thereto shall not vest in the purchaser until the purchase price thereof has been paid in full, who, with intent to hinder, delay or defraud the vendor thereof or his or her assigns or legal representatives, shall injure or destroy such property or any part thereof or shall conceal such property or any part thereof, or shall remove the same or any part thereof from the county where it was situated at the time the possession thereof passed to said purchaser or lessee before it is duly released, without the consent in writing of the vendor, or shall sell or dispose of the same or any interest therein where he parts with the possession thereof, without the consent in writing of the vendor, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months or by a fine of not more than twice the value of such property, or by both such fine and imprisonment.

Sec. 8741. Contract of sale or lease. In any contract of or for the sale of railroad equipment or rolling stocks, it shall be lawful to agree that the title of the property sold, or contracted to be sold, although deliverable immediately, or at any time or times subsequently shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money, and in any contract of or for the leasing of such property, it shall be lawful to stipulate for a conditional sale thereof at the termination of such lease, and that the rentals received may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or vendee until the purchase price shall be paid in full, notwithstanding delivery to and possession by such lessee or vendee: Provided that no such contract shall be valid as against any subsequent judgment creditor, or any subsequent bona fide purchaser, for value and without notice, unless: 1. The same shall be evidenced by an instrument duly acknowledged before some person authorized by law to take acknowledgments of deeds; 2. Such instruments shall be filed for record in the office of the county auditor of the county in which, at the time of the execution thereof, is situated the principal office of the vendee or lessee within this territory; 3. Each locomotive engine or car so sold, or contracted to be sold, or leased, as aforesaid, shall have the name of the vendor or lessor plainly marked on each side thereof, followed by the word, "owner" or "lessor", as the case may be.

Sec. 8742. Recording of contract. The contracts herein authorized shall be recorded by the said county recorder, in the book of records of mortgages of real estate in said county, and on payment in full of purchase money, and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect shall be made by the vendor or his assignee, which declaration may be made on the margin of the record of the contract, attested by the said recorder, or it may be made by a separate instrument, to be acknowledged and recorded as aforesaid, and for such services the county recorder shall be entitled to the fees provided by law for the recording of deeds and mortgages of real estate.

Wisconsin.**Sanborn & Berryman's Stats., 1898.**

Sec. 2317. Contracts for sale to be in writing and filed. No contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city, or village where the vendee resides, or if he shall not be a resident of the state then in the office of the clerk of the town, city, or village where the property may be at the time of making such contract, and such clerk shall file, keep, and index the same in like manner as mortgages of personal property and receive a like compensation therefor; but the effect of such filing shall not extend for more than one year after the time fixed for payment of the contract price or for the performance of the other conditions of such sale.

IV. Statutes relating to Sales in Bulk.**California.****Civil Code.**

Sec. 3440. Certain transfers presumed fraudulent. Exception. Public recordation required. Sales at public auction. Transfers under order of court. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry and respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer; Provided, however, that the provisions of this section shall not apply to the transfers of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care, and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and verified in the same form as provided for chattel mortgages and which shall be recorded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated; Provided, also, that the sale, transfer, or assignment of a stock in trade (or of such a quantity of a stock in trade as to be substantially a whole) in bulk, or in any manner otherwise than in the ordinary method of business of the vendor, transferer, or assignor, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferer, or assignor, unless at least five days before the consummation of such sale, transfer, or assignment the vendor, transferer, or assignor, or the intended vendee, transferee, or assignee shall record in the office of the county, recorder in the county or counties in which the said stock in trade is situated, a notice of said intended sale, transfer, or assignment, stating the name and address of the intended vendor, transferer, or assignor, the name and address of the intended vendee, transferee, or assignee, and a general statement of the character of the property or merchandise intended to be sold, assigned, or transferred, and the date when, and the place where, the purchase price, if any there be, is to be paid. Provided, nevertheless, that if such intended sale is to be at public auction the notice above required to be recorded shall state that fact, the time, terms, and place of said sale, the names and addresses of the vendor and auctioneer, and a general

statement of the character of the property or merchandise intended to be sold; but such sale shall in no event occur within five days of the date of recordation of said notice; Provided further, that the provisions of this section shall not apply or extend to any sale, transfer, or assignment made under the direction or order of a court of competent jurisdiction, or by any executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment made for the benefit of creditors generally, nor to any sale, transfer, or assignment of any property exempt from execution.

Connecticut.

Gen. Stats., 1902, c. 286. Sales at Wholesale by Retail Dealer.

Sec. 4868. Sale by retail trader of entire stock at one transaction. Whenever one who makes it his business to buy commodities and sell the same in small quantities for immediate consumption for the purpose of making a profit, shall, at a single transaction and not in the regular course of business, sell, assign, or deliver the whole, or a large part of his stock in trade, such sale or assignment shall be made in writing, describing the property so sold, assigned, or delivered; and all conditions of such sale, assignment, or delivery, shall be acknowledged before competent authority, and recorded within one day after the time of such sale, assignment, or delivery in the town clerk's office in the town where the vendor has his place of business; but Sundays and legal holidays shall be excluded in the computation of such time.

Sec. 4869. Such transaction void when. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of sec. 4868 shall be void as against all persons who were creditors of the vendor at the time of such transaction.

Sec. 4870. Assignment by insolvent debtor not affected. Nothing contained in sections 4868 and 4869 shall affect an assignment by an insolvent debtor for the benefit of his creditors, pursuant to the provisions of chapter 23.

Georgia.

Code, 1911.

Sec. 3226. Merchandise, how sold in bulk. It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, for cash or credit, before paying or delivering to the vendor any part of the purchase price therefor, to demand and receive from the vendor thereof, and if the vendor be a corporation, then from the managing officer or agent thereof, a written statement under oath of the names and addresses of all the creditors of said vendor together with the amount of indebtedness due or owing by said vendor to each of such creditors; and it shall be the duty of such vendor to furnish such statement. It shall further be the duty of said vendor to give to the vendee a statement of his assets and liabilities and the cost price of the merchandise to be sold, said cost price to be arrived at by an inventory taken at the time by the seller and purchaser.

Sec. 3227. Purchaser, duty of. Thereupon it shall be the duty of the purchaser, at least five days before the completion of said purchase, or the payment therefor, to notify personally or by registered mail, each of said creditors, of the said proposed sale, the price to be paid therefor, and the terms and conditions thereof, together with a copy of the statement of the assets and liabilities as furnished him by the vendor.

Sec. 3228. Fraudulent sales. Whenever any person shall purchase any stock of goods, wares, or merchandise in bulk, and shall pay the price or any part thereof, or execute or deliver to the vendor thereof, or to his order, or to any person for his use, any promissory note or other evidence of indebtedness for said purchase price, or any part thereof, without having first demanded and received from said vendor the statement under oath, mentioned in section 3226, and without first giving to each of said creditors the notice provided for in the preceding section, such

sale or transfer shall, as to any and all creditors of the vendor, be conclusively presumed to be fraudulent.

Sec. 3229. Fraudulent sales. Any sale or transfer of a stock of goods, wares, or merchandise out of the usual or ordinary course of the business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed, or attempted to be sold or conveyed, to one or more persons, shall be deemed a fraudulent transaction or transfer in bulk in contemplation of this and the three preceding sections; provided, that nothing contained in this and the three preceding sections shall apply to sales by executors, administrators, receivers, or any public officer under judicial process.

Louisiana.

Laws, 1896, No. 94. An Act to amend and re-enact Act 166 of 1894, etc.

Sec. 2. Misdemeanor to purchase and dispose of goods out of usual course of business. Whosoever shall purchase goods, wares, or merchandise on credit, and shall sell, hypothecate, pledge, or otherwise dispose of same out of the usual course of business, and with intent to cheat or defraud the seller, or vendor, shall be guilty of a misdemeanor — — — —.

Sec. 4. Penalty for purchasing in block goods unpaid for. Whosoever shall wilfully and knowingly purchase in blocks, goods, wares, or merchandise, unpaid for by the seller, without exacting from said seller a written statement sworn to showing that said goods, wares, or merchandise have been paid for shall be guilty of a misdemeanor — — — —.

Massachusetts.

Acts, 1903, c. 415. An Act to prohibit Sales of Merchandise in Bulk in Fraud of Creditors.¹⁾

Sec. 1. Formalities required. The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms, and conditions thereof.

Sec. 2. Application of act. Sellers and purchasers under this act shall include corporations, associations, co-partnerships, and individuals, but nothing contained in this act shall apply to sales by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officer under judicial process.

Sec. 3. Commencement. This act shall take effect upon its passage.

¹⁾ The sale of the assets of a corporation in fraud of the commonwealth is void, unless certain notifications of the proposed sale are

sent to the treasurer and the receiver-general.
— Acts, 1910, c. 187.

Michigan.

Acts, 1905, No. 223. An Act to regulate the Sales, Transfers, and Assignments of Stocks of Goods, Merchandise, and Fixtures in Bulk.

Sec. 1. When sale of merchandise void as to creditors. The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor, or assignor, shall be void as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee, shall, at least five days before the sale, make a full detailed inventory, showing the quantity, and so far as possible with exercise of reasonable diligence, the cost price to the seller, transferor, and assignor of each article to be included in the sale. And, unless the purchaser, transferee, and assignee demands and receives from the seller, transferor, and assignor a written list of names and addresses of the creditors of the seller, transferor, and assignor, with the amount of indebtedness due or owing to each, and certified by the seller, transferor, and assignor, under oath, to be a full, accurate, and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee, and assignee shall, at least five days before taking possession of such merchandise or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms, and conditions thereof.

Sec. 2. Act includes corporations, etc. Sellers, transferors, and assignors, purchasers, transferees, and assignees, under this act shall include corporations, associations, copartnerships, and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process.

Sec. 3. When purchaser, etc., to become receiver. Any purchaser, transferee, or assignee, who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferor, or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise, and fixtures that have come into his possession by virtue of such sale, transfer, or assignment: Provided, however, that any purchaser, transferee, or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferor, or assignor, or to the seller, transferor, or assignor for any of the goods, wares, merchandise, or fixtures that have come into the possession of said purchaser, transferee, or assignee by virtue of such sale, transfer, or assignment.

New Jersey.

Laws, 1907, c. 237. An Act to prohibit Sales of Merchandise in Bulk in Fraud of Creditors.

Sec. 1. As to bulk sales. The sale in bulk of the whole or a large part of the stock of merchandise and fixtures, or merchandise, or fixtures, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the purchaser shall, in good faith and for the purpose of giving the notice herein required, make inquiry of the seller and receive from him a list in writing of the names and places of residence or business of and indebtedness to each and all of such creditors, and unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale to each of the creditors of the seller as appearing on said list, or use reasonable diligence to cause personal notice to be given to them, or shall deposit in the mail a registered letter of notice, postage prepaid, addressed to each of the seller's said creditors at his post-office address, according to the written information furnished; provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any

such voidable sale after the expiration of ninety days from the consummation thereof.

Sec. 2. False answers, etc. Penalty. The seller shall make full and truthful answer, in writing, to each and all of the inquiries made of him by the purchaser, as required in section one; and if such seller shall knowingly and wilfully make or deliver, or cause to be made or delivered, to said purchaser any false answer to such inquiries, or shall induce a sale by refusing to make answer to such inquiries or by fraudulently claiming or pretending ignorance of the matters called for by such inquiries, then, in each of said cases, said seller shall be deemed guilty of a misdemeanor, after indictment, upon conviction thereof.

Sec. 3. To whom act applicable. Sellers and purchasers under this act shall include corporations, associations, copartnerships, and individuals; but nothing contained in this act shall apply to sales made under any order of a court, or to any sales made by executors, assignees for the benefit of creditors, administrators, receivers, or any public officer in his official capacity, or by any officer of a court.

New York.

Cons. Laws, 1909, c. 45. An Act relating to Personal Property, constituting c. 4 of the Consolidated Laws.

Sec. 44. Transfer of goods in bulk. 1. The transfer of any portion of a stock of goods, wares, or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferor's business, or the transfer of an entire such stock in bulk, shall be presumed to be fraudulent and void as against the creditors of the transferor unless the proposed transferee shall, at least five days before the transfer, in good faith, make full and explicit inquiry of the transferor as to the names and addresses of each and all of the creditors of the transferor, and unless such transferee shall at least five days before the transfer in good faith notify or cause to be notified of the proposed transfer personally or by registered mail each of the creditors of the transferor of whom such transferee has knowledge, or can with the exercise of reasonable diligence acquire knowledge. 2. The transferor shall at least five days before such transfer fully and truthfully answer in writing such transferee's inquiries as to the names and addresses of the transferor's creditors, and if such transferor shall knowingly or wilfully refuse so to answer or make or deliver or cause to be made or delivered to such transferee any false or incomplete answer to such inquiries, said transferor shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly. 3. Transfers under this section shall include sales, exchanges, and assignments, but nothing contained in this section shall apply to transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustee in bankruptcy, or by any public officer under judicial process.

Ohio.

Gen. Code, 1910.

Sec. 11102. Presumption of fraud; notice of intention to be filed with recorder. A sale or transfer of a portion of a stock of goods, wares, or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferor's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay, or defraud creditors within the meaning of the next two succeeding sections, unless not less than seven days' previous to the transfer of the stock of goods sold or intended to be sold and the payment of the money therefor the seller or transferor causes to be recorded in the office of the county recorder of the county in which he conducts his business, and in the office of the county recorder of the county or counties in which such goods are located, a notice of his intention to make such sale or transfer.

Sec. 11103. Requisites of notice; exceptions. Such notice must be in writing describing in general terms the property to be sold and all conditions of such sale and the parties thereto. No such presumption shall arise because of the failure to record notice as above provided in the case of a sale or transfer made under the direction or order of a court of competent jurisdiction, or by an executor, administrator, guardian, receiver, assignee for the benefit of creditors or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law, nor in the case of a sale or transfer of property exempt from execution.

Pennsylvania.

P. L. 1905, No. 44. An Act relative to the Sale in Bulk of the whole, or a large Part, of a Stock of Merchandise and Fixtures, or Merchandise, or Fixtures, not in the ordinary Course of Business, etc.

Sec. 1. Sales in bulk when fraudulent. The sale in bulk of the whole, or a large part, of a stock of merchandise and fixtures, or merchandise, or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be deemed fraudulent, and voidable as against the creditors of the seller, unless the purchaser shall, in good faith, and for the purpose of giving the notice herein required, make inquiry of the seller, and receive from him a list in writing of the names and places of residence or business of each and all of his creditors, and unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale, to each of the creditors of the seller as appearing on said list, or use diligence to cause personal notice to be given to them, or shall deposit in the mail a registered letter of notice, postage prepaid, addressed to each of the seller's said creditors at his post office address, according to the written information furnished: Provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale, after the expiration of ninety days from the consummation thereof.

Sec. 2. False answers, etc. Penalty. The seller shall make full and truthful answer in writing, to each and all of the inquiries made of him by the purchaser, as required in section one; and if such seller shall knowingly and wilfully make or deliver, or cause to be made or delivered, to said purchaser any false answer to such inquiries, or shall induce a sale by refusing to make answer to such inquiries or by fraudulently claiming or pretending ignorance of the matters called for by such inquiries, then, in each of said cases, said seller shall be deemed guilty of a misdemeanor, and upon conviction thereof, he shall be sentenced to pay a fine not exceeding five thousand dollars, or to undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.

Sec. 3. Application of act. Nothing contained in this act shall apply to sales made under any order of a court, or to any sales made by executors, assignees for the benefit of creditors, administrators, receivers, or any public officer in his official capacity, or by any officer of a court.

V. Miscellaneous.

Pennsylvania.

P. L. 1887, No. 21. Sales (April 13, 1887).

Sec. 1. Implied warranty on sale by sample. In all sales by sample, unless the parties shall agree otherwise, there shall be an implied warranty on the part of the seller that the goods, chattels, and property sold and to be delivered are the same in quality as the sample shown.

P. L. 1889, No. 87. Sales (May 4, 1889).

Sec. 1. Implied warranty as to quality, on sale of food. In every sale of green, salted, pickled, or smoked meats, lard, and other articles of merchandise, used wholly or in part for food, said goods or merchandise shall correspond in kind and quality with the description given, either orally or in writing by the vendor; and in every sale of such goods or merchandise, unless the parties shall agree otherwise, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption.

Sec. 2. Repealing clause. All acts and parts of acts inconsistent herewith be, and the same are hereby repealed.

IX.

FACTORS AND OTHER PRIVATE COMMERCIAL
AGENTS

Factors and other Private Commercial Agents.

(By Orrin Kip McMurray, Ph. B., LL. B., of the San Francisco Bar, Professor of Law, University of California.)

Analysis.

- I. DEFINITIONS, 454
- II. APPOINTMENT, 455
- III. EXTENT OF AUTHORITY OF FACTORS OR COMMISSION MERCHANTS, 455
 - A. *Implied Limitations of Factor's Authority*, 456
 - B. *Effect of Usage upon Implied Powers and Limitations*, 456
 - C. *Authority of Factors to Pledge Goods at Common Law*, 456
 - D. *Remedies of Principal upon Unauthorized Pledge by Factor*, 457
 - E. *Common Law Modifications of the Rule in Regard to Pledges by Factors*, 458
 - F. *Factor's Power to Pledge as Modified by Factor's Acts*, 458
- IV. DUTIES AND LIABILITIES OF FACTOR TO PRINCIPAL, 459
 - A. *Duty to Act in Good Faith*, 459
 - B. *Duty to Exercise Diligence and Prudence*, 460
 - C. *Duty to Obey Instructions*, 461
 - D. *Duties of Del Credere Factors*, 463
- V. RIGHTS OF FACTOR AGAINST PRINCIPAL, 463
- VI. RIGHTS OF FACTOR AGAINST GOODS: THE FACTOR'S LIEN, 464
- VII. LIABILITY OF FACTOR TO THIRD PERSONS, 465
- VIII. RIGHTS OF FACTOR AS AGAINST THIRD PERSONS, 465
- IX. LIABILITY OF PRINCIPAL TO THIRD PERSONS, 466
- X. LIABILITY OF THIRD PERSONS TO PRINCIPAL, 466
- XI. TERMINATION OF AUTHORITY, 467
- XII. BROKERS, 467
- XIII. AUCTIONEERS, 468

I. DEFINITIONS. — The most important commercial agents are factors (including del credere agents), brokers, and auctioneers.

A factor is a commercial agent to whom goods have been entrusted for the purposes of sale on commission¹). In American commercial usage, it is common to use the expressions "factor" and "commission merchant" or "commission agent" as synonymous²). Sometimes, in a loose sense, the word "consignee" is used to indicate an agent to whom goods have been entrusted for sale, but the word properly means one to whom goods have been sent, whether as agent or as bailee or as owner³). When the agent not only is entitled to the possession of the goods but undertakes that the price of the goods will be paid to the principal in all events, the factor is called a del credere agent⁴).

A broker is an agent whose duty is to make contracts and bargains for other persons for a commission⁵). The principal distinction between the factor and the broker is that the former has the possession of the goods which he is to sell, while the latter does not have possession⁶). From this distinction flow material consequences in respect to the rights and duties of these different kinds of agents. Expressed in legal phraseology, the broker is a mere agent, while the factor is at the same time both an agent and a bailee. The lines between the broker and the factor are not always clearly drawn in commercial practice, but the legal distinction is

¹) 2 Clark & Skyles on Agency, sec. 821; 1 Bouvier, Law Dictionary 640, v. Factor; Civil Code, California, sec. 2026; Sinclair v. National Surety Co., (1906) 132 Iowa, 549; White v Boyd, (1889) 124 N. C. 177. — ²) The term factor is but little used, save by lawyers, in the United States. 1 Bouvier, Law Dictionary, 641, v. Factor. — ³) Commonwealth

v. Harris, (1895) 168 Pa. St. 619; Story, Agency, sec. 33. — ⁴) 1 Clark & Skyles, Agency, sec. 434. — ⁵) Story, Agency, sec. 28. — ⁶) 2 Clark & Skyles, Agency, sec. 822. In Sinclair v. National Surety Co., (1901) 132 Iowa, 549, the word "broker" was held synonymous with "factor."

plain. An agent in carrying out a transaction may begin his employment as a broker, but subsequently become a factor by the act of his principal in authorizing him to deal with the possession of the goods¹).

An auctioneer occupies a position partaking more of the character of the factor than of the broker. He is entitled to the possession of goods for a particular purpose only, — the sale at public auction. He thus is a factor with limited powers. As will be seen, his rights and duties are analogous to those of the factor²).

Other private commercial agents (whose duties, however, are in the field of maritime law) are the ship's master, the supercargo and the ship's husband. It is unnecessary to define the master of a vessel. The supercargo is a person employed to take charge of a cargo, which he accompanies and sells to the principal's best advantage, and purchases a proper cargo for the return trip³). A ship's husband is an agent employed by the ship owner with the authority to make the necessary repairs and to attend to the management and equipment of the ship⁴).

II. APPOINTMENT. — Any person who has capacity to contract may appoint an agent, and hence may appoint a commercial agent⁵). Any person may be an agent⁶). Infancy and coverture are no objection so far as the power to transact an agency is concerned. And when slavery existed, a slave might act as agent⁷). But while rights can be acquired by a principal through such agents and while liabilities may be created against him by them, the lack of full capacity by a factor would undoubtedly affect the agent's remedies. Thus, a married woman except so far as empowered by statute cannot maintain an action in her own name, and enabling statutes generally allow her only to maintain actions in respect to her separate property⁸). It is plain therefore that a married woman appointed as factor would have no right to maintain an action in her own name against third persons in respect to the goods.

The appointment of any commercial agent may be made in any form in which an agency may be created. Writing is in general not necessary to evidence the appointment, though in a few States real estate brokers or agents are required to have a written authority⁹). Authority to act as a factor or broker or other agent may as well be implied as express. And even where there is no antecedent authority, express or implied, a subsequent ratification will operate as equivalent to an antecedent authority¹⁰).

III. EXTENT OF AUTHORITY OF FACTORS OR COMMISSION MERCHANTS.

— The factor's express powers are such as the principal may have conferred upon him, and depend wholly upon the construction of the terms of his employment¹¹).

His implied powers are as follows:

1. To sell the goods a) in his own name¹²), or b) in the name of his principal¹³).
2. To sell for cash or on credit¹⁴). In this respect, as in respect to every other of his implied powers, the usage of the particular market or of the particular trade must be observed¹⁵). If that usage forbids sales for anything but cash, the factor must observe the custom and will be liable for any loss occasioned by his granting the credit¹⁶). The power to sell for credit implies that the factor will use reasonable care and will give credit only to such persons as a reasonably prudent person would trust¹⁷).
3. To receive payment for the goods. Payment may be received, subject to the limitations expressed in the last subdivision, in negotiable paper payable to the factor's own order¹⁸).

¹) Story, Agency, sec. 32a. — ²) 2 Clark & Skyles, Agency, sec. 887. — ³) Story, Agency, sec. 33, note 4. — ⁴) Story, Agency, sec. 35. — ⁵) Civil Code, California, sec. 2296. — ⁶) Id. — ⁷) Chastain v. Bowman, (1833) 1 Hill (S. C.) 270. — ⁸) See, for example, Code Civil Procedure, California, sec. 370. — ⁹) Civil Code, California, sec. 1624; New Jersey, Gen. Stat., p. 1602, sec. 10. — ¹⁰) 2 Clark & Skyles, Agency, secs. 749, 823. In order to constitute one a factor, it is not necessary that the goods be consigned to him directly. Beardsley & Schmidt, (1904) 120 Wis. 405; Briere v. Searls (1905) 126 Wis. 347. — ¹¹) 12 Am. & Eng. Encyc.

L. (2d Ed.), 631. — ¹²) Slack v. Tucker, (1874) 23 Wall. 321. — ¹³) 2 Clark & Skyles, Agency, sec. 831; Childs v. Waterloo Wagon Co., (1901) 167 N. Y. 576; Adams v. Fraser, (1897) 82 Fed. 211. — ¹⁴) Forrestier v. Bordman, (1839) Fed. Cas. No. 4945; Civil Code, California, sec. 2368, subs. 2. — ¹⁵) 12 Am. & Eng. Encyc. L. (2d Ed) 632; Walker Co. v. Dubuque & Co., (1901) 113 Iowa, 428. — ¹⁶) Daylight Burner Co. v. Odlin, (1871) 51 N. H. 56; 12 Am. Rep. 45. — ¹⁷) Forrestier v. Bordman, (1839) Fed. Cas. No. 4945. — ¹⁸) Hapgood v. Batcheller, (1842) 4 Metc. 573.

4. To warrant the quality of the goods sold in cases where it is the usage to give such warranty¹). He may not, however, give unusual warranties²).

5. To insure the goods. Not only may he insure the goods for his own benefit to the extent of his commissions, advances, etc.³), but he may insure the principal's interest also⁴). The policy insuring the principal's interest may be issued in the name of the factor, and the latter may recover the entire loss from the insurers, holding the surplus beyond his own interest as the trustee of a resulting trust for the benefit of the principal⁵).

A. Implied Limitations of Factor's Authority. — A factor has no powers except such as are expressly or by implication given him. It is therefore impossible to enumerate exhaustively the limitations upon the factor's authority. But it is possible to enumerate a number of special cases where the factor's powers are impliedly limited.

1. The factor may not barter or exchange the goods of his principal, under the principles of the common law⁶). And the ordinary form of the Factor's Act does not alter the law in this respect⁷).

2. He may not transfer the goods in payment of his own debts⁸).

3. He may not compromise debts due to his principal nor submit them to arbitration⁹).

4. He may not extend the term of credit¹⁰).

5. He may not make or accept negotiable paper for his principal, nor may he bind his principal by indorsing negotiable paper received by him in payment of the price of the goods¹¹).

6. He may not rescind a sale previously made by him¹²).

7. He may not delegate his authority¹³).

B. Effect of Usage upon Implied Powers and Limitations. — Notwithstanding the existence of the above named implied limitations and powers, the powers of the factor may be increased or diminished by usage as well as by express or implied agreements or instructions. The factor has implied authority to act in accordance with the usage established at the place where the contract is made, and that, too, notwithstanding his principal is in fact ignorant of the existence of the usage or custom¹⁴). But such usage or custom to have the effect of binding the principal who does not know of its existence must be a general custom or usage. Thus, a principal cannot, in the absence of knowledge of the usage, be bound by the custom or practice of his factor or of any other private person, firm, or corporation¹⁵). Further, to warrant reliance upon a custom it must be shown that the same is reasonable¹⁶). And as no custom can be reasonable which is contrary to the policy of the law, any attempt to alter the powers or liabilities of a factor or other agent by proof of custom must fail where the custom contravenes clear and unambiguous statutory or contractual provisions or well settled rules of public policy¹⁷). Even though a usage is proved to exist, its application may of course be waived by the contract or the conduct of the parties¹⁸). From what has been said it is obvious that where the contract is in writing and is unambiguous in its terms, the question of usage becomes unimportant¹⁹).

C. Authority of Factor to Pledge Goods at Common Law. — The definition of a factor assumes that he has power to sell the goods which are the subject of his mandate, even though he sells with the intent of converting the proceeds²⁰). The

¹) Schuchardt v. Allens, (1863) 1 Wall. 359; H. B. Smith Co. v. Williams, (1902) 63 N. E. 318 (Ind.). — ²) Upton v. Suffolk County Mills, (1853) 11 Cush. 586. — ³) Vance, Insurance, p. 113, note; Putnam v. Insurance Co., (1843) 5 Metc. 386. — ⁴) Johnson v. Campbell, (1876) 120 Mass. 449. — ⁵) Story, Agency, sec. 111. Civil Code, California, sec. 2368, subs. 1. — ⁶) 2 Clark & Skyles, Agency, sec. 836. — ⁷) Victor Sewing Machine Co. v. Heller, (1878) 44 Wis. 265. But see Davis v. Russell, (1878) 52 Cal. 611. — ⁸) Mechem, Agency, sec. 996; Warner v. Martin, (1850) 11 How. 209; Benny v. Rhodes, (1853) 59 Am. D. 293; Hoffman v. Cramer (1898) 123 N. C. 566. — ⁹) 2 Clark &

Skyles, Agency, secs. 842—843. — ¹⁰) 12 Am. & Eng. Encycl. L. (2d Ed.) 637; 2 Clark & Skyles, Agency, sec. 833c. — ¹¹) Mechem, Agency, sec. 1004. — ¹²) Macaulay v. Palmer, (1890) 125 N. Y. 742. — ¹³) Warner v. Martin, (1850) 11 How. 209. — ¹⁴) Baily v. Bensley, (1877) 87 Ill. 556. — ¹⁵) Lyon v. Culbertson, (1876) 83 Ill. 33. — ¹⁶) National Bank of Commerce v. Exchange Bank, (1899) 52 S. W. 265 (Mo.). — ¹⁷) Barnard v. Kellogg, (1870) 10 Wall 383. — ¹⁸) On excluding the application of usage by the terms of the contract, see Dashler v. Beers, (1863) 83 Am. Dec. 274. — ¹⁹) Barnard v. Kellogg, (1870) 10 Wall 383. — ²⁰) See note, section on Definitions.

purchaser in ordinary course of business from a factor, to whom the goods have been entrusted for sale, is thus fully protected, whatever disposition the factor may make of the proceeds¹). But the common law does not afford any security to the pledgee from the factor when the latter pledges the goods without the principal's consent. The established rule, though one that has been lamented by judges and text writers, is universal (in the absence of statute) that the factor has no power to pledge the goods of his principal for a debt of the factor or for advances made to him, and the fact that the pledgee advances the money in good faith believing that the goods belong to the factor does not alter the case, — whether the pledgee acted in good or bad faith, he is equally unprotected by the common law²). It might be supposed that this harsh rule would be limited at least to the extent of placing the pledgee in the position of the factor, that is, by protecting him at least to the extent of any advances made by the factor on the goods and of any commissions earned by him (for both of which the factor has an undoubted right to detain the goods). But the common law does not even afford the bona fide pledgee this protection³). The theory is that the factor by making an unauthorized pledge forfeits his lien and commits a tortious conversion of the goods, and that the general maxim of the common law that no one can pass a better title than he had prevents the pledgee from obtaining any interest whatsoever. In other words, the so-called factor's lien is not a *jus in rem*, such as is the interest of a pledgee or mortgagee of goods. It is little more than a right of detention.

The common law does, however, recognize the right of a factor to pledge the goods of his principal to the extent of his advances and commissions⁴). If, however, the pledge extends beyond these, the pledgee takes no interest whatever.

The general rule would seem sufficiently harsh if it were confined to the cases of factors who are not engaged in business on their own account but only profess to transact business as agents for disclosed or undisclosed principals. In such cases, the pledgee often has no means of knowing to what extent he may safely make advances on the goods. But the injustice of the rule is much accentuated by the uniform decision of courts interpreting the common law that it makes no difference that the factor is engaged in business upon his own account as well as acting as a technical factor. The rule is the same though he acts as factor in only a particular transaction and does not hold himself out to the world as an agent generally⁵).

Though the rule in regard to a pledge by a factor is called a common law rule, it must not be supposed that equity affords any relief in cases of hardship. Equity does not in general enforce a different system of rights than the common law, and in this particular it follows the common law. The words common law are used in this connection to point out the distinction between statutory rules and those which are the result of the unwritten law⁶). As the rule is one of general law, it cannot be controlled by evidence of a special custom⁷).

What has been said as to the authority of the factor to bind the principal's goods by pledge must be confined to their unauthorized pledge. If the principal has given an authority to pledge his goods, either expressly or by implication, the pledge is valid⁸). And even in the case where the goods are pledged by the factor in violation of his duty, the original absence of authority may be cured by the subsequent ratification of the principal after he acquires full knowledge of the act⁹).

D. Remedies of Principal Upon Unauthorized Pledge by Factor. — The principal in case of an unauthorized pledge of goods by the factor may hold the factor for the value of the goods in an action brought for their conversion, or he may, at his

¹) *Warner v. Martin*, (1850) 11 How. 209; *Halsey v. Bird*, (1900) 99 Fed. 525. But this protection is accorded only to the purchaser who buys in the ordinary course of business. *Romeo v. Martucci*, (1900) 72 Conn. 504. — ²) *Mechem*, Agency, sec. 994; *Story*, Agency, sec. 113; 2 *Clark & Skyles*, Agency, sec. 837. ³) *Halsey v. Bird*, (1900) 99 Fed. 525; *Wright v. Solomon* (1861) 19 Cal. 64. There is some authority, however, which accords the pledgee protection to the extent of the factor's advances. *First National Bank v. Boyce*, (1879) 39 Am. Rep. 198 (Ky.). — ⁴) *Warner v. Martin*, (1850) 11 How. 209, 225; *Cham-*

bers v. Hubbard, (1899) 25 So. 536 (La.). — ⁵) In California at one time the rule against pledging was held to apply only to technical factors. *Horr v. Barker*, (1858) 11 Cal. 393. But this early decision was soon overruled. *Wright v. Solomon*, (1861) 19 Cal. 64. — ⁶) *Rodriguez v. Heffernan*, (1821) 5 Johns Ch. 429. — ⁷) *Newbold v. Wright*, (1833) 4 Rawle (Pa.) 195. — ⁸) *Citizens' State Bank v. Abbott*, (1890) 80 Iowa 646. — ⁹) *Bott v. McCoy*, (1852) 56 Am. Dec. 223 (Ala.), holding that the violation of the factor's duty is an injury to the principal alone, who is the only person entitled to complain.

election, charge the factor with the loss suffered by him by reason of the unauthorized pledge, either upon settling his account with the factor or by means of an action based on quasi-contractual principles¹). But instead of pursuing his remedies against the factor he may recover the goods themselves from the pledgee without making any tender of the factor's charges and advances or without tendering to the pledgee the amount of his advance²). The pledgee cannot set up his rights under the factor to the extent that the latter has made advances, for there is no privity of contract between the principal and the pledgee which would authorize the recovery of a judgment by the latter against the former. As any person who asserts a dominion over goods inconsistent with the owner's rights is liable for their full value upon the theory that the goods have been converted by such person, the principal may, instead of seeking the recovery of the goods in specie, maintain an action against the pledgee for their value³). In this so-called action of trover or conversion, the courts in assessing the damages may deduct from the plaintiff's recovery the amount of advances and charges made or incurred by the factor⁴). It might be added that the remedy of self-help also avails the principal; he may, if he can do so peacefully, retake his goods from the pledgee⁵).

E. Common Law Modifications of the Rule in regard to Pledge by Factors. — The general rule stated in the last section is somewhat subject to modification by the operation of other principles of the law. An important principle that sometimes serves to moderate the rigor of the general rule is the so called doctrine of estoppel in pais, — so called to distinguish it from the technical estoppels by record and by deed. The phrase has been defined as "an impediment or bar, by which a man is precluded from alleging or denying a fact, in consequence of his own previous act, allegation, or denial to the contrary"⁶). Where, therefore, the owner of goods has placed them in the hands of a factor, giving the latter not only the possession and power of sale, but clothing him with the apparent ownership, and a third person advances money to the factor relying upon the faith of such apparent ownership, the pledgee in good faith will be protected⁷). Thus, though the authorities are by no means uniform, the fact that the owner takes out the bill of lading in the name of the factor, to whom it is delivered has been considered sufficient to warrant the invocation of this principle⁸). It is well settled, however, that the mere entrusting of the possession of goods to the factor is not such conduct as to estop the owner from setting up his claim against the bona fide pledgee⁹). And it is equally well settled that the principle operates only where the pledgee makes his advances relying upon the indicia of title. If he knows nothing about the documents of title, he is not protected, notwithstanding he has acted in good faith in lending the money, and notwithstanding the factor actually has possession of them¹⁰). It is, therefore, apparent that the person claiming the estoppel must prove that his conduct has been actually influenced by the owner's conduct; there is no doctrine of constructive estoppel.

A contrast between estoppel and ostensible authority serves to bring out the true nature of both. The person dealing with an agent who has ostensible authority need not show that his conduct was in fact influenced by the possession of the ostensible authority. It is sufficient if he proves that in other cases not brought home to his knowledge the agent exercised the power. But, as said before, where an estoppel is claimed, there must be evidence that the owner's conduct actually misled the person dealing with him¹¹).

F. Factor's Power to Pledge as Modified by Factor's Acts. — Many of the States have adopted statutes modifying the law with respect to the effect of the factor's

¹) Kelly v. Smith, (1848) Fed. Cas. No. 7675.

— ²) Ludden v. Buffalo, etc., Co., (1886) 22 Ill. App. 415. — ³) Bott v. McCoy, (1852) 56 Am. Dec. 223 (Ala.). — ⁴) First National Bank v. Boyce, (1879) 39 Am. Rep. 198 (Ky.). — ⁵) 1 Cooley, Torts, * 52. — ⁶) Bouvier, Law Dictionary, v. Estoppel. — ⁷) Pollard v. Reardon, (1895) 65 Fed. 851; Wright v. Solomon, (1861) 19 Cal. 64. — ⁸) Pollard v. Reardon, *supra*. — ⁹) Wright v. Solomon, *supra*; Ewart, Estoppel, 297; Shafer v. Lacy, (1898). — ¹⁰) Gray v. Agnew, (1880) 95 Ill. 315. — ¹¹) For a discussion of the application of the principles of estoppel in

the law of agency, see the following articles: Agency by Estoppel, by W. W. Cook, (1905) 5 Columbia Law Rev. 36; Agency by Estoppel, by John S. Ewart, (1905) 5 Columbia Law Review, 354; A Misapplication of the Doctrine of Estoppel, by T. D. Kenneson, (1905) 5 Columbia Law Review, 261; Estoppel by Assisted Representation, (1905) 5 Columbia Law Review, 456; Agency by Estoppel: A Reply, by W. W. Cook, (1906) 5 Columbia Law Review, 34; Basis of Liability of Principal for Acts of Agent, (1905) 18 Harv. Law Rev., 400.

pledge to innocent third persons¹). The earliest of these acts, which may serve as a type of this class of legislation, is the New York Act, originally adopted in 1830²). That act in section 3 provides as follows: "Every factor or other agent entrusted with the possession of any bill of lading, custom house permit, or warehouse keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title who shall be entrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable obligation in writing given by such other person upon the faith thereof." Under other sections of the Act it is provided that taking the goods for an antecedent debt is not sufficient to bring the case within the Act, and that the owner may take the goods back in any case where he repays the advances³).

It is apparent that the general purpose of this Act is to extend the operation of the principles of estoppel⁴). As has already been said, the bona fide pledgee is not protected by the common law merely because of the fact that the owner of the goods has entrusted the possession of his goods to the factor⁵). This Act, however, does protect him⁶). One who makes advances upon goods which he knows do not belong to the factor cannot, however, claim the benefit of the New York Act⁷). The actual possession of the goods must have been entrusted by the owner to the agent⁸). Hence, where the factor obtains the possession of the goods by a fraud or without the owner's consent, his sale or pledge of them will not bind the owner⁹). And a consignee who is not a factor for sale cannot bind the owner under these acts¹⁰). Thus, a mere bailee is plainly not one entrusted with the possession of goods for purposes of sale¹¹). In general it has been held that factor's acts, being in derogation of the common law, should be strictly construed¹²).

IV. DUTIES AND LIABILITIES OF FACTOR TO PRINCIPAL. — A. Duty to Act in Good Faith. — The foremost duty of the factor is that of acting in the utmost good faith with respect to his dealings with his principal¹³). This duty requires him to give his undivided loyalty to his principal, and he therefore is not permitted to make a profit out of the subject of the agency¹⁴). Thus, he may not act for another person whose interest might conflict with that of his principal¹⁵). For example, where a factor for the sale of goods acts also as the agent of the buyer, the principal is entitled to the benefit of any profit he derives as agent for the buyer¹⁶). On the same principle, it is uniformly held that the factor cannot himself buy the goods which

¹) California, Civil Code, secs. 2369, which reads: "A factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership." This section proceeds not upon the principle of ostensible authority but upon that of ostensible ownership. Sec. 2991 of the Civil Code provides: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value." It will be noted that the code does not define "apparent ownership", but the cases hold that merely entrusting one with the possession of property does not create an apparent ownership. Thus, it has been decided that a mere bailee for safe keeping does not come within the provisions of sec. 2991. *Shafer v. Lacy* (1898) 121 Cal. 574. See also Civil Code, California, secs. 2026—2030, 2368. See also *Wisp v. Hazard*, (1885) 66 Cal. 459; Georgia, Code, 1911, secs. 3329, 3369, 3502, 3609, 3610; Maine, Rev. Statutes 1903, c. 33; Maryland,

Gen. Laws 1904, art. II; Massachusetts, Rev. Laws, 1902, c. 68; New York, Cons. Laws, 1909, c. 45, sec. 43; General Code, 1910, secs. 8358—8364, Pennsylvania, Law 14 th April, 1834; Rhode Island, General Laws, 1909, c. 187; Wisconsin, Sanborn & Berryman Annotated Statutes, secs. 3345, 3346. These statutes are reprinted *infra*. — ²) Laws, 1830, c. 179. — ³) Secs. 4 and 5 of the Act of 1830. — ⁴) *Cleveland v. Shoeman*, (1883) 40 Ohio St. 176; *New York Security & Trust Co. v. Lipman*, (1898) 157 N. Y. 551. — ⁵) See ante, Common Law Modifications of the Rule in Regard to Pledge by Factors. — ⁶) *Wisp v. Hazard*, (1885) 66 Cal. 459. — ⁷) *Covell v. Hill*, (1852) 6 N. Y. 374. — ⁸) *Howland v. Woodruff*, (1875) 60 N. Y. 73. — ⁹) *Soltau v. Gerdau*, (1890) 119 N. Y. 380; *H. A. Prentice Co. v. Page*, (1895) 164 Mass. 276. — ¹⁰) *Chicago Taylor Printing Press. Co. v. Lowell*, (1882) 60 Cal. 454. — ¹¹) *Shafer v. Lacy*, (1898) 121 Cal. 574. — ¹²) *Victor Sewing Machine Co. v. Heller*, (1878) 44 Wis. 265. — ¹³) *Story*, Agency, sec. 210; 2 *Clark & Skyles*, Agency, sec. 848. — ¹⁴) *Story*, Agency, sec. 211. — ¹⁵) *Keighler v. Savage Mfg. Co.*, (1858) 71 Am. Dec. 600 (Md.). — ¹⁶) *Id.*

are the subject of his agency, even though he pays for them a fair price¹). The principal has several elections in such case: a) To avoid the sale; b) To ratify the same and collect the purchase price from the factor; c) To charge the factor with the actual price of the goods; or d) If the factor has resold the goods to a third person at an advanced price to hold the factor for the amount so received²). The situation is the same where the factor instructed to purchase goods buys his own goods³). It cannot be said in any of these cases that the factor's act is void, however. The only person who is entitled to complain is the principal, and he may, as well by subsequent ratification as by antecedent authorization, empower the factor to occupy a dual capacity⁴).

Out of the same principle, namely, that of loyalty to his employer, arises the rule that the factor cannot dispute the title of his principal in the goods. Thus, if the proceeds of the sale be attached while in the factor's hands at the suit of a third person, the factor is not allowed to pay the money over to such third person, even under an order of court. The title to the money is not in the agent, and therefore he cannot excuse himself, except by showing that the money was taken from him by legal process in an action brought against him⁵).

His duty to keep his principal fully informed of all matters relating to the subject matter of the agency may also be considered as a branch of this general obligation, although sometimes it more properly falls under the head of his obligation to use care and prudence. An illustration of this duty is afforded by the case where the purchaser becomes insolvent. In such case, the factor must promptly inform the principal that he may take proper measures to secure himself. If he omits to notify his principal, he may be held liable for all the damages which the principal suffers by reason of the omission⁶). The duty to render an account of his sales to his principal within a reasonable time after they are made, and to keep proper books and papers indicating his business transactions is a particular case of the duty to keep the principal informed of whatever is necessary for the latter's protection and guidance⁷).

B. Duty to Exercise Diligence and Prudence. — The factor is under an obligation to employ reasonable diligence and care in the custody and sale of the goods⁸). The standard by which the degree of care is to be measured, however, is not merely that of the ordinary man. The factor, like an attorney in this respect, holds himself out to the world as possessing such a degree of skill and prudence as persons exercising the calling usually possess⁹). It is his duty, therefore, to use such a degree of diligence as is possessed by factors generally. If he has exceptional qualifications and skill, his principal is also entitled to the use of such exceptional qualifications and skill¹⁰). It is sometimes a very difficult matter to determine whether an act or omission was a negligent act or omission, or was a mere error of judgment. If the former, the factor is liable; if the latter, he is not¹¹). The ultimate determination of this delicate question is left to the jury, under proper instructions from the court¹²).

With respect to his duty as to the sale of the goods, he must of course follow his principal's instructions. But suppose that his instructions are to sell the goods to the best advantage. In such a case he will be protected if he sells using reasonable care and prudence¹³). Sometimes even though he disobeys instructions, he may be protected, as where by selling a portion of the goods at a somewhat lower price than that fixed by the principal, he effects a saving for the latter in other respects¹⁴). In all cases, he must sell without unreasonable delay and at the place to which the goods have been consigned to him for sale¹⁵). He has no implied power to reship the goods for sale at another market¹⁶). He must sell at least at the market price: failure to sell at such price would itself be evidence either of bad faith or of negligence¹⁷). Where he sells on credit (which, as we have seen, he has an implied power to do¹⁸), he must use reasonable diligence to ascertain the purchaser's solvency¹⁹).

¹) *Tims v. Miller*, (1892) 34 Am. St. R. 762 (S. C.). — ²) 2 Clark & Skyles, Agency, sec. 848.

— ³) *Keighler v. Savage Mfg. Co.*, (1858) 71 Am. Dec. 600 (Md.). — ⁴) As to ratification, see *Wadsworth v. Gay*, (1875) 118 Mass. 44.

— ⁵) *Barnard v. Kobbé*, (1874) 54 N. Y. 516. — ⁶) *Forrestier v. Bordman*, (1839) Fed. Cas. No. 4945.

— ⁷) 12 Am. & Eng. Encyc. L. (2d Ed.) pp. 666—667. — ⁸) *Story*, Agency, sec. 198.

— ⁹) *National Bank v. City Bank*, (1880) 103 U. S.

668. — ¹⁰) 2 Clark & Skyles, Agency, sec. 850. —

¹¹) *Heineman v. Heard*, (1875) 62 N. Y. 452. —

¹²) *Id.* — ¹³) *Forrestier v. Bordman*, (1839) Fed. Cas. No. 4945. — ¹⁴) *Story*, Agency, sec. 198.

— ¹⁵) 12 Am. & Eng. Encyc. L. (2d Ed.) 658. — ¹⁶) *Pugh v. Porter Bros. Co.*, (1897) 118 Cal. 628. — ¹⁷) *Id.* — ¹⁸) See *supra* section on Implied Powers of Factor. — ¹⁹) *Foster v. Walker*, (1874) 75 Ill. 464.

For an omission of this duty, he is rather strictly held accountable for any loss which his principal may suffer¹). Where he sells on credit, his duty is not terminated by the sale, but he must use reasonable diligence to collect the purchase price²).

No general duty rests on the factor to insure the goods which are the subject of the agency, but a special duty is often imposed by the custom of the particular trade or market, or by the course of dealing with the principal³). Where the duty exists, the factor need only use reasonable diligence to procure insurance; if he is unable to procure it after such efforts, he is not liable. If, however, he fails to exercise any diligence in the matter, he becomes himself liable as an insurer⁴).

When the factor has collected the amount of the purchase price of the goods, it is his duty to keep the proceeds apart from his own funds⁵). If he commingles such proceeds with his own funds, as, for example, when he deposits the proceeds in his own bank account, he will be liable to the principal upon the insolvency of the bank, though he used due care in selecting the bank⁶). In other words, he becomes a debtor to the principal⁷). If he wishes to avoid this absolute responsibility, he may do so by keeping the funds of his principal apart from his own. It cannot be said, however, that he is guilty of a misappropriation of his principal's funds if he does commingle them, for, contrary to the case of other agents, the law is settled in the case of the factor by general custom that he does not commit a conversion by such conduct⁸).

Under the general duty of using reasonable diligence and prudence, the rules in regard to the factor's remittance of the proceeds may well be stated. It is the duty of the factor to retain the proceeds, and not to remit them until he receives directions to that effect and as to the means of remittance⁹). In other words, he is not liable to an action until his principal has instructed him as to the form and time of remittance. If, however, he fails to render an account of sales or otherwise to inform his principal of the sale he may be held liable for ensuing loss upon the ground of negligence. When he follows the principal's directions respecting the transmission of the proceeds of sale, his full duty is performed, and he cannot be held responsible for loss, if it happens that the means of transmission was unsafe¹⁰). Where the remittance is made by the draft of a third person endorsed by the factor, there is some difference of opinion as to whether the factor becomes liable to his principal upon his endorsement. The better view seems to be that if he is not acting under a *del credere* commission, the factor does not become liable to his principal by reason of the endorsement, even though the endorsement is unrestricted, the theory being that the endorsement is solely for the purpose of passing title¹¹). The factor may always escape liability by making his endorsement restrictive, as by writing before his name the words "without recourse." If he does not take this precaution, he will be liable at least so far as concerns bona fide purchasers for value of the paper¹²).

In connection with the duty under consideration, an interesting series of questions arises as to the right of the factor to mingle goods entrusted to him for sale with goods of other principals. Where the goods are of the same kind, quality, and description, as grain or wool, a custom of factors to make such confusion has been sustained¹³). In general and in the case of goods not fungible, always, the factor cannot so intermix the goods of various principals¹⁴).

An essential difference between this duty and that of loyalty is that the violation of this obligation entitles the principal only to damages to the extent to which he has suffered loss, while the breach of the obligation of loyalty often entitles the principal to collect and retain profits that he otherwise would not have acquired. In other words, he need not always show damage in seeking recovery for the breach of the obligation of loyalty, while in his action based on the breach of the present obligation, he must in every case allege and establish the fact of actual damage.

C. Duty to Obey Instructions. — Of a similar nature to that of the duty of loyalty is the duty of the factor to obey his principal's instructions. It matters not whether

¹) *Id.* — ²) 2 Clark & Skyles, Agency sec. 860. — ³) Kingston v. Wilson, (122) Fed. Cas. No. 7823. — ⁴) *Id.* — ⁵) 12 Am. & Eng. Encycl. L. (2d Ed.) 663. — ⁶) Farmers, etc., Nat. Bk. v. Sprague, (1873) 52 N. Y. 605. — ⁷) Vail v. Durat, (1863) 7 Allen (Mass.) 408. — ⁸) *Id.* — ⁹) 2 Clark & Skyles, Agency, sec.

855. — ¹⁰) Muller v. Bohlens, (1809) Fed. Cas. No. 9914. — ¹¹) 1 Randolph, Commercial Paper (2d Ed.) secs. 383—384. — ¹²) Lewis v. Brehme, (1870) 3 Am. Rep., 190 (Md.). — ¹³) Davis v. Kobbe, (1886) 1 Am. St. Rep. 663 (Minn.). — ¹⁴) 12 Am. & Eng. Encyc. L. (2d Ed.) p. 656.

the instructions are given at or before the consignment arrives, or whether they are subsequently given or modified¹). In any event, the principal may give or modify instructions as he pleases, and it is the factor's duty to follow the instructions. No usage or custom will warrant the factor in disobeying his instructions²). And, in general, the good faith of the factor, or the fact that he desires to benefit his principal, does not excuse his violation of his duty in this respect³).

The instructions to the factor must be express, and if they are ambiguous, the factor is not to be held liable because he makes a reasonable error in interpreting them⁴). There is no particular form, however, which the instructions must take. It is sufficient if a wish be communicated by the principal to the factor. Such a wish is the equivalent of a command⁵). Where goods are sent to a factor to be sold on terms mentioned in the communications accompanying the consignment, the factor will be held bound by such terms, provided he accepts the consignment without dissent⁶).

It should be noted that while every violation of instructions gives at least a right of action on the part of the principal against the factor for nominal damages⁷), the factor is in general liable only for such damages as are the proximate results of his disobedience⁸). Thus, where a factor neglected to sell in accordance with instructions, he was held not to be liable for the accidental destruction of the goods by fire⁹). He would, however, in such a case be liable for the depreciation in market value of the goods after the date he should have sold them, as well as for their actual deterioration in quality by reason of the lapse of time without any supervening accidental cause¹⁰).

The rule imposing the duty upon the factor to obey instructions is not without reasonable exceptions. The chief exceptions are as follows:

1. The factor is not liable for failing to follow instructions where it was impossible for him to do so¹¹).

2. The factor may in cases of unforeseen emergency deviate from instructions, where he is unable to communicate with his principal¹²);

3. Where the factor has made advances on account of the consignment, and the principal after demand refuses or neglects to repay the amount of such advances within a reasonable time after such demand, the factor may sell sufficient of the goods to reimburse himself, even though at a lower price than that fixed by the instructions of the principal¹³). It is manifest that this exception in favor of the factor is essential to prevent great injustice to him, who might otherwise by the obstinacy or folly of the principal be forced to lose the amount of advances made by him in good faith. Some American cases treat the factor's power to sell as a power coupled with an interest and therefore irrevocable¹⁴). The principal cannot, therefore, after the advances have been made so alter his instructions as to interfere with the factor's power of sale. But other cases hold that the power is irrevocable only where the advances constitute the consideration for an agreement that the power shall not be revocable¹⁵). Of course, where the factor has expressly promised to sell the goods at a certain price or to hold them for a certain time, he will not be permitted to exercise the right to sell for reimbursement of his advances, in the face of such express agreement¹⁶). And in any case the general rule in regard to the right of sale for reimbursement is subject to be controlled by the special agreement between the principal and the factor¹⁷).

It is perhaps not necessary to repeat what has already been said with regard to the factor's duty of diligence, that the factor's breach of duty in failing to obey instructions may be ratified by the principal, who, with full knowledge of the vio-

¹) *Pulsifer v. Shepard*, (1864) 36 Ill. 513. — ²) *Barksdale v. Brown*, (1819) 9 Am. Dec. 720 (S. C.), where the factor who was instructed to sell for cash let the purchaser take the goods on a week's credit. — ³) *Hatcher v. Comer* (1884) 73 Ga. 418. — ⁴) 2 *Clark & Skyles*, Agency, sec. 851 b. — ⁵) *Brown v. McGraw*, (1840) 14 Pet. 479, 494. — ⁶) *Mechem, Agency*, sec. 1008. — ⁷) *Mechem, Agency*, sec. 1009, p. 830. — ⁸) *Dalby v. Stearns*, (1882) 132 Mass. 230. — ⁹) *Lehman v. Pritchett*, (1888) 4 So. 601 (Ala.). — ¹⁰) 12 Am. & Eng. Encyc. L.

(2d Ed.) p. 654. — ¹¹) *Evans v. Root*, (1852) 57 Am. Dec. 512 (N. Y.). — ¹²) *Story, Agency*, sec. 193. *Story* cites as instances of departure from instructions by reason of the necessity of the situation, the case of perishable goods and the case of injured goods sold to prevent further loss. — ¹³) *Brown v. McGraw*, (1840) 14 Pet. 479, 494. — ¹⁴) *Davis v. Kobe*, (1886) 1 Am. St. R. 663 (Minn.). — ¹⁵) *Marziou v. Pioche*, (1858) 8 Cal. 522. — ¹⁶) *Eichel v. Sawyer*, (1890) 44 Fed. 850. — ¹⁷) 12 Am. & Eng. Encyc. L. (2d Ed.) p. 652.

lation of his duty by the factor receives the proceeds of an unauthorized sale or otherwise indicates his acquiescence in the factor's conduct¹).

D. Duties of del credere factors. — The del credere factor is one who for an additional compensation guarantees to his principal the purchase price of goods sold by him²). The fact that this guaranty exists does not in any way affect the relations between the agent and the principal so far as concerns the sale of the goods or the execution of the agency³). American courts generally hold that the del credere factor becomes primarily liable as soon as the term of credit expires (if sold on credit⁴). There is some authority, however, especially in the earlier American cases, to the effect that the del credere factor is only a guarantor, that is, that he is only liable where the purchaser makes default in paying for the goods after a demand for the purchase price⁵). The prevailing American view which makes him liable at once, though the purchaser is not in default, leads to the conclusion that the promise of the factor in order to bind him need not be in writing, under the provision of the Statute of Frauds which requires a promise to answer for the debt, default, or miscarriage of another to be in writing⁶). The promise is an original one and therefore need not be in writing to bind the factor.

Although the del credere agent is primarily responsible, yet this situation does not alter the fact that he is merely an agent. Accordingly, the proceeds of the goods when collected by the del credere agent remain the property of the principal⁷).

V. RIGHTS OF FACTOR AGAINST PRINCIPAL. — The duties of the principal to the factor may be stated as follows:

1. To compensate the factor for his services⁸).

2. To reimburse him for his expenditures in connection with the agency, for his advances made to the principal and for damages suffered by him in carrying out the agency⁹).

As to the factor's right to compensation and the principal's duty to make such compensation, it is sufficient to say that the law will, in the absence of special agreement, imply that the factor is to receive a reasonable commission upon the goods sold by him¹⁰). A ratification of an unauthorized sale by a factor entitles him to such commissions as he would have had the right to claim under an antecedent authority¹¹). The del credere factor is entitled to an additional commission on credit sales, but he cannot claim a del credere commission where the sale is for cash, as in such a case he bears no additional risk¹²).

The factor may lose his right to claim commissions by reason of his fraud, misconduct, or gross negligence in connection with the transaction of the subject matter of the agency. It seems, however, that he does not forfeit all rights to a commission unless he has been guilty of bad faith or of such a degree of negligence as may be considered the equivalent of bad faith¹³).

The principal must reimburse the factor for all expenditures made by him in connection with the consignment, as, for example, the expense of preparing for the market goods which have been injured in transit¹⁴). He must also repay all advances reasonably made by the factor in good faith on account of the goods¹⁵). In most jurisdictions, the factor may recover against the principal after a reasonable time has elapsed without first proceeding to sell the goods¹⁶). Some jurisdictions, however, hold that a resort must be had first against the goods, and that the principal is personally liable only for the balance remaining due after their sale¹⁷). There would seem on principle to be no reason for creating a species of pledge or security differing from all other kinds. The right of reimbursement may also be lost by the factor's bad faith¹⁸).

¹) See ante, section on Duty to use Diligence and Prudence. — ²) Bouvier, Law Dictionary. — ³) 9 Am. & Eng. Encyc. L. (2d Ed.) 183. — ⁴) 2 Clark & Skyles, Agency, sec. 862. — ⁵) Mechem, Agency, sec. 1014. — ⁶) Bullowa v. Orgo, (1898) 41 Atl. 494; In re Taft (1904) 133 Fed. 511; Albin Phosphate Co. v. Wyllie, (1896) 77 Fed. 541; Tustin Fruit Association v. Earl Fruit Co., (1898) 53 Pac. 693 (Cal.); Cushman v. Snow, (1904) 71 N. E. 529. — ⁷) 9 Am. & Eng. Encyc. L. (2d Ed.) p. 183. — ⁸) Story, Agency, sec. 326. — ⁹) Story, Agency, secs. 335, 339. — ¹⁰) Turnbull v. Pomeroy,

(1885) 140 Mass. 117. — ¹¹) Lubert v. Chauviteau, (1853) 3 Cal. 458. — ¹²) 9 Am. & Eng. Encyc. L. (2d Ed.) 184. — ¹³) Story, Agency, secs. 331—334a. — ¹⁴) Mason v. Bradley, (1889) 74 Wis. 189. — ¹⁵) Joseph P. Murphy Co's. Estate, (1906) 214 Pa. St. 258; 5 L. R. A. (N. S.) 1147. — ¹⁶) Dolan v. Thompson, (1879) 126 Mass. 185. — ¹⁷) This is the rule in New York. Gihon v. Stanton, (1854) 9 N. Y. 476. See also 12 Am. and Eng. Encyc. L. (2d Ed.) 674. — ¹⁸) Dodge v. Tileston, (1832) 12 Pick. 328.

The principal is bound to indemnify the factor for all losses sustained by him through the assumption of the agency¹). Thus, if a third person recovers damages against the factor for selling the goods which in fact belonged to such third person, the agent may recover the amount that he is forced to pay under such judgment from the principal²). So, where the principal refuses to perform a proper contract and the factor is forced to settle with the purchaser by paying him the damages sustained, the principal is bound to make indemnity³).

VI. THE FACTOR'S RIGHTS AGAINST THE GOODS. — The Factor's Lien. —

The factor has a lien upon the goods in his possession, which have been consigned to him by the principal, not only for his commissions, advances, and disbursements in connection with the particular consignment, but also for the general balance of account due to him from his principal⁴). His lien also extends to the proceeds of the sale, in whatever form they may be, whether money or securities taken for the purchase price⁵). In other words, he is entitled to retain from the moneys collected by him so much as is necessary to satisfy his rightful demands, and he may decline to turn over the goods or the paper representing their purchase money until he is paid and reimbursed by his principal. The lien also extends to liabilities incurred by the acceptance of bills or the endorsement of bills or notes for the accommodation of his principal in connection with the transaction of the business of the principal⁶). He has no lien, however, on account of debts owing to him from the principal, not arising out of the relation of principal and factor⁷).

It should be observed that the factor's lien is wider than that of bailees generally at the common law. Thus, a carrier is entitled to a lien for the charges in connection with the particular shipment⁸); there are, however, certain agents in a somewhat similar position at common law, notably, bankers and attorneys⁹). These agents, as well as factors, are entitled to retain the proceeds of the agency to satisfy a general balance of account¹⁰).

The factor's lien may be overcome by proof of a special agreement to the effect that the factor was not to have the right to detain for his commissions and advances. But the burden of showing the existence of such agreement is on the principal¹¹).

The factor's lien is dependent on possession. The factor must have either an actual or a constructive possession to maintain it, and the lien is lost so far as the goods are concerned by the factor's parting with such possession¹²). The possession of the factor must have been obtained legally and without fraud¹³). A constructive possession by reason of the possession of negotiable documents of title drawn in the factor's name would seem to be equivalent to actual possession for all purposes¹⁴). But a non-negotiable document upon which the bailee has not yet attorned does not give the absolute means of obtaining possession, and would therefore seem to be insufficient to protect the factor as against creditors, unless, indeed, there be an express agreement with the principal which would have the effect of creating an equitable lien¹⁵). The factor possessing a non-negotiable document of title may, however, by procuring the bailee to attorn to him become the sole person entitled to possession of the goods¹⁶). Such a transaction would in effect be the delivery of the goods by the factor to such bailee to hold for his order.

As said before, the factor's lien on the goods may be enforced by his sale of sufficient goods to satisfy his claim¹⁷). He must not, however, sell more goods than sufficient for that purpose, and if he does so, he renders himself liable as a

1) *Fidelity Ins. Co. v. Roanoke Iron Co.*, (1898) 91 Fed. 19; *Willingham v. Rushing*, (1898) 31 S. E. 130 (Ga.). — 2) *Story, Agency*, sec. 339. — 3) *Searing v. Butler*, (1873) 69 Ill. 575. — 4) *Story, Agency*, sec. 376. See *Civil Code, California*, sec. 3053. — 5) *Vail v. Durant*, (1863) 7 Allen, 408; *Brander v. Philipps*, (1842) 16 Pet. 121, 129. It has been held that the lien extends to the proceeds of an insurance policy upon the goods. *Johnson v. Campbell*, (1876) 120 Mass. 449. See also, as to the extent of the factor's lien, *Plattner Improvement Co. v. International Harvester Co.*, (1904) 133 Fed. 376; *Wright v. Ellwood, etc., Tube Co.*, (1904) 128 Fed. 462. — 6) *Vail v. Durant*, (1863) 7 Allen, 408. —

7) 12 Am. & Eng. Encyc. L. (2d Ed.) 680. —

8) *Story, Agency*, sec. 353. — 9) *Id.* — 10) That the factor's lien is a general one, that is, that it extends to the general balance, see *Johnson v. Clark*, (1898) 50 N. E. 762 (Ind.); *Lafferty v. Hall*, (1898) 44 S. W. 426. — 11) 2 *Clark & Skyles, Agency*, sec. 868. — 12) *Elwell v. Coon*, (1900) 46 Atl. 580 (N. J.); *Rosenbaum v. Hayes*, (1901) 86 Nev. 973. — 13) *Rochester Bank v. Jones*, (1851) 55 Am. Dec. 290 (N. Y.). — 14) *Williston, Sales*, sec. 408. — 15) *Williston, Sales*, sec. 413. — 16) *Williston, Sales*, sec. 285. — 17) See section on *Duty to Obey Instructions*. See also *Civil Code, California*, sec. 2027.

tortious converter of all the goods¹). The sale should be conducted in the manner that a pledgee's sale is had, — that is, the factor should give his principal reasonable notice of his intention to sell and of the time and place of sale, and the sale must be made at public auction²). If this method of sale is impossible, for example, by reason of the inability to give actual notice to the principal, the factor may proceed in equity to foreclose the lien³). It has already been pointed out that, in a few jurisdictions, the factor must proceed against the goods before seeking to hold the principal personally⁴).

Among the means by which the lien may be waived or lost are the following:

1. By agreement between the parties;
2. By parting with the possession voluntarily.

However, where the goods are sold in accordance with the principal's instructions, the lien of the factor attaches to the proceeds of the sale.

3. By failing to assert lien when his principal demands from him the goods, and refusing to deliver upon grounds other than his right to the lien.

4. By misconduct of the factor, as, for example, by refusing to render an account to his principal.

5. By the tender by the principal of the amount due for advances, etc.⁵).

It is perhaps needless to state that the factor has no lien as against the real owner where the goods do not belong to the principal⁶).

VII. LIABILITY OF FACTOR TO THIRD PERSONS. — The factor who, according to instructions sells the goods, disclosing his agency, is not responsible to third persons⁷). If, however, the agent does not disclose the fact of his agency, he renders himself liable as a principal⁸). Thus, where a factor sells goods with a warranty of quality, but does not disclose his agency, the buyer may hold him liable for any damages occurring by reason of the breach of the warranty⁹). It is no defence to the agent that the third person might also hold his principal when discovered, in cases where the principal or the custom of the trade has authorized the giving of the warranty.

It was at one time supposed that the case of factors for a foreign principal stood upon different principles from the case of the ordinary factor, and that such factor became liable, as a matter of law, whether his agency was disclosed or not. The rule generally prevailing at present is that there is no such absolute presumption, but that it is a question of fact whether exclusive credit was given to the factor or not¹⁰).

A factor, like every other agent, warrants his authority to those who deal with him¹¹). If, therefore, he has no authority, actual or ostensible, to sell goods, while his act cannot bind his principal, his implied representation of authority is sufficient to found an action against him on the part of the third person who has been injured¹²). But where there is an ostensible authority, or where the principal is estopped to deny the authority, no such action will lie against the factor, for the third person cannot show in such a case that he has suffered damage.

VIII. RIGHTS OF FACTOR AS AGAINST THIRD PERSONS. — The factor may maintain an action in his own name for the price of the goods sold by him, and that irrespective of the question whether or not he disclosed his agency to the purchaser¹³). This principle forms an exception to the general rule in regard to the right of an agent to sue, which is that an agent cannot maintain an action in his own name against third persons concerning the subject matter of the agency¹⁴). The right to maintain actions in his own name extends to cases of other wrongs as well as that of the breach of the obligation to pay the purchase price¹⁵). Thus,

¹) *Blaisdell Co. v. Lee*, (1900) 127 N. C. 365. — ²) Civil Code, California, sec. 2027. — ³) 12 Am. & Eng. Encyc. L. (2d E.) 687. — ⁴) See section on Duty to Obey Instructions. — ⁵) 2 Clark & Skyles, Agency, sec. 872. — ⁶) 2 Clark & Skyles, Agency, sec. 870. — ⁷) Of course he may make himself liable by express agreement, or is liable where the third party refuses to give credit to his principal but insists on dealing with the agent alone, *Story, Agency*, secs. 261—262. — ⁸) *Story Agency*, sec. 266. — ⁹) *Hastings v. Lovering*,

(1824) 2 Pick. 214. — ¹⁰) 2 Clark & Skyles, Agency, sec. 874. — ¹¹) *Story, Agency*, sec. 264. — ¹²) It is immaterial that the agent thought himself possessed of the authority. *Mechem, Agency*, secs. 541, 551. California Civil Code, sec. 2342, provides: "One who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes." — ¹³) *Wolfe v. Missouri Pacific R. R. Co.*, (1888) 10 Am. St. R. 331. — ¹⁴) *Roberts v. Burr*, (1901) 135 Cal. 156. — ¹⁵) 2 Clark & Skyles, Agency, sec. 878.

actions for injuries to the goods may be maintained by the factor in his own name. The factor's right to sue for the price of goods or for injuries to them is, however, subject to the principal's right to assume control of the litigation¹). But where the factor has a lien upon the goods, the principal is not allowed to defeat it by intervening in the litigation²). In cases where the factor sues, the third party may avail himself of any defence or set-off against the factor as well as against the principal³).

In the case of sealed instruments or of negotiable instruments taken in the name of the agent, the action at common law must be in the name of the latter alone⁴). In such a case, the principal cannot sue in his own name, although he will be entitled to direct the litigation brought in the agent's name.

IX. LIABILITY OF PRINCIPAL TO THIRD PERSONS. — The principal is bound to third persons:

1. By all contracts which he expressly authorized the factor to make;
2. By all contracts which he impliedly authorized the factor to make;
3. By all contracts made by the factor which though in violation of instructions are such as are apparently within the scope of the factor's authority to make;
4. By all contracts made by one who is permitted by the principal to be held out as his agent for a particular purpose, though in fact no such relation exists; and
5. By all contracts, which, though entered into with an original absence of authority, have been ratified by the principal with full knowledge⁵).

Private instructions given to the factor, but not known nor presumed to be known by the third person, are not binding upon such third person dealing with the factor⁶).

It makes no difference in the liability of the principal that the contract was entered into in the agent's name (except in the cases of negotiable paper and sealed instruments). Though the fact of agency as well as the name of the agent was undisclosed, the third person with whom the contract was made, upon learning the name of the principal may hold him liable⁷).

X. LIABILITY OF THIRD PERSONS TO PRINCIPAL. — The principal, whether disclosed or undisclosed, may sue upon the contracts made for his benefit by the factor⁸). And the right of the principal to sue the purchaser is not affected by reason of the fact that the factor has sold the goods of several principals to one purchaser, provided the price of each principal's goods can be determined⁹). If the factor, however, takes a single note from the purchaser for the purchase price, the question whether or not the principal can sue has been answered differently in different jurisdictions. In Massachusetts, where the taking of a promissory note is *prima facie* payment, it has been held that the principal cannot in case a note is taken sue the purchaser¹⁰). In New York, however, where taking a note does not give rise to the presumption of payment, it has been held that the principal may sue, notwithstanding the taking of the note¹¹). In any case where the principal assumes control of the suit, the right of the factor to his lien must be protected¹²).

The purchaser of the goods may, in cases where the factor acted for an undisclosed principal, plead any defense in an action by the principal which he might have pleaded against the agent. Thus, payment to the factor before notice of his agency or before notice from the principal not to pay the factor will avail against the principal in his action for the price. A set-off existing against the factor at the time of the sale of the goods by him may also be pleaded by the purchaser, in cases where the purchaser relied upon the factor as the owner. The right of the buyer to set-off defenses against the factor in an action brought by the principal exists, however, only in cases where there is no notice, actual or constructive, that the factor is, in fact, an agent¹³).

Except where modified by legislation of the character embodied in the Factors Acts, or in particular cases by the application of the principles of estoppel, the

¹) *Beardsley v. Schmidt*, (1904) 98 N. W. 235 (Wis.). — ²) *Story*, Agency, sec. 403. — ³) *Story*, Agency, sec. 404. — ⁴) *Story*, Agency, secs. 393—394. — ⁵) *Huffcut*, Agency, secs. 100—109. — ⁶) *Higgins v. McCrea*, (1886) 116 U. S. 671, 680. — ⁷) 2 *Clark & Skyles*, Agency, sec. 880; 1 *Clark & Skyles*, Agency, secs. 457 et seq. — ⁸) 12 Am. & Eng.

Encyc. L. (2d Ed.) 693. — ⁹) *Roosevelt v. Doherty*, (1880) 129 Mass. 301. — ¹⁰) *Id.* — ¹¹) *Corties v. Cumming*, (1826) 6 Cowen (N. Y.), 181. — ¹²) *Girard v. Taggart*, (1818) 9 Am. Dec. 327 (Pa.). — ¹³) For a discussion of matters in this paragraph, see opinion of *Mitchell, J.*, in *Baxter v. Sherman*, (1898) 73 Minn. 434; 72 Am. St. Rep. 631.

principal may follow his goods and retake them from the hands of third persons, who have obtained them from the factor. He has a like right to follow the proceeds of the goods, so long as they may be identified, and until they come into the hands of a bona fide purchaser¹). It follows from this that the principal may recover the proceeds from the hands of a subagent, though the factor has no power to appoint such subagent²).

XI. TERMINATION OF AUTHORITY. — The factor's authority may be determined in the following ways:

1. By expiration of its term, when fixed for a definite time;
2. By the extinction of its subject;
3. By the death of the agent;
4. By his renunciation of the agency;
5. By the agent's incapacity, such as insanity, bankruptcy, and the like³).

Where the agent's power is not coupled with an interest, it is also terminated (at least as to persons having notice):

1. By revocation by the principal;
2. By death of the principal; and
3. By the principal's incapacity to contract⁴).

It is, of course, needless to state that the authority is also terminated by the full accomplishment of the purposes of the agency⁵).

Neither the death of the principal nor the revocation of the agency can, under the prevailing American view, defeat the factor's rights to sell the goods to reimburse himself for his advances and liabilities⁶). But where the factor has not such interest in the goods and where the agent's authority has not been given for valuable consideration or by way of security, the principal may at his will revoke the agency, although it is expressly made irrevocable by the terms of the grant⁷).

Revocation may be either express or by implication. A sale by the principal himself of the goods which are the subject of the agency is an instance of revocation by implication⁸). Another instance of revocation by implication is the dissolution of a partnership⁹). The latter rule seems to be an unfortunate application of the prevailing common law theory of partnership. The death of one member of a firm thus has the effect of terminating all agencies.

A revocation by the principal does not take effect until notice of such revocation is given to the agent. Until that time his powers continue¹⁰). And a purchase by one who has had previous dealings with a factor without notice of revocation of his agency, will be protected. The notice should not only be given to the factor but also to those who have been in the habit of dealing with him¹¹). Death or insanity of the principal or the agent immediately revokes the agency, and transactions accruing after such death or insanity must be decided on principles of quasi-contract, not on principles of contract, for the factor's powers cease immediately upon death or insanity of the principal, except so far as concerns his lien.

XII. BROKERS. — The general principles which have been stated with respect to factors apply also to brokers, subject to the necessary changes in the application of those principles arising from the different situation of the broker. The broker is a mere middleman or negotiator, and therefore is not entrusted with the possession of the goods¹²). If he is also entrusted with the possession of goods for the purposes of sale, he becomes to that extent a factor. From the fact that he has not the possession of the goods, it follows that he cannot maintain actions respecting them; differing materially in this respect from the factor¹³). Nor is he under any obligation to the purchaser or to his principal with regard to the delivery of the goods¹⁴). For the same reason, he has no right to contract in his own name without the consent of his principal, though this principle does not apply to brokers upon the stock

¹) 12 Am. & Eng. Encyc. L. (2d Ed.) 695—696. See also *Bills v. Schliep*, (1903) 127 Fed. 103; *Childs, etc., Co. v. Waterloo Wagon Co.*, (1901) 167 N. Y. 576. — ²) *Chickering v. Hosmer*, (1815) 12 Mass. 185. — ³) Civil Code, California, sec. 2355. 1 *Clark & Skyles, Agency*, secs. 151, 156. — ⁴) Civil Code, California, sec. 2356. — ⁵) 1 *Clark & Skyles Agency*, sec. 154. — ⁶) *Willingham v. Rushing*, (1898) 31 S. E.

130 (Ga.); *Field v. Farrington*, (1869) 10 Wall. 141. — ⁷) *Outerbridge v. Campbell*, (1903) 84 N. Y. Supp. 537. — ⁸) 1 *Clark & Skyles, Agency*, sec. 170b. — ⁹) 1 *Clark & Skyles, Agency*, sec. 170c. — ¹⁰) *Jones v. Hodgkins*, (1872) 61 Maine, 480. — ¹¹) *Id.* — ¹²) *Story, Agency*, sec. 28. — ¹³) *Hass v. Ruston*, (1896) 56 Am. St. Rep. 288, 294 (Ind.). — ¹⁴) *Story, Agency*, sec. 32.

exchange who have the implied power to buy and sell in their own names¹). In another very material respect, the fact that he owes no duties with reference to the possession of goods differentiates him from the factor; he has no power by implication to receive payment for goods sold by him, nor to collect the purchase price of such goods²). The broker has only implied power to sell for cash, not on credit³).

Like the factor, the broker can neither buy from nor sell to himself⁴). Nor can he, without the consent of the person who first employs him, act also as broker for the other party in the transaction, and, of course, even though his own principal authorizes him to act for the other party, he owes a duty to the second party in the transaction to inform him of his agency under the first⁵). The reason for this disqualification is manifestly that the interests of buyer and seller are antagonistic, and the broker cannot faithfully serve two masters⁶). To a certain extent, by the usages of particular kinds of business, a broker may be authorized to act for both persons, where there is no discretion imposed upon him. But such custom must be known to his employers and cannot go to the extent of warranting the broker to act for both parties where their interests are divergent and a discretion is involved⁷). To the general rule that a broker cannot represent both sides in a transaction, a minor exception exists in the rule that he is entitled to sign the memorandum of sale for both parties, required by the Statute of Frauds to be signed by the parties or their agent duly authorized⁸). This, of course, is a merely formal act. If a broker accepts commissions from the other side, he not only forfeits his right to commissions from that principal but may be required to pay over to his principal the commission wrongfully received⁹).

The broker has no lien upon any goods of his principal which may come to his hands — as, by purchase. If entrusted with goods for sale, he has a lien, not as a broker but as a factor¹⁰).

XIII. AUCTIONEERS. — The auctioneer is in effect a factor with a limited power of sale¹¹). Generally speaking, however, he is one exercising a regularly licensed calling, though there are also in many States statutes requiring both factors and brokers to have licenses. Still, the business of an auctioneer is more generally regarded as a calling of a public nature than the business of the other agents named¹²). Like the factor, and unlike the broker, the auctioneer may sue in his own name for the goods or for the purchase price¹³). Generally speaking, he can sell goods only for cash¹⁴), so that the power to sue for the purchase price is not often exercised. He is, of course, the exclusive agent of the vendor until the property is sold by the acceptance of the purchaser's bid¹⁵). He then becomes the vendor's agent for the purpose of signing the memorandum of sale required by the Statute of Frauds¹⁶). This is really, it seems, an agency created by operation of law, and is irrevocable by the vendee. The latter cannot after the goods are knocked down to him revoke the power of the auctioneer to sign a binding memorandum¹⁷).

What has been said with regard to the powers, duties, and liabilities of factors applies to the case of the auctioneer, allowing for the primary difference in the nature of the agency.

An auctioneer has only the following authority from the vendor, unless otherwise specially authorized: 1. To sell at public auction to the highest bidder; 2. To sell for cash only (unless by custom the articles are sold on credit); 3. To prescribe reasonable terms and rules of sale; 4. To deliver the thing sold on payment of the price; 5. To collect the price; 6. Where it is the custom, to warrant the quality and quantity of the thing sold, and, always, to warrant the title of his principal to the thing sold; and 7. To do whatever is necessary to carry out these powers¹⁸).

¹) *Hass v. Ruston*, (1896) 56 Am. St. Rep. 288, 294 (Ind.). — ²) *Higgins v. Moore*, (1866) 34 N. Y. 417 (holding that a local custom authorizing him to receive payment is not sufficient to overcome the rule of law). — ³) 2 Clark & Skyles, Agency, sec. 755. — ⁴) *Stewart v. Mathes*, (1873) 32 Wis. 344, 350. — ⁵) *Walker v. Osgood*, (1867) 98 Mass. 348. — ⁶) *Bell v. McConnell*, (1881) 37 Ohio St. 396. — ⁷) *Walker v. Osgood*, (1867) 98 Mass. 348. — ⁸) *Story, Agency*, sec. 28. — ⁹) 2 Clark & Skyles, Agency, secs. 765,

781. — ¹⁰) *Story, Agency*, sec. 34. — ¹¹) *Story, Agency*, sec. 27; *Civil Code, California*, sec. 1792. — ¹²) 2 Clark & Skyles, Agency, sec. 887. — ¹³) 2 Clark & Skyles, Agency, sec. 902. — ¹⁴) *Civil Code, California*, sec. 2362, subs. 2. — ¹⁵) *Story, Agency*, sec. 27. — ¹⁶) *Civil Code, California*, sec. 2363. — ¹⁷) An English authority to this point is *Van Praagh v. Everidge*, (1903) 1 Ch. 434 (C. A.); (1902) 2 Ch. 266. — ¹⁸) *Civil Code, California*, sec. 2362.

Statutes on Factors.

California.

Civil Code.

Sec. 2026. Factor, what. A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser.

Sec. 2027. Obedience required from factor. A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

Sec. 2028. Sales on credit. A factor may sell property consigned to him on such credit as is usual; but, having once agreed with the purchaser upon the term of credit, may not extend it.

Sec. 2029. Liability of factor under guaranty commission. A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

Sec. 2030. Factor cannot relieve himself from liability. A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself from responsibility therefor without the consent of his principal.

Sec. 2368. Actual authority of factor. In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted: 1. To insure property consigned to him uninsured; 2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same; and, 3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

Sec. 2369. Ostensible authority. A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

Sec. 2991. Real owner cannot defeat pledge of property transferred to apparent owner for the purpose of pledge. One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value.

Sec. 3053. Lien of factor. A factor has a general lien, dependent on possession, for all that is due him as such, upon all articles of commercial value that are entrusted to him by the same principal.

Georgia.

Code, 1911.

Sec. 3329. Liens established. The following liens are established in this state: . . .

11. Liens in favor of innkeepers, boarding-house keepers, carriers, livery-stable keepers, pawnees, depositaries, bailees, factors, acceptors, and attorneys-at-law.

Sec. 3362. Liens of pawnees, etc. Pawnees, factors, bailees, and acceptors shall have such liens as are in this code designated. Such liens shall be inferior to liens for taxes, liens of which such persons had actual notice before becoming creditors,

special liens for rent, liens of laborers, liens or mortgages duly recorded, judgment liens, and other general liens reduced to execution and levied.

Sec. 3369. Liens of factors, etc., how satisfied. Liens of factors and acceptors, and of incorporated companies, shall be satisfied by such sale as the usage of the locality where such factors and acceptors reside, and incorporated companies are located, may have established, or may establish.

Sec. 3502. Factor's lien. A factor's lien extends to all balances on general account, and attaches to the proceeds of the sale of goods consigned, as well as to the goods themselves. Peculiar confidence being reposed in the factor, he may, in the absence of instructions, exercise his discretion according to the general usages of the trade; in return, greater and more skillful diligence is required of him, and the most active good faith.

Sec. 3609. When he has a right of action. Generally an agent has no right of action on contracts made for his principal. The following are exceptions: 1. A factor contracting on his own credit . . .

Sec. 3610. For interference with his possession. An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons.

Maine.

Rev. Stats., 1903, c. 33. Principal, Factors and Agents, Warehousemen.

Sec. 1. How far shipper, factor or agent shall be considered the owner of goods under his control. Every person in whose name merchandise is forwarded, every factor or agent entrusted with the possession of any bill of lading, custom-house permit or warehouse-keeper's receipt for the delivery of such merchandise, and every such factor or agent not having the documentary evidence of title, who is entrusted with the possession of merchandise for the purpose of sale, or as security for advances to be made thereon, shall be deemed the true owner thereof, so far as to give validity to any lien or contract made by such shipper or agent with any other person for the sale or disposal of the whole or any part of such merchandise, money advanced, or negotiable instrument or other obligation in writing, given by such person upon the faith thereof.

Sec. 2. Not to extend to prior demands against agent. No person, taking such merchandise in deposit from such agent as security for an antecedent demand, shall thereby acquire or enforce any right or interest therein other than such agent could then enforce.

Sec. 3. Rights of the true owner in such cases. But the true owner of such merchandise, upon repayment of the money so advanced, restoration of the security so given, or satisfaction of all legal liens, may demand and receive his property, or recover the balance remaining as the produce of the legal sale thereof, after deducting all proper claims and expenses thereon.

Maryland.

Poe's Pub. Gen. Laws, 1904, Art. 2. Agents and Factors.

Sec. 1. Who to be treated as true owner of consigned goods. Extent of consignee's right. Any person intrusted for the purpose of consignment or sale with any goods, wares, or merchandise, except agricultural productions, and who shall have shipped or consigned the same in his own name, and any person in whose name any goods, wares, and merchandise shall be shipped or consigned by any other person, shall be taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon for any money or negotiable security advanced or given to or for the use of the person in whose name such goods, wares or merchandise shall be shipped or consigned, or for any money or negotiable security received by him to the use of such consignee, in the same manner as if such person were the true owner.

Sec. 2. Limitations upon consignee's rights. The provisions of the preceding section shall not apply to any case where the consignee shall have notice by the

bill of lading or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security for which such lien is claimed, that the person so shipping or consigning in his own name, or in whose name any goods, wares or merchandise shall be shipped or consigned by any other person is not the actual and bona fide owner thereof.

Sec. 3. When and how far holder of bill of lading or possessory document is to be deemed true owner. Any person intrusted with and in possession of any bill of lading, storekeeper's or inspector's certificate, order for the delivery of goods, or other document showing possession, shall be deemed the true owner of the goods, wares, or merchandise described therein, so far as to give validity to any contract thereafter to be made by such person with any other person or body corporate for the sale or disposal of the said goods, wares, or merchandise, or for the pledge or deposit thereof as a security for any money or negotiable instrument advanced or given on the faith of such documents, or any of them; provided, that such person or body corporate shall not have notice by such document or otherwise, that the person so intrusted is not the actual and bona fide owner of such goods, wares, and merchandise.

Sec. 4. Contracts between factor and third parties, and payments to factor when good against consignor. Any person or body corporate may contract with any agent or factor intrusted with any goods, wares, or merchandise, or to whom the same may be consigned, for the purchase thereof, and may receive the same from such agent, factor, or consignee, and pay him therefor; and such contract and payment shall be good against the owner, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent or factor; provided, that such contract and payment be made in the usual course of business, and that when such contract is entered into or payment made, such person or body corporate shall not have notice that such agent or factor is not authorized to sell the goods, wares, or merchandise, or receive the purchase money for the same.

Sec. 5. Deposit or pledge by factor or holder of bill of lading or possessory document to third parties, for pre-existing debt without notice. If any person or body corporate shall take any goods, wares, or merchandise, or any document mentioned in section 3, in deposit or pledge from any person so intrusted with the same, or to whom the same may be consigned, or who may be intrusted with and in possession of any such bill of lading, storekeeper's or inspector's certificate, order for the delivery of goods, or other such document showing possession, without notice as aforesaid, as a security for any debt or demand existing before the time of such deposit or pledge, then such person shall acquire such right, title, or interest as was possessed and might have been enforced by the person from whom he received the same, and no more.

Sec. 6. Deposit or pledge by factor to third parties with notice. Any person or body corporate may take any goods, wares, or merchandise, or any such document as aforesaid, in deposit or pledge as a security for a pre-existing debt or demand from such agent or factor, knowing him to be such, but with such notice such person or body corporate shall only acquire the right or interest therein which was possessed by such agent or factor at the time of the deposit or pledge; but if such person or body corporate shall have notice that such agent or factor had no authority from his principal to pledge or deposit the same or to part with the possession thereof, in such case such person or body corporate shall acquire no right or interest therein.

Sec. 7. Upon insolvency of factor, principal may collect unpaid purchase money. Set-off. In all cases where an agent or factor shall have made a contract for the sale of goods, wares, or merchandise, or shall have delivered the same in pursuance of any such contract to any person or body corporate, and shall, before the payment of the purchase money for the same, have become insolvent, the principal or owner of the said goods may demand and receive the said purchase money from the person or body corporate indebted therefor, and such person or body corporate shall have no benefit of set-off in any action which may be brought for the recovery of the same, unless such claim or set-off shall have arisen in a course of dealing with the said agent or factor acting as such for the same principal or owner, or from previous advances of money or materials found, or work or labor done for the use or advantage of the said principal or owner.

Sec. 8. When set-off allowed. In no case shall any claim or demand of set-off of a debt due by any agent or factor be allowed against his principal in favor of any person or body corporate receiving goods, wares, or merchandise as aforesaid, in pursuance of a contract of sale or in deposit or pledge, unless such person or body corporate shall have contracted for or received the same on deposit or pledge, without knowledge that such agent or factor had no authority to sell or deposit the same.

Sec. 9. Upon insolvency of factor, principal may recover unsold and unpledged goods. The owner of any such goods, wares, or merchandise in the hands of an agent or factor, unsold and not pledged, may demand and recover the same from such agent or factor, or the trustee of such agent or factor in the event of his insolvency, and in preference to all other creditors of such agent or factor.

Sec. 10. Where third party entitled to set-off, principal may recover surplus of unpaid purchase money or surplus over advances made to factor. The said owner may also recover from any person or body corporate the sum agreed to be paid for the purchase of such goods, wares, or merchandise, subject, however, to the same right of set-off on the part of such person or body corporate, against such agent or factor as is hereinbefore provided in cases where such agent or factor shall have become insolvent; and may demand and recover from such person or body corporate such goods, wares, or merchandise so deposited or pledged, on re-payment of the money or restoration of the negotiable instrument so advanced, and on payment of such further sum of money, or restoration of such other negotiable instrument (if any), as may have been advanced or given by such agent or factor to such owner or on payment of a sum of money equal to the amount of the same, or may recover from such person or body corporate any balance or sum of money remaining in his or its hands as the produce of the sale of such goods, wares, or merchandise, after deducting thereout the amount of the money or negotiable instrument so advanced.

Sec. 11. Owner redeeming goods pledged by insolvent factor to be held to have paid pro tanto any debt due by him to such factor. In case of the insolvency of any agent or factor, the owner of the goods, wares, or merchandise, so pledged and redeemed as provided in the preceding section shall be held to have discharged pro tanto the debt due by him to the estate of such insolvent.

Sec. 12. Title and right of consignees of agricultural products. No consignment of agricultural productions whatever by the grower or producer or other owner to any commission merchant, factor, agent, or other bailee or consignee, for the purpose of sale for the use and benefit of such grower, producer, or other owner shall be deemed or taken to vest in such commission merchant, agent, factor or other bailee or consignee, any other title or right to such articles consigned, than the special right or title to sell and deliver the same to a fair and bona fide purchaser for a valuable consideration.

Sec. 13. Mortgage and pledge of agricultural products by consignee to be void. Every mortgage, pledge, deposit, or other disposal by said commission merchant, factor, agent, bailee, or consignee, of such agricultural productions thus consigned for sale alone, unless with the consent of the grower, producer, or other owner, expressly given, shall be null and void; and no title to said articles, or any of them, shall pass to the person receiving the same, but the title thereto shall remain in the grower, producer, or other consignor thereof, as if no such mortgage, pledge, deposit, or other disposal had been made.

Sec. 14. Agricultural products unsold in hands of insolvent factor, not to pass to his trustee in insolvency. Whenever any commission merchant, factor, agent, or other consignee, shall be discharged under the insolvent laws of this state, no agricultural produce which may have been consigned to him for sale, and which may be on hand at the time of his application and discharge, not sold to a fair and bona fide purchaser for a valuable consideration, shall pass to the trustee of said insolvent, or be in any wise answerable for his debts; but all such agricultural produce so on hand at the time of such application and discharge shall be the property of the grower, producer, or other owner who shall have consigned the same.

Sec. 15. Lien of consignee for advances to owner of agricultural products. Nothing contained in the three preceding sections shall in any manner impair any right of lien which any commission merchant, factor, or agent may have acquired or be entitled to for advances bona fide made, either in money or goods, to any such grower, producer, or owner, on the faith and security of such consignment; but such right of lien shall remain as at common law and mercantile usage.

Sec. 16. This article not to affect legal and equitable rights of owner against factor. Nothing contained in this article shall deprive any principal or owner of goods, wares, or merchandise, of any remedy at law or in equity, which he might have against his agent or factor on any matter or contract between them, or for the violation of any engagement, duty, or debt, for which such agent or factor has heretofore been liable at law and in equity, subject, nevertheless, to the right of such agent or factor to be allowed the benefit of any payments of any debt or damages received and paid from and on such contracts as aforesaid, by any other person or body corporate.

[Sec. 17, added by Laws, 1910, c. 178, relates to real estate agents and brokers.]

Massachusetts.

Rev. Laws, 1902, c. 68. Of Agents, Consignees, and Factors.

Sec. 1. Sales by consignees, when. A factor or other agent who is intrusted with the possession of merchandise or of a bill of lading consigning merchandise to him with authority to sell the same shall be deemed the true owner of such merchandise, so far as to give validity to any bona fide contract of sale made by him.

Sec. 2. Lien of consignee. A shipper who is in lawful possession of merchandise at the time of shipment and in whose name it is shipped for sale shall be deemed the true owner thereof so far as to entitle the consignee to a lien thereon for money advanced or for securities given to the shipper for or on account of such consignment, unless the consignee, at or before the time when he made the advances or gave the securities, had notice by the bill of lading or otherwise that the shipper was not the actual and bona fide owner.

Sec. 3. Same subject. If a person who is intrusted with merchandise has authority to sell or consign the same, a consignee to whom he consigns it shall have a lien thereon for any money or merchandise advanced or for any negotiable security given by him on the faith of such consignment, to or for the use of the person in whose name the consignment or delivery was made, and for any money, negotiable security, or merchandise received for the use of such consignee by the person in whose name the consignment or delivery was made, if such consignee had, at the time of such advance or receipt, probable cause to believe that the person in whose name the merchandise was shipped, transmitted, or delivered was the actual owner thereof or had a legal interest therein to the amount of said lien.

Sec. 4. Lien for advances to consignee. If a consignee or factor, having possession of merchandise with authority to sell the same, or having with such authority possession of a bill of lading, permit, certificate, or order for the delivery of merchandise, deposits or pledges such merchandise or a part thereof or such document with any other person as a security for money or merchandise advanced, or for a negotiable instrument given by him upon the credit thereof, such other person, if he makes such loan, advance, or exchange in good faith and with probable cause to believe that the agent making the deposit or pledge had authority so to do and was not acting fraudulently against the owner of such merchandise, shall, notwithstanding he has notice of such agency, acquire the same interest in and authority over such merchandise and documents as he would have acquired if the agent had been the actual owner thereof.

Sec. 5. Pledge by consignee to secure antecedent debt. If such merchandise or document is accepted in deposit or pledge for an antecedent debt due from such consignee or factor, the person receiving the same shall thereby acquire no other or further right or interest in or authority over or lien upon the same than the consignee or factor might have enforced against the actual owner.

Sec. 6. Effect of three preceding sections. The provisions of the three preceding sections shall not affect the lien of a consignee or factor for the expenses and charges attending the shipment, transportation, and care of merchandise intrusted to him; nor prevent the actual owner of merchandise from recovering it, previous to any pledge thereof, from the consignee or factor or from his assignee in case of his insolvency; nor prevent such owner from recovering any merchandise or document so deposited or pledged, upon tender of the money and restoration of the negotiable security or property so advanced to such consignee or factor, and upon

tender of such further amount of money and restoration of such negotiable instrument or property as may have been advanced or given by the consignee or factor to the owner, or upon tender of an amount of money equal to the amount or value of such merchandise; nor prevent him from recovering from a person with whom such merchandise has been so deposited or pledged any balance of money remaining in his hands as the proceeds of the sales thereof, after deducting the amount or value of the money or negotiable security so advanced thereon.

New York.

Cons. Laws, 1909, c. 45. An Act relating to Personal Property, constituting c. 4 of the Consolidated Laws.

Sec. 43. Factors' act. 1. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof. 2. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit. 3. Nothing contained in the preceding subdivisions of this section shall be construed to prevent the true owner of any merchandise so deposited, from demanding or receiving the same, upon prepayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit. 4. Nothing contained in this section shall authorize a common carrier, warehouseman, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

Ohio.

Gen. Code, 1910.

Sec. 8358. Lien of consignee of merchandise. Every person in whose name merchandise is shipped, or delivered to the keeper of a warehouse, or other factor or agent, to be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon: 1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment, or delivery of merchandise to be shipped, has been made; 2. For money or negotiable security received by the person in whose name such shipment, or delivery of merchandise to be shipped, has been made to, or for the use of, such consignee.

Sec. 8359. Limitation on last section. The lien provided for in the next preceding section shall not exist when such consignee has notice by the bill of lading, or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment or the delivery of the merchandise to be shipped has been made, that such person is not the actual and bona fide owner thereof.

Sec. 8360. In what cases factor or agent deemed true owner. Every factor or other agent, intrusted with the possession of a bill of lading, custom-house permit,

or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, intrusted with the possession of merchandise for the purpose of sale, or as a security for advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument, or other obligation in writing, given by such other person upon the faith thereof.

Sec. 8361. When merchandise deposited by agent as security for antecedent debt. Every person who accepts any such merchandise on deposit from any such agent, as security for any antecedent debt or demand, shall not thereby acquire or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent, at the time of such deposit.

Sec. 8362. Rights of true owner under last two sections. Nothing contained in the next two preceding sections shall prevent the true owner of any merchandise, so deposited, from demanding or receiving it, upon repayment of the money advanced, or on restoration of the security given on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who deposited it; nor from recovering any balance which may remain in the hands of the person with whom such merchandise has been deposited, as the produce of a sale thereof, after satisfying the amount justly due to such person by reason of the deposit.

Sec. 8363. Hypothecation by common carriers and warehousemen. Except as hereinafter provided, nothing contained in this chapter shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate it.

Sec. 8364. Owner's relief by action. In an action therein by the owner of any merchandise or other property, so intrusted or consigned, a court may compel discovery or grant relief against the factor or agent by whom such merchandise or other property has been applied or sold, contrary to law, or against a person who knowingly is a party to such fraudulent application or sale thereof. No answer in such action shall be read in evidence against the defendant making it on the trial of any indictment for the fraud charged in the petition.

Pennsylvania.

Law of 14th April, 1834.

Sec. 1. In what cases consignees to have a lien. Whenever any person intrusted with merchandise, and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person, such other person shall have a lien thereon: I. For any money advanced or negotiable security given by him on the faith of such consignment, to or for the use of the person in whose name such merchandise was shipped or transmitted. II. For any money or negotiable security received for the use of such consignee, by the person in whose name such merchandise was shipped or transmitted.

Sec. 2. To have no lien, where they have notice. But such lien shall not exist for any of the purposes aforesaid, if such consignee shall have notice, by the bill of lading or otherwise, before the time of such advance or receipt, that the person in whose name such merchandise was shipped or transmitted is not the actual owner thereof.

Sec. 3. Persons advancing money on pledge of goods by factor, without notice, to acquire the same interest as if the factor were the owner thereof. Whenever any consignee or factor, having possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt, or order for the delivery of merchandise, with the like authority, shall deposit or pledge such merchandise, or any part thereof, with any other person, as a security for any money advanced or negotiable instrument given by him on the faith thereof; such other person shall acquire, by virtue of such contract, the same interest in and authority over the said merchandise as he would have acquired thereby, if such consignee or factor had been the actual owner thereof: Provided, That such person shall

not have notice by such document, or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise.

Sec. 4. If with notice, to acquire the same interest as the factor had against his principal. If any person shall accept or take such merchandise or document from any such consignee or factor, in deposit or pledge for any debt or demand previously due by or existing against such consignee or factor, and without notice as aforesaid, and if any person shall accept or take such merchandise or document from any such consignee or factor, in deposit or pledge, with notice or knowledge that the person making such deposit or pledge is a consignee or factor only, in every such case, the person accepting or taking such merchandise or document in deposit or pledge, shall acquire the same right and interest in such merchandise as was possessed or could have been enforced by such consignee or factor against his principal, at the time of making such deposit or pledge, and no further or other right or interest.

Sec. 5. Lien for expenses to remain. Owner may recover goods from factor or his assignees, and may redeem goods pledged by factor, or recover the overplus of the proceeds thereof. Nothing in this act contained shall be construed or taken: I. To affect any lien which a consignee or factor may possess at law, for the expenses and charges attending the shipment or transmission and care of merchandise consigned or otherwise intrusted to him. II. Nor to prevent the actual owner of merchandise from recovering the same from such consignee or factor, before the same shall have been deposited or pledged as aforesaid, or from the assignees or trustees of such consignee or factor, in the event of his insolvency. III. Nor to prevent such owner from recovering any merchandise so as aforesaid deposited or pledged, upon tender of the money, or of restoration of any negotiable instrument so advanced or given to such consignee or factor, and upon tender of such further sum of money, or of restoration of such other negotiable instrument, if any, as may have been advanced or given by such consignee or factor to such owner, or on tender of a sum of money equal to the amount of such instrument. IV. Nor to prevent such owner from recovering, from the person accepting or taking such merchandise in deposit or pledge, any balance or sum of money remaining in his hands, as the produce of the sale of such merchandise, after deducting thereout the amount of money or the negotiable instrument so advanced or given upon the security thereof as aforesaid.

Rhode Island.

Gen. Laws, 1909, c. 187. Of Principals and Agents or Factors.

Sec. 1. Lien of consignee for advances. The consignee of merchandise shipped shall have a lien thereon for any money or negotiable security by him advanced upon the faith of such shipment to or for the use of the person in whose name the shipment shall have been made, in the same manner and to the same extent as if such person were the true owner thereof: Provided, at the time of the advance, the consignee shall have had no notice or knowledge that the shipper was not the true owner of such merchandise.

Sec. 2. Apparent ownership of goods is deemed the real ownership for certain purposes. Every person intrusted with and in the possession of goods for the purpose of sale, or of any bill of lading, receipt, or certificate of a warehouse-keeper or inspector, or of any warrant or order for the delivery of goods, shall be deemed the true owner of the goods so by him possessed or described in either of said instruments in favor of the purchaser or pledgee of such goods for money or negotiable security: Provided, such purchaser or pledgee at the time of payment or advance as aforesaid shall have had no notice or knowledge that the possessor of such goods or instrument was not the true owner of such goods by him possessed or in such instrument described.

Sec. 3. Certain bailees are prohibited from selling or pledging such goods. Nothing in the preceding section shall be so construed as to authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may have been committed for transportation or storage only, to sell or pledge the same; nor shall any person taking in deposit or pledge merchandise or goods described in

either of the instruments therein mentioned, from any agent for sale, warehouse-keeper, or inspector, for an antecedent debt, be entitled to any greater interest in such goods or instrument than was possessed by such agent, warehouse-keeper, or inspector at the time of such deposit or pledge.

Sec. 4. Purchases and sales by agents are valid when. All purchases and contracts for the purchase of goods made with, and all payments for goods made to, any agent intrusted therewith, or with or to the consignee thereof, in the ordinary course of business, shall bind the owner of such goods in favor of the purchaser, contractor, or payee, although knowing of the agency or consignment: Provided he had, at the time of such purchase, contract, or payment, no notice or knowledge that such agent or consignee was not authorized to sell or receive payment for such goods.

Sec. 5. Right of true owner to demand goods from agent or consignee, or price from purchaser of the goods, if sold; right to redeem goods pledged, and recover balances from pledgee or agent. Nothing in this chapter contained shall be so construed as to prevent the true owner of any goods shipped, intrusted, deposited, or pledged as hereinbefore described, from demanding the same from his factor, agent, or consignee, before the same shall have been so sold, contracted to be sold, deposited, or pledged; nor to prevent such owner from demanding and receiving from any such purchaser the sum agreed to be paid for the purchase of such goods, subject to any right of set-off on the part of such purchaser against such agent or factor; nor to prevent any such owner from demanding and recovering such goods from any person with whom the same may have been so deposited or pledged as a security for any money or other property advanced or any negotiable security or obligation in writing given as aforesaid, upon repayment of such money or restoration of such other property and satisfaction of such security or obligation in writing so advanced, together with such further sum as shall, with the amount so advanced by such depositary or pledgee, be equal to the money or other property and security or obligation in writing, if any, advanced by such agent or factor to such owner or to the amount for which such agent or factor has a lien on the same goods; nor to prevent such owner from recovering from such depositary or pledgee any balance or sum of money remaining in his hands as the produce of the sale of such goods after deducting therefrom the amount of the money or other property or security in writing so advanced; and the amount so set off and retained by such purchaser or paid by such owner on redeeming such goods or in any manner allowed by him on recovering the same or the produce of the sale thereof, shall be deemed and taken as so much paid by him to and for the use of such agent or factor.

Wisconsin.

Sanborn & Berryman's Stats. 1898.

Sec. 3345. Liens, of consignees for advances. Every consignee of property shall have a lien thereon for any money advanced or negotiable security given by him to or for the use of the person in whose name the shipment of such property is made, and for any money or negotiable security received by such person for his use unless he shall, before advancing any such money, or giving such security, or before it is so received for his use, have notice that such person is not the actual owner thereof.

Sec. 3346. Liens of factors, brokers, etc. Every factor, broker, or other agent intrusted by the owner with the possession of any bill of lading, custom-house permit, warehouse receipt, or other evidence of title to personal property, or with the possession of personal property for the purpose of sale, or as security for any advances made or liability by him incurred in reference to such property, shall have a lien upon such personal property for all such advances, liability incurred, or commissions or other moneys due him for services as such factor, broker, or agent, and may retain the possession of such property until such advances, commissions, or moneys are paid, or such liability is discharged.

X.

COMMON CARRIERS OF GOODS AND
WAREHOUSEMEN

Common Carriers of Goods and Warehousemen.

(By Orrin Kip McMurray, Ph. B., LL. B., of the San Francisco Bar, Professor of Law, University of California.)

Analysis.

I. DEFINITION OF COMMON CARRIER: KINDS OF CARRIERS, 481

II. DUTIES OF COMMON CARRIER

- A. Dependent on Extent to which he Holds Himself out as Carrier, 481*
- B. Duty to Accept Goods for Transportation, 482*
- C. Other Duties at Common Law, 482*
- D. Duties with Respect to the State, 483*

III. BILLS OF LADING

- A. Definition and Form, 483*
- B. Authority to Issue Bills of Lading, 484*
- C. Threefold Character of Bill of Lading, 484*
 - 1. As a Receipt, 484*
 - 2. As a Muniment of Title: Negotiability of Bills of Lading under Statutes, 485*
 - 3. As a Contract, 486*

IV. THE LIABILITY OF THE COMMON CARRIER

- A. At Common Law, 487*
- B. Exceptions to Strict Liability, 488*
 - 1. Loss through "Act of God", 488*
 - 2. Loss through Act of Public Enemy and Public Authority, 489*
 - 3. Loss through Act of Owner and Inherent Nature of Goods, 489*
- C. Statutory Limitations of Liability, 490*
 - 1. Under Revised Statutes ; for Valuables and Losses by Fire, 490*
 - 2. Under Revised Statutes ; Limitation of Liability to Value of Ship and Freight, 490*
 - a) In General, 490*
 - b) Who Entitled to Limit Liability, 491*
 - c) To what Extent do these Sections apply to Foreign Ships, 491*
 - d) Cases Covered by the Sections, 492*
 - e) Remedies for Limitation of Liability, 492*
- D. The Harter Act, 493*
 - 1. In General, 493*
 - 2. Purposes and Interpretation of the Harter Act, 494*
 - 3. The First Two Sections of the Act, 495*
 - 4. The Third Section of the Act : Its General Scope and Effect, 495*
 - 5. Exercise of Due Diligence to Render Ship Seaworthy and Properly Manned, 496*
 - 6. Seaworthiness : Equipment and Manning, 497*
 - 7. Errors and Faults in Navigation, 497*
- E. Limitation of Liability by Contract, 497*
 - 1. In General, 497*
 - 2. May Not Relieve Himself From Consequences of his Own Negligence or that of his Servants, 498*
 - 3. Contracts Limiting Liability Otherwise than for Negligence, 498*
 - 4. Conflict of Laws with Reference to Contracts Limiting Liability, 499*

V. TERMINATION OF CARRIER'S LIABILITY, 500

VI. RIGHTS OF CARRIER, 501

- A. Right to Compensation, 501*
- B. Lien of Carrier, 501*

VII. WAREHOUSEMEN

- A. In General, 502*
- B. Duties of Warehousemen, 502*
- C. Nature of Warehouseman's Receipt, 502*
- D. Warehouseman's Lien, 503*

I. DEFINITION OF A COMMON CARRIER: KINDS OF CARRIERS. — A common carrier is one who undertakes as a business, for hire or reward, to carry from one place to another, the goods of all persons who may apply for such carriage¹). The mere fact that one carries goods for others, from time to time, does not necessarily make him a common carrier. To constitute that status, and to distinguish him from a private carrier, the carrier must hold himself out as willing to carry goods for all who may apply²). If he assumes such public employment, it is immaterial as to the extent of his business or the means used in its conduct. Thus, the owner of a dray or delivery wagon, or of a small canal boat, may be as much a common carrier as a transcontinental railroad company or a transoceanic steamship company³). On the other hand, the owner of a railroad or a steamship is not necessarily a common carrier. Thus, where a railroad was built for use entirely in connection with the private business of its owner, and was used in that business exclusively, the owner of such railroad did not assume the duties a common carrier⁴). So, an owner of a steamship who uses the ship in his own business, does not necessarily become a common carrier under the common law from the fact that he takes on board goods for the accommodation of another person, even though he receives a reward for such service⁵).

Express companies plainly fall within the classification of common carriers. These are companies which undertake for a special rate, to forward goods in somewhat safer custody and to deliver them with somewhat greater certainty than the ordinary common carrier, though employing, except for purposes of local delivery, the means of conveyance of railroad and steamship companies. Though they do not own or control the means of transportation, yet they undertake for the carriage of goods for all persons indifferently, and, hence, have been uniformly held to be common carriers⁶).

On the other hand, sleeping car companies and parlor car companies, which undertake to furnish accommodation for passengers on railroad trains, have been held, notwithstanding that their employment appears to be of a public nature, not to be common carriers of passengers⁷).

II. DUTIES OF COMMON CARRIER. — A. Duty Dependent upon Extent to which he Holds Himself Out as a Carrier. — A carrier by undertaking a public employment does not necessarily hold himself out as a carrier of goods of every kind which may be offered. Thus, a carrier of passengers, as a street railway company, is under no obligation to carry goods generally. But this obligation may, of course, be assumed⁸). So, an ordinary common carrier of goods does not hold himself out as a carrier of goods of great value, such as money or works of art⁹). Sometimes, where the carrier is a corporation, the question whether or not it is a common carrier of such articles must be considered in connection with its charter¹⁰). Thus, if its charter authorizes it to carry goods, wares, and merchandise, it has been held that the company would not be liable for the carriage of bank bills¹¹). However, if the company has departed

¹) 1 Hutchinson on Carriers, sec. 47. —

²) There is some authority to the effect that one who has not held himself out as a carrier for the public may nevertheless be held liable for the extraordinary duties which the common carrier owes in respect to goods delivered to him for carriage. *Gordon v. Hutchinson*, (1841) 37 Am. Dec. 464. But the great weight of authority is to the contrary. 1 Hutchinson on Carriers, secs. 48 et seq.; *Memphis News Publishing Co., v. Railway*, (1900) 75 S. W. 941. — ³) In *Robertson v. Kennedy*, (1834) 26 Am. Dec. 466, the owner of an ox team hauling goods upon a sled was, from the fact that he was engaged in serving all who sought his services, held a common carrier. — ⁴) *Wade v. Litcher, etc., Co.*, (1896) 74 Fed. 517, 33 L. R. A. 255. In *Fleming v. Railroad Co.*, (1901) 89 Mo. App. 129, a belt line engaged in switching trains on its own road from a station to neighboring stockyards was held to be a common carrier. Cf. *Albion Lumber*

Co. v. De Norbra, (1896) 72 Fed. 739. —

⁵) *Allen v. Sackrider*, (1867) 37 N. Y. 341. —

⁶) *Buckland v. Adams Express Co.*, (1867) 97 Mass. 124; *Bank of Kentucky v. Adams Express Co.*, (1876) 93 U. S. 174. "The fact that the business is called that of "forwarder" or "dispatch" company does not alter the liability. *Hutchinson on Carriers*, secs. 71—72. — ⁷) Neither are they inn keepers (another class of persons subject to the duties of a public calling). *Pullman Palace Car Co. v. Hall*, (1899) 106 Ga. 765; 44 L. R. A. 790. Such companies, however, are defined as common carriers under the Interstate Commerce Act. 1 Hutchinson on Carriers sec. 67. — ⁸) 1 Hutchinson on Carriers, sec. 60. — ⁹) *Pfister v. Central Pacific Railroad Co.*, (1886) 70 Cal. 169. — ¹⁰) *Sewall v. Allen*, (1831) 6 Wend. 335, 346; *Citizens Bank v. Nantucket Steamboat Co.*, (1811) 2 Story, 33; 5 Fed. Cas. N. O. 2730; *Pfister v. Central Pacific R. R. Co.*, (1886) 70 Cal. 169. — ¹¹) *Sewall v. Allen supra*.

from its chartered purposes, and has held itself out to the public as a carrier of such articles, only the State or the stockholder can complain of the violation of the charter. It is well settled that the corporation itself cannot set up the defence of ultra vires in such a case in an action brought by a shipper¹⁾.

A person or company engaged generally in the business of a common carrier may, by special contract, adopt a different character²⁾. Thus, where a shipowner grants a charter party by which the hirer becomes entitled to the whole capacity of the ship, the owner is not a common carrier for the voyage, but is an ordinary bailee for hire³⁾. So, where the owner of goods also owns cars which he uses in their transportation, the railroad company merely supplying the road and motive power, the latter has been usually held not a common carrier with respect to such cars and goods⁴⁾. The railroad would seem to be a bailee for hire in such cases.

B. Duty to Accept Goods for Transportation. — The first duty of the common carrier is to accept goods offered to him for carriage⁵⁾. This obligation, however, is not absolute. Thus, the carrier who has held himself out as carrying only certain kinds of goods, cannot be compelled to carry other kinds⁶⁾. And even though he had undertaken to carry goods generally, it is plain that he will not be required to carry articles dangerous in themselves⁷⁾, or the carriage of which is illegal⁸⁾. It has been held, however, that a railroad cannot refuse to carry coal because its quality is inferior and will tend to hurt the market for coal from the section from which it is carried, and thereby decrease the carrying business of the road⁹⁾. And though the goods are proper to be carried, the carrier is not always obliged to accept them. Thus, 1. he is not obliged to accept goods where they are not properly packed¹⁰⁾, or 2. Where press of business will not enable him to carry the goods tendered¹¹⁾, or 3. Where they are tendered at an unreasonable time or place, or at a time or place other than that fixed by the reasonable regulations of the carrier¹²⁾; or 4. Where they are tendered by a person having no authority to deliver them¹³⁾, or 5. Where he would be exposed to unusual risk is he undertakes to carry the goods¹⁴⁾.

Where none of these reasons, nor others of a like character, exist, however, the carrier must carry such proper goods as are properly tendered to him for carriage, and are of the kind as to which he has assumed to be a carrier. If he refuses to carry the goods without just excuse, he is answerable in damages to the owner¹⁵⁾.

C. Other Duties of the Carrier at Common Law. — Besides the duty to receive and carry goods, the carrier owes certain other obligations of a public nature.¹⁾ It

¹⁾ *Smith v. Nashua, etc., R. R. Co.*, (1853) 59 Am. Dec. 364. — ²⁾ The question of the right of the common carrier to limit his liability is considered later under the topic Limitation of Liability. In the cases cited in the following note, the carrier had changed his status from that of a common carrier to that of an ordinary bailee, or, in some cases, to that of a mere agent. — ³⁾ *Lamb v. Parkman*, (1857) 14 Fed. Cas. No. 8020. The general principles of law governing charter parties will be found in the chapter on Contracts, supra. — ⁴⁾ Most of the cases on this subject have been cases of travelling circuses and menageries. *Coup v. Wabash Railway Co.*, (1885) 56 Mich. 111; *Wilson v. Railroad Co.*, (1904) 129 Fed. 774, affirmed, (1904) 133 Fed. 1022. — ⁵⁾ *1 Hutchinson on Carriers*, sec. 111. — ⁶⁾ *Platt v. Lecocq*, (1907) 158 Fed. 723, 731. — ⁷⁾ *California Powder Works v. Atlantic and Pacific Railway Co.*, (1896) 113 Cal. 329 (explosives); *Coup v. Wabash, etc., Ry. Co.*, (1885) 56 Mich. 111 (wild animals). The interstate transportation of explosives is regulated by Acts of Congress of May 30, 1908 (35 U. S. Statutes at Large c. 234) and of March 4, 1909 (35 U. S. Statutes at Large c. 321 secs. 232 et seq.). — ⁸⁾ See article on the Inherent Limitation of the Public Service Duty to Particular Classes, by Professor Bruce

Wyman, of the Harvard Law School, in 23 *Harvard Law Review*, 339 (1910). — ⁹⁾ *Olanta Coal Min. Co. v. Railroad Co.*, (1906) 144 Fed. 150. — ¹⁰⁾ *Union Express Co. v. Graham*, (1875) 26 Ohio St. 595. — ¹¹⁾ *Peet v. Railway*, (1866) 20 Wis. 594. — ¹²⁾ *Cronkrite v. Wells*, (1865) 32 N. Y. 247; *Harp v. Railroad Co.*, (1903) 125 Fed. 445. — ¹³⁾ In such cases though the carrier is not liable for an unlawful interference with the goods if he accepts them from such person in good faith, believing that the latter had the proper authority, he may nevertheless require evidence of authority and refuse to carry unless that evidence is produced. *Fitch v. Newberry*, (1843) 1 Dougl. (Mich.) 1. — ¹⁴⁾ Existence of state of war held an excuse. *Phelps v. Railroad Co.*, (1880) 94 Ill. 548. — ¹⁵⁾ *People v. New York Central, etc., R. Co.*, (1882) 28 Hun. (N. Y.) 543. (In this case mandamus was granted at the suit of the State to compel the railroad to operate its trains.) The duty of carriers, notably railroads, to accept goods offered for transportation is frequently enforced by penalties and fines. Statutes to this effect exist in a number of States. These statutes ordinarily require that the shipper give notice to the railroad as to the amount of freight to be transported or the number of cars required, and require the railroad to furnish the same within a certain time.

is his duty to have and to furnish adequate facilities for the reasonably prompt transportation of goods¹). He will therefore be liable in damages, even though his failure to carry is due to the fact that he has not sufficient means for transportation, unless such circumstances as unusual press of business, strikes on the part of his employees, or the like circumstances, excuse his want of facilities²). 2. It is the duty of the carrier to serve all members of the public alike, and without discrimination as to facilities or rates³). This duty is emphasized by State and Federal laws requiring equality in rates and service, a thing that is not demanded under the common law rule in question. The rule against discrimination, in the absence of statute, does not require an equality of treatment but merely absence of unreasonable discrimination in the matter of rates and facilities⁴). The requirement that no discrimination shall be had among the members of the public does not require that the carrier shall not use his facilities so far as they are not connected immediately with his public duties just as he pleases. Thus, though the matter is one upon which it cannot be said that the rule has been finally settled, the prevailing weight of authority is to the effect that a railroad company may grant special and exclusive privileges at its stations to certain hackmen, porters, or expressmen. The theory upon which the right of the carrier to give such preferences is based is that the carrier is really providing for the public convenience and welfare by granting such monopoly⁵). The detailed discussion of the public duties of the carrier falls outside of the scope of the present work.

D. Duties of Carriers with Respect to the State. — It is not within the scope of this work to discuss the common carrier in his relation to the State. It is sufficient to say that legislation of a most far reaching character has been adopted by the National and State governments for the purpose of requiring carriers to perform their common law duties of equal service without discrimination. A reference to some of the National statutes is had in the note⁶).

III. BILLS OF LADING. — A. Definition and Form. — A carrier may undertake to transport goods without giving any document or receipt for the goods, but such a transaction is very unusual⁷). Usually such a document is given. Technically a bill of lading is a written evidence of a contract of carriage of goods sent by sea for a certain freight⁸). The written contract of the carrier by land, however, is also usually spoken of nowadays as a bill of lading, although other words are often used, as "freight bills," "domestic bills of lading"⁹).

A "clean" bill of lading is one issued by a ship's master, owner, or agent, for the transportation of goods by water, and which is silent as to the manner of stowing the goods. In such case the goods must be stowed under deck, and it cannot therefore be shown by the owner that there was an oral stipulation that the goods might be stowed on deck¹⁰).

In the absence of statute, it seems there is no duty on the carrier to issue a bill of lading, nor is there any duty on the shipper to require one¹¹), though statutes in a few States have imposed this duty upon the carrier¹²). Indeed, historically, the origin of the bill of lading is the desire on the part of the carrier to exempt himself from loss by reason of certain causes¹³).

¹) 5 Am. and Eng. Encyc. L. (2d Ed.) p. 167. — ²) Michigan Central R. Co. v. Barrows, (1875) 33 Mich. 6. — ³) 5 Am. and Eng. Encyc. L. (2d Ed.) p. 177. — ⁴) See article on Business Policies Inconsistent with Public Employment, 20 Harvard Law Review, (1907) p. 511, by Professor Bruce Wyman. — ⁵) Donovan v. Pennsylvania R. Co., (1905) 199 U. S. 272. — ⁶) U. S. Stat. 1909—1910, c. 309, p. 539 (creating Commerce Court); 3 Fed. Stat. Ann. 809; same act 24 U. S. Stat. 379 (1887) (the Cullom Act); 10 Fed. Stat. Ann. 170, 32 U. S. Stat. 847 (the Elkins Act); Fed. Stat. Ann. Supp. 1907, p. 167, 34 U. S. Stat. 584 (1906) the Hepburn Act.) These acts constitute the acts creating the Interstate Commerce Commission and dealing with its powers over carriers engaged in interstate commerce. 7 Fed. Stat. Ann. 336; 26 U. S. Stat. 210 (1890) (the Sherman

Act) dealing with combination in restraint of trade and held to include interstate carriers in U. S. v. Trans-Missouri Freight Association (1896) 166 U. S. 341 and U. S. v. Joint Traffic Association, (1897) 171 U. S. 505. Other legislation dealing with safety of passengers and employees and other matters affecting interstate commerce may be found of Watkins on Shippers and Carriers, 1909. The principal Federal acts are reprinted infra, as well as certain State acts. The Sherman Act is reprinted under Monopolies and Combinations, infra. — ⁷) Missouri etc. R. Y. Co. v. Patrick, (1906) 144 Fed. 632. — ⁸) Porter, Bills of Lading, secs. 1 and 2. — ⁹) 4 Am. and Eng. Encyc. (2d Ed.) 510. — ¹⁰) The Delaware, (1871) 14 Wall. 579. — ¹¹) Johnson v. Stoddard, (1868) 100 Mass. 306. — ¹²) E. g., Texas, Rev. St. 1895, art. 322. — ¹³) Porter, Bills of Lading, sec. 13.

In the case of bills of lading issued for carriage of goods by sea, it is the custom to issue them in sets of three. Each of these is an original and the three constitute but one bill of lading¹). In domestic carriage, it is the custom to issue duplicates, but such duplicates are merely copies of the original bill, so that if the bill be made "or order," the carrier will not be justified in surrendering the goods to the consignee without the delivery of the original²).

The bill of lading usually contains the date and place of shipment, the name of the shipper, carrier, and consignee, the name and place of destination and the terms upon which the goods are carried³).

B. Authority to Issue Bill of Lading. — For centuries the master of a vessel has been considered as having implied authority to issue bills of lading for goods actually delivered to the vessel⁴). It is well settled, however, that this power extends only to goods actually received⁵). Whether a bona fide purchaser or indorsee of a bill of lading given by a master or other agent, where goods are in fact shipped, may recover against the carrier is a different question, and one upon which great divergence of opinion exists. The matter will be considered in another place⁶).

Questions frequently arise with respect to the power of a carrier to issue a bill of lading binding a connecting carrier to whom the first carrier is to deliver the goods. Unless the initial carrier actually had the authority to bind the connecting carrier, or unless the latter ratifies his previous want of authority, the bill will not be binding on the second carrier. The second carrier will, under his public duty, be obliged to accept the goods from the first carrier, and hence cannot be considered as having ratified the bill of lading by merely transporting the goods⁷). Where the first carrier signs without authority, it would seem that he is liable for any damages which the shipper suffers by his unauthorized act, upon the theory that an agent impliedly warrants his authority.

C. Threefold Character of Bill of Lading. — The bill of lading has a three-fold character: 1. As a receipt or an evidence that the goods have been received by the carrier; 2. As a contract evidencing the agreement between the parties; 3. As a muniment of title, representing the goods.

1. THE BILL OF LADING AS A RECEIPT. — As a receipt, the bill of lading, while it *prima facie* establishes the receipt of the goods, and settles their description and quantity or weight⁸), is by no means conclusive⁹). The carrier may, notwithstanding as against the shipper show either that no goods were received, or that those received differed in character and quantity from the description in the bill¹⁰).

Of course, the carrier may, by his language, make the bill of lading conclusive upon these matters, but the language to have that effect must be clear and explicit¹¹). The use of the words "quantity guaranteed" has been held to indicate that the carrier intended to be concluded by the bill¹²). A stipulation, however, that the carrier will pay damages "caused by boat or carrier, or deficiency of cargo from quantity as herein specified," was, in some early cases, held insufficient to charge the carrier where the amount delivered, though short of the amount specified in the bill, was the amount in fact received by the carrier¹³). But this doctrine has been shaken if not destroyed by later decisions¹⁴).

Where the bill specifies that the goods were shipped "in good condition," it has frequently been held that it may be shown that the goods were not in good condition when shipped. The effect of the recital seems to be to raise a *prima facie* presumption that the goods were free from obvious defects, but it certainly does not prevent the carrier from showing a loss by reason of latent defects in the goods¹⁵). The use of the words, "apparent good condition," does not seem to alter the construction of the phrase¹⁶).

¹) Williston on Sales, sec. 441. — ²) *Midland Nat. Bank v. Missouri Pac. Ry. Co.*, (1896) 132 Mo. 492. Cp. *Uniform Bills of Lading*, secs. 6, 7. — ³) 4 Am. and Eng. Encyc. L. (2d Ed.) p. 513. — ⁴) 4 Am. and Eng. Encyc. L. 512; 1 Hutchinson on Carriers, sec. 159. — ⁵) *Schooner Freeman v. Buckingham*, (1855) 18 How. 182. — ⁶) See post, section on The Bill of Lading as a Muniment of Title. — ⁷) *Gulf, etc., Ry. Co. v. Dwyer*, (Texas, 1890) 16 Am. St. R. 926. — ⁸) *The Titania*, (1904) 131 Fed. 229. —

⁹) *The Lady Franklin*, (1868) 8 Wall. 325. — ¹⁰) *Porter, Bills of Lading*, secs. 14—32. See *Uniform Bills of Lading Act*, sec. 23. — ¹¹) *Porter, Bills of Lading*, sec. 31. — ¹²) *Bissell v. Campbell*, (1873) 54 N. Y. 353. — ¹³) *Abbe v. Eaton*, (1873) 51 N. Y. 410; *Meyer v. Peck* (1863) 28 N. Y. 590. — ¹⁴) *Rhodes v. Newhall*, (1891) 126 N. Y. 859; *Sawyer v. Cleveland Iron Min. Co.*, (1895) 69 Fed. 211. — ¹⁵) *Barrett v. Rogers*, (Massachusetts, 1811) 5 Am. Dec. 45. — ¹⁶) *Ill. Cent. R. R. v. Cobb*, (1874) 72 Ill. Ill. 148.

The words "contents unknown" in the bill of lading acknowledge that the goods when received are externally in good condition. Under such a clause the shipper cannot rely upon the bill of lading as *prima facie* evidence to show the condition of the goods at the time of shipment¹).

It would seem that the qualification of the receipt by such words as "contents and value unknown" can only apply where the contents are not open for inspection²). Even where a bill of lading is bought by a bona fide purchaser for value, he cannot assert that he relied upon the statement of weight given in the bill, where this statement is qualified by the use of such an expression as "weight, contents, and value unknown"³).

2. THE BILL OF LADING AS A MUNIMENT OF TITLE. — The law upon this subject is in far from a satisfactory condition, save in jurisdictions where the matter has been regulated by statute.

The common law treats the bill of lading as a symbol of the goods, and its transfer is equivalent to a transfer of the property in the goods⁴). In other words, the transfer of the bill of lading transfers a right in rem and not a mere right in personam. Beyond this, however, the common law does not go. It does not recognize the negotiability of bills of lading, so that a purchaser of such bill from one who has a defeasible title does not, under the common law, get any better title than his seller had⁵).

On the other hand, the commercial world deals with the bill of lading as if it were a negotiable instrument as well as a symbol of the goods. The purchase or pledge of a bill of lading or railroad shipping receipt, under which goods are made deliverable to the order of a person named is a very frequent transaction. It is important that the rights of such bona fide purchasers or pledgees should be protected as far as is consistent with the rights of other persons.

It has become the almost universal practice of railroads to issue two forms of bills of lading, the "order" bill and the "straight" bill. Where the first form is issued, the railroad refuses to surrender the goods unless the bill be also produced and surrendered. Under the second form, the railroad may discharge its obligation without demanding the bill, by a delivery of the goods to the person named as consignee. The courts have to a certain extent recognized the commercial practice of the railroads and the business community as law, and in several cases it has been held that the carrier by making delivery to an assignee of the consignee without demanding the surrender of the bill of lading, becomes liable to the holder of such "order" bill for the value of the goods so delivered. On the other hand, there is no liability where the carrier delivers to the consignee, in the case where the bill is a "straight" one⁶).

This view affords a measure of protection to persons dealing with "order" bills of lading, but still falls short of giving the complete security which the commercial community demands. The situation may be that the person discounting the bill of lading himself had no title, or at most a defeasible title to the bill. In such cases the courts have generally held that the former owner of the goods may prove his right even as against a bona fide holder.

As illustrating the partial nature of the protection afforded the bona fide purchaser of the bill of lading under the common law view, the case of the issuance of a bill where no goods have actually been received by the master of a ship or freight agent, may be mentioned. The Federal courts and the courts of a majority of the States hold in such a case that the carrier is not liable to the bona fide purchaser or pledgee of such fraudulently issued bill of lading⁷). But there is a respectable amount of authority holding the contrary view, and apparently with the better reason⁸). Manifestly, the purchaser or pledgee of a bill of lading, in jurisdictions where the first view prevails takes greater risks than the exigencies of commerce demand.

Negotiability of Bills of Lading under Statutes. — Statutes have been passed from time to time in a few jurisdictions to obviate this result, but the courts seem

¹) *Clark v. Barnwell*, (1851) 12 How. 272; *Argo Steamship Co. v. Seago*, (1900) 101 Fed. 999. See also *La Kroma*, (1905) 138 Fed. 936. —

²) *Tibbits v. Railroad Co.*, (1893) 49 Ill. App. 567.

— ³) *Miller v. Hannibal Railroad Co.*, (1882) 90 N. Y. 430; see also *Iron Mt. Ry. Co. v. Knight*,

(1887) 122 U. S. 78. — ⁴) *Williston on Sales*, sec. 405. — ⁵) *Williston on Sales*, secs. 281, 406. — ⁶) *Walters v. Western, etc., Railroad*

Co., (1893) 56 Fed. 369, (1894) 63 Fed. 391.

— ⁷) *Friedlander v. Texas, etc., Railway Co.*, (1888) 130 U. S. 416. — ⁸) *Bank of Batavia*

v. N. Y., etc., Railroad Co., (1887) 106 N. Y. 195. *Williston on Sales*, sec. 419. Upon the

whole matter treated in this and the following sections see *Williston on Sales* chap. 12, which is the only satisfactory discussion to be found upon this difficult subject.

to have placed rather strict interpretations upon them¹). Thus, where a statute declared that bills of lading were negotiable in the same manner as bills of exchange and promissory notes, the Supreme Court of the United States held that the intention was merely to enable them to be transferred by indorsement, and not to enable the bona fide purchaser to take a better title than his vendee had²).

Legislation of the character referred to has not proved sufficient to meet the demands of commerce, and accordingly the Commissioners on Uniform State Laws have caused to be prepared a Uniform Bills of Lading Act, in which the whole subject has been scientifically codified³). The most essential sections of this Act are sections 31 and 32. The former provides: "A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation, the bill is in such form that it may be negotiated by delivery." And the following section, defining the rights of the person to whom such a bill has been negotiated, in effect declares: 1. That such indorsee gets such title as his indorser had; 2. Such title as his indorser had ability to convey; 3. Such title as the consignor and consignee had; 4. Such title as the consignee and consignor had power to convey, and 5. He also gets the direct obligation of the carrier to hold possession of the goods for him, as fully as if the carrier had contracted directly with him.

The general effect of this Act seems to be to place bills of lading in most respects upon the same footing with bills of exchange and promissory notes. The particulars in which differences exist are: 1. The bona fide indorsee of a bill of lading from a thief or finder is not protected as against the original owner, whereas an indorsee of a bill of exchange under similar circumstances is protected⁴); 2. The indorsee of a bill of lading has no right of recovery from previous indorsers by reason of the failure of the carrier or of previous indorsers to fulfil their obligations⁵); 3. If the goods have been destroyed or if the consignor had no title to them, the bill of lading can give no title to the bona fide purchaser⁶); 4. While no garnishment of a debt may be had when the debtor has given a bill of exchange or promissory note, but the bill itself is the subject of attachment or garnishment, the goods represented by a bill of lading may be attached under the Uniform Bills of Lading Act, provided the bill of lading is first impounded by the court⁷); 5. Lastly, the alteration of a bill of lading does not, as in the case of a bill of exchange, avoid the obligation of the party primarily liable thereon; the alteration is void, and the bill of lading as originally issued remains valid⁸).

While the Bills of Lading Act itself has been only very recently proposed, and has been adopted by the Legislatures of but five States at the present date, the most material provisions of that Act, namely, those making bills of lading negotiable, have been adopted in the Uniform Sales Act, already adopted in nine States and Territories⁹). In all these States, therefore, the doctrine of negotiability, so far as bona fide purchasers of the bill of lading are concerned, is adopted. The Sales Act, however, does not affect the common law of those States so far as respects pledgees or others claiming merely by way of security. The question must, therefore, be determined in each jurisdiction in accordance with the law as enunciated by its highest courts.

3. THE BILL OF LADING AS A CONTRACT. — While, as a general rule the recitals as to the receipt of goods are, as between the shipper and the carrier, open to contradiction, the bill of lading regarded as a contract between the parties is not subject to being varied by the parties by proof of a parol agreement contrary to the face of the bill¹⁰). Proof of a custom inconsistent with the terms of the bill of lading will also be excluded, for the reason that the written bill is the final expression of the will of the parties¹¹). Proof of custom is, however, admissible to explain doubtful terms in the bill for the propose of aiding the court in its work of interpretation¹²).

¹) See the statutes making warehouse receipts and bills of lading negotiable referred to in Williston on Sales, sec. 407, and note. —

²) *Shaw v. Railroad Co.*, (1879) 101 U. S. 557.

— ³) This Act was finally submitted by the Commissioners of Uniform State Laws only in 1909, and has been adopted in five jurisdictions. It is reprinted *infra*. — ⁴) Uniform Bills of Lading Act, sec. 12. — ⁵) *Id.*,

sec. 36. — ⁶) *Id.*, sec. 31; Williston on Sales, sec. 416. — ⁷) *Id.*, sec. 16; Uniform Nego-

tiable Instruments Act, sec. 125. — ⁸) *Id.*, sec. 24; Williston on Sales, secs. 438—439. —

⁹) See note to section entitled Introductory Note in article on Sales, *supra*. — ¹⁰) *Portland Flouring Mills Co. v. British, etc., Insurance Co.*, (1904) 130 Fed., 860. — ¹¹) *Id.* — ¹²) *Id.*

And even though the bill does not expressly provide a particular obligation, yet if the law necessarily implies such obligation from the words used, or from the course of trade or customs of business, no testimony tending to show that such obligation does not exist because of a contrary oral agreement, can be received by the court¹). Thus, in the case cited in the note, the giving of a "clean" bill of lading prevented the owner of the ship from showing that there was an oral stipulation with the shipper to the effect that the goods might be stowed on deck. Again, an illustration of the same kind is afforded by the case where the bill of lading is silent as to the route. In such case the carrier may select any route, provided it is safe and reasonably direct; no parol evidence is, therefore, admissible to show that the carriage was to be by a particular route²). So, when the bill is silent as to the time within which the goods are to be forwarded, the law implies that they are to be transported within a reasonable time, and no evidence that they are to be sent forward at a definite time will be permitted³). The questions connected with the matter of the limitation of the carrier's liability by contract, which is usually embodied in the bill of lading, is considered in another place⁴).

How Assent of Consignor Indicated. The shipper may, of course, indicate his assent to the terms of the bill of lading by signing it⁵). Where there is no such signature, however, his assent is presumed, in general, from the fact of its delivery to him and his retention of the same, and, ordinarily this presumption is conclusive⁶). There may be circumstances, nevertheless, under which the acceptance is not presumed from the receipt of the bill of lading by the shipper. Thus, fraud and mistake may make that a voidable transaction, which on its face seems perfect⁷). And of a somewhat similar nature is the exception in the case where the terms and conditions of the contract in favor of the carrier are inserted in the bill of lading in such a manner as to mislead the shipper⁸). Another case in which a shipper may dispute the contract contained in the bill is where the carrier receives the goods before delivering the bill, and the bill subsequently delivered does not conform to the contract upon which the goods were delivered to the carrier⁹). In such case, the shipper's inadvertence in failing to read the conditions in the bill will not bar him from showing the actual agreement. With these exceptions, however, it may be said generally that the shipper is bound by the receipt and retention of the bill, even though the terms are not written on its face, but are endorsed upon its back. In such a case, there should probably be a reference on the face to the conditions on the reverse side of the paper¹⁰).

IV. THE LIABILITY OF THE COMMON CARRIER. — A. At the Common Law.

— The common carrier of goods for hire, whether by land or sea, under the principles of the common law, is liable as an insurer of the goods against losses and injuries of every kind during the time that they are in his possession as carrier¹¹). The fact that he has used the utmost diligence in carrying the goods and keeping their custody does not relieve him from this extraordinary liability¹²). He is, except so far as the exceptions hereinafter enumerated are concerned, absolutely liable for their loss, even though occasioned by pure accident. This unusual liability attaches to the carrier from the moment that the goods are delivered to and accepted by him for carriage until the termination of their carriage. Even though he keep the goods for a time in a warehouse awaiting transportation, he will be held liable for their loss by fire or other accidental circumstance, though he be entirely without fault in the matter¹³). If, however, he also conducts a warehouse business, and goods are delivered to him under a contract by the terms of which he is later to transport them, his liability, while the goods are in the warehouse under this contract is merely that of an ordinary bailee for hire, and he will not be liable except for his fault in improperly caring for the goods¹⁴). And, in general, where anything remains to be done by the shipper with reference to the goods, as marking them or classifying them, the liability

¹) The Delaware, (1871) 14 Wall., 579.

— ²) Snow v. Indiana, etc., R. R. Co., (1887) 109 Ind., 422. — ³) Central R. R. Co. v. Hasselkus, (Georgia, 1893) 44 Am. St. Rep., 37. — ⁴) See sections on Limitation of Liability by Contract. — ⁵) Black v. Wabash, etc., Railway Co., (1889) Ill. 111, 351. — ⁶) Hoadley v. Northern Transportation Co., (1874) 115 Mass. 304; Uniform Bills of Lading Act, sec. 10. — ⁷) McMillan v. Michigan Southern,

etc., Railroad Co., (1867) 16 Mich. 79, 114.

— ⁸) The Majestic, (1897) 166 U. S. 375; The Minnetonka, (1906) 146 Fed. 509. — ⁹) Strohn v. Detroit, etc., Railroad Co., (1867) 94 Am. Dec. 564. — ¹⁰) The Majestic, supra. — ¹¹) 1 Hutchinson on Carriers, sec. 170a. — ¹²) California, Civil Code, sec. 2194. — ¹³) 1 Hutchinson on Carriers, sec. 89. — ¹⁴) London, etc., Insurance Co. v. Rome, etc., Railroad Co., (1894) 144 N. Y. 201.

of the carrier cannot be considered as having attached¹). The test, in each case, is whether the goods are stored by the carrier as part of the process of transporting them or whether they are stored for the shipper's own purposes²).

In general, the carrier's liability as insurer of the goods continues until their delivery to the consignee. Sometimes, however, although the goods have not been actually delivered to the consignee, the liability of the carrier may be reduced to that of a warehouseman. This, for example, may be the case where, after due efforts to find the consignee, the carrier has been unsuccessful in discovering him, or where the consignee upon the goods being tendered to him, refuses to receive them³). In such cases, the carrier is liable only for his failure to use due diligence in caring for the goods, and is not responsible for their accidental destruction or injury.

B. Exceptions to Carrier's Strict Liability at Common Law. — Although, in general, the carrier's responsibility for the safety of goods entrusted to him for carriage is as stated in the last sections where there is no statute or contract affecting his liability, yet there are certain important exceptions to this general rule. The most important cases of non-liability are: 1. The carrier is not liable for the loss of goods through "act of God;" 2. Through the acts of a public enemy; 3. Through the act or omission of the owner of the goods; 4. Through the inherent nature of the goods; and 5. Through acts of public authority⁴).

1. LOSS THROUGH "ACT OF GOD." — This phrase means that the loss has occurred through superhuman agency. It has been defined as "such irresistible disaster as results immediately from natural causes, and is in no sense attributable to human agency"⁵). Hence, it is an element in the excuse that the loss occurred without human agency. If the act of the carrier or of any other person contributes to the loss, the defence will not avail⁶). But this doctrine is not carried so far that a disaster which could not have been anticipated or provided against, such as the accidental bursting of a great artificial dam, is considered an "act of God." The fact that it was constructed by the hand of man did not make its destruction any the less the result of superhuman cause⁷). So the jettison of a cargo made necessary by a storm, where the cargo was originally properly stowed, is considered as falling under this exception. But where the jettison occurs in an effort to save the ship and cargo, where the vessel has been negligently taken by the master into a port during a heavy fog, it cannot be called an "act of God," nor, that which perhaps has a wider meaning, a "peril of the sea"⁸). Fire, generally speaking, is not an "act of God," even though it be blown by an unusual wind; but if occasioned by lightning, the carrier will be absolved from blame, where the goods are destroyed by such calamity⁹). The running of a vessel upon a rock or bar or shallow, if not the result of fault on the part of those navigating the ship, is a "peril of the sea" within the meaning of a clause in a bill of lading, although not an "act of God"¹⁰). On the other hand, an injury to a cargo by rats is not a "peril of the sea," much less an "act of God;" the reason is that it is not an "irresistible disaster resulting from natural causes"¹¹).

Even though the fact that the loss was caused in part by the "act of God" is established by the carrier, he may nevertheless be liable upon the ground of negligence. Thus, though the blocking of the track of a railroad company by snow plainly falls under the present exception, the carrier will be liable for injuries to livestock, which it might have avoided after its train was blocked, by the exercise of proper care¹²).

The burden of proof that the goods were lost by superhuman cause or "perils of the sea" is upon the carrier¹³).

¹) *Iron Mountain Railway Co. v. Knight*, (1887) 122 U. S. 79. — ²) *London, etc., Insurance Co. v. Rome, etc., Railroad Co.*, *supra*. — ³) *Manhattan Rubber Shoe Co. v. Railroad Co.*, (1896) 41 N. Y. Supp. 83; *California, Civil Code*, sec. 2120. — ⁴) *Schouler on Bailments*, sec. 405; 1 *Hutchinson on Carriers*, sec. 170a. See also, *California, Civil Code*, secs. 2194 and 2197. — ⁵) *Schouler on Bailments*, sec. 410. — ⁶) *Wald v. Pittsburgh, etc., Railroad Co.*, (1896) 162 Ill. 545. — ⁷) *Long v. Pennsylvania Railroad Co.*, (1892) 147 Pa. St. 343. — ⁸) *The Portsmouth*, (1869)

9 Wall. 682; *The Musselcrag*, (1905) 141 Fed. 260. The expression "peril of the sea" is not synonymous with "act of God," the former includes many acts and circumstances not embraced under the latter. *Schouler on Bailments*, sec. 446, note. — ⁹) *York v. Central Railroad*, (1865) 3 Wall. 107; 1 *Hutchinson on Carriers*, sec. 182. — ¹⁰) *Schouler on Bailments*, sec. 413. — ¹¹) 3 *Kent's Commentaries*, (14th Ed.), pp. 300—301. — ¹²) *Black v. Chicago, etc., Railroad Co.*, (1890) 30 Neb. 197. — ¹³) *The Majestic*, (1897) 166 U. S. 375, 386.

Where the carrier has deviated from the appointed route, and the goods are lost by irresistible disaster not resulting from human agency, the cases agree that the carrier cannot set up the defence¹). But where there has been merely delay and not an actual deviation, and where the loss would not have occurred but for the delay, the question is by no means settled whether the carrier may plead the defence. The Supreme Court of Pennsylvania, in an early case, decided in favor of the non-liability of the carrier under such circumstances, unless it were shown that his act contributed proximately to the loss²). This view is also adopted by the Supreme Court of Massachusetts, as well by those of several less important jurisdictions, and has also been followed by the United States Supreme Court and the Federal courts³). In other important jurisdictions, however, the most notable of which are New York and Illinois, the doctrine of those cases which deny the defence in cases of deviation is followed and the carrier is held liable, notwithstanding the loss by an "act of God"⁴).

2. ACTS OF PUBLIC ENEMY AND OF PUBLIC AUTHORITY. — Concerning the carrier's immunity for loss of goods occurring through acts of the public enemy and through acts of public authority, but a few words need be said. The first exception applies only where the enemies are engaged in open war with the government; loss by thieves, rioters, and mobs do not fall within the exception, although loss by pirates is considered as included therein⁵). Rebellion, however, may, take on the character of warfare in which case the carrier's exemption applies if the goods are taken or destroyed by the belligerents⁶).

The excuse of the carrier for non-delivery of the goods arising from acts of public authority exists wherever the goods are taken upon legal process under attachment against the owner⁷). But upon the question whether it also exists where the goods taken are attached under a writ against a third person, there is some difference of opinion. Outside of Massachusetts and possibly one or two other States, it seems that the land carrier is protected if the sheriff or officer actually takes the goods, and it is not his duty to determine who is in fact the owner of the goods⁸). But in order that the carrier may be exempt, it seems the process under which the goods are taken must be regular upon its face⁹). In order that the carrier may claim this defence, he must give notice of the attachment to the consignor or owner, in order to enable the latter to protect himself by proper claim or defence¹⁰). The carrier by water must defend the claim himself by proper legal proceedings until the owner or consignor may have a reasonable opportunity to appear¹¹).

3. LOSSES CAUSED BY THE ACT OF THE OWNER AND THROUGH THE NATURE OF THE GOODS. — Another exception to the carrier's liability as an insurer is established in the case where the proximate cause of the loss is the owner's own act¹²). Thus, where goods are improperly packed when delivered to the carrier, and the loss occurs through such improper packing, the latter is not held liable¹³). A fortiori, where the shipper is guilty of fraud, the carrier is absolved from liability for the loss of the goods. Thus, where jewels or similar valuable goods are packed as if they were articles of small value, for the purpose of deceiving the carrier and inducing him to carry at a lower rate than he is entitled to, the carrier is not responsible for their loss¹⁴). If, notwithstanding the owner has been negligent in shipping the goods in an improper way, the loss would not have occurred but for the carrier's negligence, the latter is not excused¹⁵). The exceptions now under consideration only exempt the carrier from his unusual liability as an insurer. He re-

¹) 1 Hutchinson on Carriers, secs. 190—192. — ²) Morrison v. Davis, (1852) 20 Pa. St. 171. — ³) Hoadley v. Northern Transportation Co., (1874) 115 Mass. 304; Memphis, etc., Railroad Co. v. Reeves, (1869) 10 Wall. 176; Northern Pac. Railroad Co. v. Kempton, (1905) 138 Fed. 992. — ⁴) Wald v. Pittsburgh, etc., Railroad Co., (1896) 162 Ill. 546; Michaels v. N. Y. Central Railroad Co., (1864) 30 N. Y. 564. — ⁵) 1 Hutchinson on Carriers, secs. 203—210a. — ⁶) Mauran v. Alliance Insurance Co., (1867) 6 Wall. 1. — ⁷) Schouler on Bailments, sec. 428. — ⁸) Stiles v. Davis, (1861) 1 Black (U. S.) 101. — ⁹) Merriman v. Grant Northern Express Co. (1896) 63 Minn. 543, where a game warden

took fish away from a carrier under a statute that had been repealed, and the carrier was held liable for the value of the fish, etc., taken. 1 Hutchinson on Carriers, sec. 400. — ¹⁰) R. R. Co. v. O'Donnell, (Ohio, 1892) 34 Am. St. Rep. 579. — ¹¹) The M. M. Chase, (1889) 37 Fed. 708, 711. — ¹²) 1 Hutchinson on Carriers, sec. 211; Schouler on Bailments, sec. 422. — ¹³) Goodman v. Oregon, etc., Ry. Co., (1892) 22 Oreg. 14. — ¹⁴) Shackt v. Illinois, etc., R. Co., (1895, Tennessee) 28 L. R. A. 176; Michelitschke v. Wells, Fargo, etc., Express Co., (1897) 118 Cal. 683. — ¹⁵) McCarthy v. Louisville, etc., R. R. Co., (1893) 102 Ala. 193.

mains liable for negligence to the same extent as any other person. The burden of showing that he was in fact free from contributing negligence, is always upon the carrier¹).

Of a similar character to the above exception is the carrier's non-liability for losses caused through the inherent nature of the goods carried. It would be manifestly unjust, for example, that the carrier should be responsible for the decay or fermentation of fruits or food stuffs occurring through natural causes, where he is entirely free from fault. He is, therefore, free from responsibility where such accidents happen²). Injuries to animals caused by their own acts or by natural causes reasonably seem to fall under this class, although some authorities prefer to regard the carrier of animals as not subject to the responsibility of a carrier of goods³). An important statute, known as the Twenty-eight Hour Law, has been passed by Congress imposing penalties for carrying animals for more than twenty-eight hours without unloading for rest, water, and feeding, and otherwise affecting the rights and obligations of such carriers⁴).

C. Statutory Limitations of Liability. — 1. UNDER REVISED STATUTES OF THE UNITED STATES. — *Liability for Valuables and for Damages by Fire.* — By section 4281 of the Revised Statutes of the United States, the liability of the carrier by water is abrogated in cases of the carriage of certain valuable articles such as jewelry, pictures, china, silks, furs, laces, notes, and securities, where the same are contained in parcels or trunks and delivered and laden as freight or baggage, unless a written notice of the contents and value is given to the master or person receiving them, and the description and value thereof is entered upon the bill of lading; nor, if such notice is given, is the owner or master liable for anything more than the value stated. This section, it has been suggested, would not apply to the case of a contract made by a foreigner with a foreign owner, even though the action is brought in the United States; the construction in this respect, as we shall see later, differing from that given to the sections of the Revised Statutes limiting liability and from that given to the Harter Act⁵). Nor does the statute apply where small articles of jewelry or silverware are carried as a part of the traveler's baggage⁶). It does cover, however, memorandum books in which the traveler had made memoranda in regard to articles used by him in his business⁷).

The next section of the Revised Statutes exempts the water carrier from damage to merchandise shipped on the vessel, by fire occurring on board the vessel, unless the fire is caused by the design or neglect of the owner. This statute exempts the owner from all liability for fire occurring on the vessel, except where it occurred through his own design or neglect. The ordinary doctrine of master and servant therefore does not apply and the owner is not liable for damage by fire occurring on board the vessel, where such fire is caused by the negligence of those in charge of the ship, that is, the officers and crew⁸). The language of this statute only exempts the shipowner or carrier by water where the fire occurs on board the ship. He would, therefore, be liable for injuries to merchandise where the fire spreads from the dock to the ship, notwithstanding this section⁹). The section is evidently not intended to cover baggage of the passenger; it applies only to "merchandise"¹⁰).

2. STATUTE LIMITING OWNER'S LIABILITY TO VALUE OF SHIP AND FREIGHT. — *a) In General.* — Since 1851, the liability of ship owners for loss or injury to the cargo has been limited to the value of their interest in the vessel and freight then pending, in cases where the injury has occurred without their privity or knowledge¹¹). The sections of the Revised Statutes referred to in the note, do not,

¹) *Buck v. Pennsylvania R. R. Co.*, (1897) 150 Pa. St. 170. — ²) *Faucher v. Wilson*, (1895) 68 N. H. 338. — ³) *Hart v. Penn. R. R. Co.*, (1884) 112 U. S. 331. Cf. *Michigan, etc., R. R. v. McDonough*, (1870) 21 Mich. 165. — ⁴) 34 U. S. Statutes at Large, 607; Federal Stat. Ann., Supp. 1907, p. 25. The Act is reprinted infra. — ⁵) *Carlson v. Oceanic Steam Nav. Co.*, (1888) 109 N. Y. 362. — ⁶) *Carlson v. Oceanic Steam Nav. Co.*, *supra*. — ⁷) *The St. Cuthbert*, (1899) 97 Fed. 341. — ⁸) *Craig v. Continental Insurance Co.*, (1891) 141 U. S. 646; *In re Old Dominion Steamship Co.*, (1902) 115 Fed. 845. — ⁹) *Constable*

v. National Steamship Co., (1894) 154 U. S. 62. If the freight is still on the wharf, but the ship's officers have taken charge of it, it is considered as "shipped, taken in, or put on board." *Dill v. Bertram*, (1857) 7 Fed. Cas. No. 3910. — ¹⁰) *The Marine City*, (1881) 6 Fed. 415. For the same reason horses and trucks in charge of their drivers which were destroyed by fire were held not within this section. *The Garden City*, (1886) 26 Fed. 769. — ¹¹) U. S. Rev. Stat., secs. 4283 and 4289. As originally adopted, the last section excluded vessels engaged in river or inland navigation from the provisions allowing limi-

however, affect the shipowner's liability for his own negligence, and he remains liable without limit for losses occurring by reason of such fault. For the negligence of the master and crew, however, unless the provisions of the Harter Act protect him, he is liable only to the value of the ship and freight¹). A general manager, however, to whose management is left a company's entire fleet, has been considered as representing the ship-owning company, to the extent that his knowledge will be imputed to the principal, who therefore cannot limit its liability, where he has been guilty of gross negligence²). As the knowledge of a president or other principal officer of a corporation will be charged to the corporation, where the president of such corporation attempted to transport passengers in an overcrowded vessel, the company could not limit its liability for the resulting loss of life³). Aside from the case of the officers or managing agents of the corporation, however, the doctrine of constructive notice does not seem to apply; there must, in general, be something in the nature of personal knowledge of, or participation in, the acts which produce the loss, to prevent the application of the rule of limited liability⁴). For this reason the fact that the master is a part owner, and that his negligence occasioned a collision, is no bar to the co-owners securing a limitation of their liability to the extent of their interest in the ship and freight in an action brought on account of the collision⁵). The fact that the log books are not produced after demand, and evasive answers are given concerning them, does not show privity on the part of the owners, though the petition seeking to limit the liability might be dismissed for the contumacy of the shipowner⁶).

b) *Who is Entitled to Limit Liability under Sections 4283 and 4289 of the Revised Statutes.* — Not only the owner, but the charterer of a vessel may in some cases take advantage of these statutes. One who mans, victuals, and navigates a vessel at his own expense is an owner within their meaning⁷). But a charterer who does not man, victual, and navigate the vessel is not an owner within their meaning, so that a light-erage company which contracted to transfer the cargo from one ship to another and for that purpose chartered a lighter, the owner furnishing the lighterman who had the power to employ stevedores and superintend the work, was not entitled to limit its liability for a loss of the cargo occasioned by the capsizing of the lighter⁸). Nor do these sections in any respect affect the liability of the masters, officers, or seamen. The masters, officers, or seamen remain liable without limitation, notwithstanding they are owners or part owners of the vessel⁹).

The owners are entitled to the benefit of the statute even though they have chartered the vessel in such way that the charterer is the owner for the time being¹⁰).

The fact that a vessel is not registered, is of no importance in connection with the statutory limitation of liability, nor does the fact that the carrier transports the goods partly by water and partly by land affect the question¹¹).

The language of the statutes is that the *owner* may limit his liability. The construction that has been placed upon this language however, is that the right to limit liability exists whether a proceeding in personam is brought against the owner or one in rem against the vessel¹²).

c) *To What Extent do Sections 4283 and 4289 of the Revised Statutes affect Foreign Ships and Shipowners.* — In the leading case of *The Scotland*¹³), it was held by the United States Supreme Court, that where a collision occurred between a British

tations of liability, but, since 1886, such vessels are included. Canal boats, barges, and lighters are also within the provisions of the law by the express language of sec. 4289 allowing such limitation of liability. Although under the system of divided sovereignty, Congress is given jurisdiction over matters of foreign and interstate commerce only, the states being left sovereign with regard to the regulation of intrastate commerce, it has been held that these sections apply to shipping engaged in the carrying trade on rivers between points within a state. In *re Garnett*, (1891) 141 U. S. 12.

¹) *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, (1889) 129 U. S. 440. — ²) *Parsons v. Empire Transportation Co.*, (1901) 111 Fed. 208. — ³) *Weisshaar v. Kimball Steamship Co.*, (1904)

128 Fed. 397. Omission by such an officer to properly examine the boat is chargeable to the corporation. *The Republic*, (1894) 61 Fed. 109. See also *The Colima*, (1897) 82 Fed. 679. — ⁴) *The Colima*, (1897) 82 Fed. 679; *The Annie Faxon*, (1896) 75 Fed. 314. — ⁵) *In re Leonard*, (1882) 14 Fed. 55. — ⁶) *La Bourgogne*, (1908) 210 U. S. 95. — ⁷) *U. S. Rev. Stat.*, sec. 4286. — ⁸) *Smith v. Booth*, (1901) 110 Fed. 684; affirmed (1903) 122 Fed. 626. See also *Thorp v. Hammond*, (1870) 12 Wall. 416; *The Barnstable*, (1901) 181 U. S. 468. — ⁹) *U. S. Rev. Stat.*, sec. 4287. — ¹⁰) *Quinlan v. Pew*, (1893) 56 Fed. 119. — ¹¹) *Wallace v. Providence Steamship Co.*, (1882) 14 Fed. 56. — ¹²) *City of Norwich*, (1886) 118 U. S. 468. — ¹³) (1881) 105 U. S. 24.

ship and an American ship on the high seas, and an action in personam was brought in the United States Courts by the owner of the American vessel against the owners of the British vessel, the latter were entitled to a decree limiting their liability under the sections of the Revised Statutes under consideration. In discussing the case the Court¹⁾ suggests the following rules in regard to the law that would control: 1. If the collision occurred in British waters between British ships, the British law would be applied, if it were proved what that law was; 2. If the collision occurs on the high seas, prima facie the rule of the forum will control; 3. But if they belonged to the same nation, the Court would apply the law of the flag²⁾; 4. If they belonged to different nations, the law of the forum will apply, for it would be unjust to apply either of the conflicting systems of law³⁾; 5. In all other cases, the law of the forum will be applied, for aliens as well as for citizens⁴⁾.

d) *Cases Covered by the Sections of the Revised Statutes.* — The liability thus limited covers damage to persons as well as to goods. It covers cases of loss of life whether the right of action is given by the admiralty law, by State statutes, or by Federal statute⁵⁾. It includes liability for loss of baggage as well as freight⁶⁾. It enables damages for collision to be limited⁷⁾. But it does not apply to cases other than of maritime tort. Thus, where a steamship set fire, by means of sparks emitted from its smokestack, to property on land, the District Court was held to have no jurisdiction in admiralty to determine liability⁸⁾. But where a vessel collided with the abutments of a bridge, doing them an injury, the statute was held to apply⁹⁾. Though the injury is caused by a fire on board the vessel for which the owner is liable because unable to establish his lack of design or negligence under section 4282, he may nevertheless limit his liability to the value of the ship and freight¹⁰⁾. The following have been held to be omissions of the owner personally for which he cannot limit liability: The employment of an incompetent crew of Chinese sailors who could receive orders only through the boatswain — the crew should be equal to any exigency which may happen¹¹⁾; failure to use due diligence to provide a competent master and crew¹²⁾; failure to comply with the inspection laws¹³⁾.

In the following cases, the shipowner's liability was limited: Where, owing to the fault of the master, the ship was improperly loaded and badly managed¹⁴⁾; where the loss was owing to fault in navigation¹⁵⁾; where official inspectors omitted their duty of proper inspection¹⁶⁾.

In a recent case where it was claimed that the shipowner was privy to the negligence, which consisted in running the steamer at an undue rate, because it was under stipulation with its government to carry the mails under conditions which must have required a breach of the international rules, the Supreme Court declined to consider the claim on the ground that it would not permit the action of the government to be questioned¹⁷⁾.

e) *Remedies for Limitation of Liability.* — The usual mode of limiting liability is for the shipowner to begin an action in admiralty requiring the several claimants, if there are several, to establish their claims to the sum for which the owner may be liable¹⁸⁾. The action to determine liability may be begun before any action has actually been filed¹⁹⁾ and it may be maintained after the question of liability has already been determined by a judgment in another court²⁰⁾. If, however, the owner has already paid the amount of a judgment against him, the statute does not warrant him in suing to recover the sum already paid, although he may limit his liability as against

1) 105 U. S. at p. 29. — 2) This has been questioned so far as the question relates to the remedy and not to the right. The measure of damages that will be applied in collision cases for example, is the rule of the forum. The *Eagle Point*, (1905) 136 Fed. 1010; 1015. — 3) *La Bourgogne*, (1908) 210 U. S. 95. — 4) See also *In re Leonard*, (1882) 14 Fed. 55; *Levinson v. Oceanic Steam Nav. Co.*, (1876) 15 Fed. Cas. No. 8292. — 5) *Butler v. Boston, etc., Steamship Co.*, (1889) 130 U. S. 552. — 6) *In re Louisville Packet Co.*, (1889) 95 Fed. 996. — 7) *Norwich Co. v. Wright*, (1871) 13 Wall. (U. S.) 121; *The Scotland*, (1881) 105 U. S. 24. — 8) *Exp. Phenix Ins. Co.*, (1886) 118 U. S. 610. — 9) *In re Vessel Owners Tow-*

ing Ass'n., (1886) 26 Fed. 169; *The Blackheath*, (1904) 195 U. S. 361; Cf. *The Lotta*, (1907) 150 Fed. 219. — 10) *Providence, etc., Steamship Co. v. Hill Manufacturing Co.*, (1883) 109 U. S. 587. — 11) *In re Pacific Mail Steamship Co.*, (1904) 130 Fed. 76. — 12) *Matter of Wright*, (1878) 10 Bened. (U. S.) 14. — 13) *The Annie Faxon*, (1896) 75 Fed. 320. — 14) *The Colima*, (1897) 82 Fed. 679. — 15) *The Longfellow*, (1900) 104 Fed. 363; *La Bourgogne*, (1908) 210 U. S. 95. — 16) *The Annie Faxon*, *supra*. — 17) *La Bourgogne*, (1908) 210 U. S. 95. — 18) U. S. Rev. Stat., sec. 4284. — 19) *The Alpena*, (1881) 8 Fed. 284. — 20) *Gleason v. Duffy*, (1902) 116 Fed. 301.

other claimants¹). If there are actions pending, the commencement of the proceedings to limit liability will operate as a stay on such actions²).

Section 4825 of the Revised Statutes provides that the owner may transfer his interest in the vessel and freight to a trustee for the benefit of such claimants, to be appointed by a competent court, whereupon he is discharged and all claims and proceedings against him cease³).

Where there is only one suit pending, arising out of the accident, and it is not probable that another will be filed, the shipowner may plead his limitation by way of defence in that action⁴), and in such case the action to limit liability will not lie⁵). If, however, there are likely to be several actions, or if more than one has been filed, under the provisions of section 4284 an action to limit and apportion liability may be maintained — the most usual method of taking advantage of the statute⁶).

The right to proceed for a limitation of liability is not lost by reason of the surrender of the vessel to the insurers, and the insurance money is not a part of the owner's interest in the ship⁷). It need not, therefore, be surrendered. The money received as damages in a collision, however, for injuries to the owner's ship must be surrendered, for it is part of the "amount or value" of his ship⁸). The amount which is considered to be the value of the ship is her value at the end of the voyage. If she sinks, therefore, prematurely terminating her voyage, the value to which claimants will be limited will be the value of the ship after she has sunk⁹). In the case of *La Bourgogne* which was lost with her captain and nearly all her crew and passengers, through her faulty navigation, and where claims aggregating more than \$ 2,000,000 were filed, the trial court limited the liability of her owner to \$ 100, the value of a life boat, which was all that was saved from the wreck¹⁰). This value, so far as the ship was concerned, was sustained by the United States Supreme Court¹¹). The same case illustrates what is meant by "freight pending." It was held in the trial court that the amount prepaid for freight and passengers on the voyage from New York to Havre was not "freight pending," because it was not earned until the arrival at Havre. The Supreme Court of the United States held that such money should be surrendered. The claimants contended that the shipowners should also surrender one fifty-second of a sum of more than five million francs which the French government paid the steamer annually as a subsidy for carrying the mails, and which would represent the proportionate amount earned by the single voyage. Such money was held not to be "freight pending."

The fact that the shipowner does not offer to surrender the freight, was held not to bar him from his action to limit liability, in a case where he bona fide believed it was not surrenderable and where the law was not settled when he filed his petition¹²).

D. The Harter Act. — 1. IN GENERAL. — Changes of the utmost importance in the liability of the shipowner have been introduced by the so-called Harter Act, passed by Congress in 1893¹³). This Act is not only of great importance with reference to American ships and shipowners, but also with reference to foreign ships delivering goods to or from American ports, for any exception in a bill of lading inserted in violation of the provisions of this Act will be held void if the matter is presented before a court of the United States, even though the contract was made in a foreign country¹⁴).

The most important sections of this Act are the first three. The first section provides that it is unlawful for the shipowner, the agent, the manager or the master

¹) *The Benefactor*, (1883) 103 U. S. 243.

— ²) *Providence, etc., Steamship Co. v. Hill Manufacturing Co.*, (1883) 109 U. S. 587. —

³) The failure of the owners to transfer the ship and freight pending does not deprive them of their right to limit liability under sec. 4284. *The Scotland*, (1881) 105 U. S. 34. —

⁴) This may be done in the State court, if the action is there pending. *Loughlin v. McCaulley*, (1898) 186 Pa. St. 517; *The Lotta*, (1907) 150 Fed. 219. — ⁵) *The Eureka No. 32*, (1901) 108 Fed. 673. — ⁶) Both sec. 4284 and 4285 are defective in their enumeration of losses and injuries, and a strict reading of them dissociated from section 4283 would seem to exclude injuries to the person. The

courts have, however, read the various sections together, and have held that an action will lie to limit liability under 4284 in the case of personal injuries. *Butler v. Boston etc., Steamship Co.*, (1889) U. S. 551. —

⁷) *The City of Norwich*, (1886) 118 U. S. 491. — ⁸) *O'Brien v. Miller*, (1897) 168 U. S. 306. — ⁹) *The City of Norwich*, (1886)

118 U. S. 491. — ¹⁰) *La Bourgogne*, (1902) 117 Fed. 261. — ¹¹) *La Bourgogne*, (1908)

210 U. S. 95. — ¹²) *La Bourgogne*, (1908) 210 U. S. 95. — ¹³) 27 U. S. Stat. at Large, 445;

4 Fed. Stat. Ann. 854. Reprinted *infra*. — ¹⁴) *Botany Worsted Mills v. Knott*, (1900) 179 U. S. 69.

of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document, any clause relieving the ship or the owner or the master from liability for "damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of merchandise or property committed to its or their charge.

The second section prohibits the insertion in the bill of lading or shipping document, of any stipulation whereby the owner diminishes, weakens, or avoids his obligation to use due diligence to properly equip, man, provision, and outfit the vessel, and to make the vessel seaworthy and capable of performing her intended voyage. The latter part of the second section forbids the insertion of such stipulation for the purpose of relieving the master and those handling the cargo from liability for damage occasioned by failure "to carefully handle and stow her cargo and to care for and properly deliver the same."

The third section of the Act provides that if the owner of any such vessel shall exercise due diligence to make the vessel "in all respects seaworthy and properly manned, equipped and supplied", neither he nor the vessel nor the agent nor charterer shall be liable for loss "resulting from faults or errors in navigation, or in the management of said vessel." Nor shall the vessel, her owner, the charterer, the agent, or the master be liable for losses arising from "dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality, or vice of the things carried, or from insufficiency of package, or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

2. PURPOSES AND INTERPRETATION OF THE HARTER ACT. — It was stated in Congress when the Harter Act was under debate, that its purpose was to prevent the practice upon the part of shipowners engaged in foreign trade of inserting in their bills of lading clauses exempting them from liability for the negligence of their servants and agents¹). As a matter of fact the Federal Courts as formerly stated, had already held such stipulations void, but the claim was made that foreign courts, and in some cases courts of the States, gave effect to such stipulations to the detriment of the shipper. To prohibit this practice, at least so far as the United States could do so, sections 1 and 2 declared such stipulations unlawful. As an offset to these sections, the third section, as originally introduced, the effect of which was apparently misunderstood by Congress, provided that the shipowner should not be liable for error of judgment in the navigation or management of the ship if she were navigated with due care, and were seaworthy when she began her voyage. The third section as finally passed relieved the shipowner from liability for negligence of his agents for faults in navigation as well as for errors in judgment, and reduced the requirement of seaworthiness to a requirement on the part of the shipowner that he should use due diligence to make the ship seaworthy. The result, while perhaps desirable, leads to the very peculiar state of affairs that under the Act the shipowner is often found seeking to prove that his master and agents were negligent, while the shipper tries to show that the master and agents were free from fault²).

Undoubtedly the real purpose of the Act, whatever may have been stated in debate, was to relieve shipowners from the undue burden of the rule preventing them from stipulating against the negligence of their masters and crews in navigating the vessel, and the Supreme Court of the United States has so stated the purpose, and has construed the Act accordingly³). It has been said that the Act should not, however, be construed so as to extend the carrier's exemption from liability in doubt-

¹) See "The Harter Act", by Frederick Green, in 16 Harvard Law Review, p. 158, from which most of the statements in the above paragraph are adopted. — ²) See for example, *The Wildcroft*, (1906) U. S. 378, where a cargo of sugar was injured by fresh water which leaked through an open stop cock when water was being taken on for the vessel's boilers. The case turned on the burden of proof, and it was argued by the shipowner's counsel that the evidence showed that the fault was owing to the negligence of the

shipowner's agent while the shipper claimed they were not negligent. The Court held that the burden was on the shipowner to show seaworthiness and that the cock was a proper one. Cf. *The Folmina*, (1909) 212 U. S. 354. — ³) See *The Southwark*, (1903) 191 U. S. 1; *International Nav. Co. v. Farr*, etc., *Mfg. Co.*, (1900) 181 U. S. 218; *The Irrawaddy*, (1898) 171 U. S. 187; *The Silvia*, (1898) 171 U. S. 465. See also *Rowson v. Atl. Transportation Co.*, (1903) 1 K. B. 114 (England).

ful cases¹). And the Courts have repeatedly pointed out that the shipowner must show himself entitled to the statutory remedy, by proof that he has used due diligence in fitting out the vessel and in stowing her cargo²).

3. THE FIRST TWO SECTIONS OF THE ACT. — Section 1 prohibits the carrier from limiting his liability by any bill of lading or shipping document for the improper stowage, loading, care, custody, or delivery of the goods. Section 2 prohibits him from relieving himself from negligence in equipping, manning, provisioning, and outfitting the vessel or rendering it otherwise seaworthy either on the part of himself or his agents.

These sections apply only as between the shipper and the vessel or her owner. They do not affect the contract between a charterer and an owner. The charter party is not a shipping document within the meaning of the Act³). It seems that so far as the shipping of goods is concerned they will apply to any shipowner who transports merchandise to or from a port of the United States, whether he be a common carrier or a private carrier⁴). Even though the bill of lading may properly make the limitation in the country from which the goods were shipped, the prohibition of the Act will apply, in any case brought in the United States Courts or the courts of the States⁵).

Under these sections it has been held that the carrier cannot stipulate that he shall not be liable for certain goods which are above the value of \$ 100, except the value be stated in the bill of lading, for the effect of the stipulation is to "weaken" the carrier's obligation of due care, which he is forbidden to do by the statute. He must be held liable whether the value is stated in the bill or not. This, however, does not prevent a stipulation that he shall not be liable for more than \$ 100 for the loss of such goods, for the reason that his obligation to use diligence is not thereby weakened⁶).

A stipulation in the bill of lading that the shipper may only recover upon affirmative proof of negligence is held void for the same reason. The burden is upon the shipowner to show due diligence and to shift that burden is to "weaken" his obligation of due care⁷).

4. THE THIRD SECTION OF THE ACT; ITS GENERAL SCOPE AND EFFECT. — The third section is the one which chiefly affects the shipowner's liability. It has been said very neatly that its effect is to give "a statutory bill of lading"⁸). Its result, generally stated, is that if the shipowner uses due diligence to make the ship seaworthy and properly equipped, manned, and supplied, he has fulfilled his duty so far as loss is from the following causes concerned: 1. Faults in navigation; 2. Faults in management; 3. Errors in navigation; 4. Errors in management; 5. "Damages of the seas or other navigable waters"; 6. Acts of God; 7. Acts of public enemies; 8. Inherent defects in the goods; 9. Defects in their package; 10. Seizure under legal process; 11. The act or omission of the shipper or his agent; 12. Saving or attempting to save life or property at sea, and 13. Deviation in rendering such services⁹). It will be remembered that his liability is already limited as to certain valuable goods under section 4281 of the Revised Statutes and as to loss by fire not occurring by his own privity or design under section 4282 of the Revised Statutes. Most of the risks of navigation so far as the transportation of goods is concerned, are thus provided against, and he may provide against others by the bill of lading, provided he does not attempt to relieve himself from liability for improper loading, etc., and for omission to use reasonable care in making the ship seaworthy under sections 1 and 2. Where neither the Statutes nor the bill of lading protect him, he may seek a limitation of liability under section 4283 et seq. of the Revised Statutes. One very important liability of the shipowner is left unaffected by the Act, and that is his liability for latent defects. The claim was at one time urged that the Act relieved the shipowner from the warranty of seaworthiness which exists under the maritime law. The Supreme Court of the United States, however, has interpreted the Act as not affecting this general warranty. If the owner desires protection against the results of loss

¹) *The Germania*, (1903) 124 Fed. 5. —

²) *The Southwark*, (1903) 191 U. S. 1; *The Irrawaddy*, (1898) 171. U. S. 187. — ³) *Lake Steam Shipping Co. v. Bacon*, (1904) 129 Fed. 819; *The Delaware*, (1895) 161 U. S. 459.

— ⁴) 16 *Harvard Law Review*, p. 159. — ⁵) *Knott v. Botany Worsted Mills*, (1900)

179 U. S. 72; *The Kensington*, (1902) 183 U. S. 263. — ⁶) *Calderon v. Atlas Steamship Co.*, (1898) 170 U. S. 272. — ⁷) *The Southwark*, (1903) 191 U. S. 1. — ⁸) *Putnam, J.*, in *The Chattahoochee*, (1896) 74 Fed. 899. — ⁹) 27 U. S. Stat. at Large, 445; *The Manitoba*, (1900) 104 Fed. 153.

occurring through latent defects therefore, he must clearly stipulate to that effect in his bill of lading¹).

A superficial reading of section 3 would seem to exempt the shipowner who has complied with the requirement in regard to seaworthiness from all liability, including, for example, liability to another ship or her cargo for collision²). The whole Act must be read together, however, and as so read there can be no doubt but that Congress was dealing with only one matter, the relations of the ship and the cargo. It does not affect the liability of the owner for collisions³).

Carriers of passengers are not within the exemptions. The Act speaks of vessels transporting "merchandise or property"⁴). It seems baggage is not within the exemptions⁵).

To entitle a shipowner to the benefit of the exemptions in the third section, all that is necessary is that his ship should transport property "to or from any port in the United States". This language is wider than that of sections 1 and 2, which affects ships transporting property "from or between ports of the United States of America and foreign ports." The exemptions have been held to apply to vessels which run between ports in the same State⁶). It is well settled that the foreign ship or shipowner is entitled to the exemptions to the same degree as the domestic⁷).

5. EXERCISE OF DUE DILIGENCE TO RENDER SHIP SEAWORTHY AND PROPERLY EQUIPPED. — The duty to render the ship seaworthy, as has already been said, is not in any degree lessened by the Harter Act. The shipowner (unless protected by the terms of his bill of lading) remains liable for latent defects notwithstanding the exercise of ordinary or even extreme diligence in making the ship seaworthy. Where, therefore, a vessel, had a loose rivet which could not have been discovered by the exercise of the utmost care, and damage occurred to the cargo by the admission of sea water by reason of this latent defect, the shipowner was held liable, notwithstanding a clause in the bill of lading broad enough to cover the loosening of rivets after the cargo was received. The general terms of the bill were construed as having only a prospective operation⁸).

The exercise of due diligence to make the ship seaworthy and properly equipped, does not therefore render the shipowner immune from all liability. It merely discharges him from liability for injury to the goods by reason of the enumerated causes, the most important of which is improper navigation or management of the vessel. The exercise of due diligence in the respects enumerated is, in fact, a condition precedent to exemption for loss for the causes named. If such diligence is omitted, the shipowner remains liable as an insurer for all loss, not properly exempted by the terms of the bill of lading, which in all cases must comply with sections 1 and 2 of the Act.

What is the "due diligence" which has this important effect? It means something more than employing careful and competent agents to make the vessel seaworthy⁹). Thus, in the case just cited, where it was shown that competent agents were employed and proper materials furnished to make the vessel in all respects seaworthy, but an injury occurred to the cargo by reason of an open porthole, the owner was held liable¹⁰). The fact that surveyor's certificates have been obtained does not show the exercise of the diligence required by the statute¹¹). The negligence of the agents and servants in making inspection or preparing the vessel is attributable to the owner¹²).

¹) The *Carib Prince*, (1898) 170 U. S. 655. — ²) The owner therefore may stipulate against loss by thieves provided the loss is not in part occasioned by his own negligence or that of his servants. *Cunard Steamship Co. v. Jelley*, (1902) 115 Fed. 686. —

³) The *Delaware*, (1895) 161 U. S. 459; The *Chattahoochee*, (1898) 173 U. S. 540, 555. — ⁴) The *Rosedale*, (1898) 88 Fed. 328; affirmed (1899) 92 Fed. 1021; The *Kensington*, (1902) 183 U. S. 273; *La Bourgogne*, (1908) 210 U. S. 95. — ⁵) Cases in preceding note. — ⁶) In re *Piper Aden Goodall Co.*, (1898) 86 Fed. 670; The *Nettie Quill*, (1903) 124 Fed. 669. — ⁷) *Knott v. Botany Worsted Mills*, (1900) 179 U. S. 72. — ⁸) The *Carib Prince*, (1898) 170 U. S. 655. The stipulation in this case

exempted the vessel from liability for latent defects in her hull, but it was held that this stipulation should not be construed so as to extend to such defects as were in existence when the voyage began. To the point that the warranty of seaworthiness still continues notwithstanding the Harter Act, see also *The Southwark*, (1903) 191 U. S. 1; *The C. W. Elphicke*, (1903) 122 Fed. 439; *Nord Deutscher Lloyd v. Insurance Co. of North America*, (1901) 110 Fed. 427. — ⁹) *International Nav. Co. v. Farr, etc., Mfg. Co.*, (1901) 181 U. S. 225. — ¹⁰) See also *The Manitoba*, (1900) 104 Fed. 158. — ¹¹) *The Annazia*, (1904) 127 Fed. 495. — ¹²) *The Flamborough*, (1895) 69 Fed. 470.

From the fact that the exercise of due diligence is a condition precedent to the shipowner's exemption, it seems to follow that the burden is upon him of showing such diligence. The courts have uniformly so decided¹).

6. SEAWORTHINESS: PROPER EQUIPMENT AND MANNING. — Whether a vessel is seaworthy or not necessarily depends upon the character of the goods transported and other circumstances. Thus, a barge was held not seaworthy for a voyage on the Alaskan coast, though it might have been sufficient in a river²). And seaworthiness does not merely mean ability to withstand stress of weather and the like. Where meat or butter is to be transported, for example, it means that proper refrigerating apparatus has been supplied³). Improper stowage of the cargo or the ballast is considered as rendering the vessel unseaworthy⁴).

Omission to supply an efficient foghorn is an omission in proper equipment⁵).

The employment of a crew which could not understand the commands given in an emergency, though they were competent for the ordinary duties of an uneventful voyage, rendered the shipowner liable for loss, where the fault was one in navigation⁶).

7. ERRORS AND FAULTS IN NAVIGATION. — Often it is a question of great difficulty to determine whether a loss is the result of an error or fault in navigation, or whether it is owing to an improper loading, stowage, custody, care, or delivery of the cargo, or unseaworthiness. In the following cases the fault was held to be a fault of navigation: Erroneous handling of the ship leading to a collision⁷); Failure to keep a lookout⁸); Running at an excessive rate in the fog⁹); The selection of an improper anchorage¹⁰); Failure to close an iron port on the approach of a storm¹¹). On the other hand where the vessel sailed with her ports open under such circumstances that they admitted water without an unusual sea, the fault was unseaworthiness, for which the owner was liable, and not management of the vessel under section 3¹²). An open stop-cock which admitted fresh water and damaged the cargo was a fault in seaworthiness, not in management¹³).

Particularly with reference to the management of the cargo distinctions of considerable nicety develop. Thus, in the *Glenloch*¹⁴), where an English bill of lading incorporated the Harter Act, the Supreme Court of Judicature, Probate Division, held that where the engineer after the arrival in port of the vessel for the purpose of stiffening the ship, let water into a ballast tank so negligently that the water injured the cargo, the owner was not liable, because this was a fault in management. On the other hand, in *The Germanic*¹⁵), where, after arrival in port and after the vessel was turned over to the land agents of the owner, the vessel unloaded her cargo in such a manner that she brought her centre of gravity above the metacentre so that she sank, the loss was owing to the improper delivery and unloading of the cargo. The Court says: "If the primary purpose is to affect the ballast of the ship, the change (of the cargo) is management of the vessel, but if the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third"¹⁶).

E. Limitation of Liability by Contract. — **1. IN GENERAL.** — It is now well settled that, under the common law of the States, the carrier may by special contract

¹) *The Southwark*, (1903) 191 U. S. 1; *International Nav. Co. v. Farr, etc., Mfg. Co.*, (1901) 181 U. S. 218. — ²) *Parsons v. Empire Transp. Co.*, (1901) 111 Fed. 202. — ³) *The Southwark*, (1903) 191 U. S. 1; *Rowson v. Atlantic Transportation Co.*, (1903) 1 K. B. 114 (England). — ⁴) *The Oneida*, (1904) 128 Fed. 688; *The Frey*, (1899) 92 Fed. 669; *The Germanic*, (1904) 196 U. S. 589; *The Colima*, (1897) 82 Fed. 679. — ⁵) *The Niagara*, (1898) 84 Fed. 902. — ⁶) *In re Pacific Mail Steamship Co.*, (1903) 126 Fed. 1020. — ⁷) *The Albert Dumois*, (1900) 177 U. S. 240. — ⁸) *The Rosedale*, (1898) 88 Fed. 324; affirmed (1899) 92 Fed. 1021. — ⁹) *La Bourgogne*, (1908) 210 U. S. 95. — ¹⁰) *The Etona*, (1894) 64 Fed. 880. — ¹¹) *The Silvia*, (1898) 171 U. S. 415. — ¹²) *International Na-*

vigation Co. v. Farr, (1901) 181 U. S. 218. See also *The Monitoba*, (1900) 104 Fed. 145. — ¹³) *The Wilderoft*, (1906) 201 U. S. 378. — ¹⁴) (1896) P. 10 (Eng.). — ¹⁵) (1905) 196 U. S. 589. — ¹⁶) 196 U. S. at pp. 597—8. See also, *Knott v. Botany Mills*, (1900) 174 U. S. 69, in which case the cargo was originally properly stowed, but by the taking on of additional cargo, she trimmed so that water from a cargo of sugar drained into a cargo of wool in another compartment. This was held not a fault in management of the ship, but in the stowage and care of the cargo. In *The Etona*, (1894) 64 Fed. 880, the facts were the same, except that the drainage was occasioned by the ship's listing in a heavy storm, and the owner was held exempt.

diminish his strict liability as an insurer of the safety of the goods¹). In a few States, however, statutory or constitutional provisions prohibit the making of such contracts²). With these comparatively unimportant exceptions the Courts in the various jurisdictions recognize that some limitation may be made by special contract, although, by a preponderating weight of authority they deny the carrier the right to effect such limitation by a mere general notice³). The method by which the carrier usually carries out his purpose is by making provision in his bill of lading or shipping receipt, and the shipper is held bound by stipulations so made where he accepts and retains the bill of lading without dissent⁴).

While the right of the carrier to limit his liability to some extent is thus fully recognized, the jurisdictions differ widely as to the scope of this right. It is, however, pretty well settled that the carrier cannot refuse to carry goods unless the shipper consents to his terms, nor can he so express his contracts as to exact from the shipper an obligation to agree to the stipulation at the risk of failing to have his goods carried⁵). In other words, the shipper can always insist on the carrier's transportation of the goods under his liability as an insurer⁶).

2. CARRIER MAY NOT RELIEVE HIMSELF BY CONTRACT FROM THE CONSEQUENCES OF HIS OWN NEGLIGENCE OR THAT OF HIS SERVANTS.

— It is almost universally conceded that the carrier cannot by any stipulation to that effect directly limit his liability for negligence, nor excuse himself from the consequences of the negligence of his agents and servants⁷). The New York Courts stand alone in denial of this proposition and permit the carrier to so contract as to relieve himself even from the consequences of the gross negligence of his servants. In Illinois a stipulation that the carrier shall not be liable for ordinary negligence on the part of his servants is sustained, although one which provides against liability for their gross negligence is refused enforcement. California, by statutory rule, seems to have reached the same result practically as the Illinois Courts⁸). Even New York, however, refuses to give effect to contracts protecting the carrier from the results of his own wilful wrongdoing⁹).

In those few States where the stipulation against negligence is permitted, the courts require a clear expression of intent to that effect, and resolve all ambiguities against the carrier, upon the theory that he occupies a position of advantage with reference to the shipper¹⁰). Where the stipulation is not doubtful in meaning, the burden of proof in such jurisdictions is upon the carrier to show the circumstances of loss¹¹).

3. CONTRACTS LIMITING LIABILITY OTHERWISE THAN FOR NEGLIGENCE.

— In other respects than as regards his liability for negligence, the carrier may for the most part freely stipulate. Thus, he may provide against liability for losses by fire or by mobs or strikes, for which as we have seen he is liable at common law¹²). And where he is under no obligation to carry at all, as in the

1) 1 Hutchinson on Carriers, sec. 237; New Jersey Steam Navigation Co. v. Merchants Bank, (1848) 6 How. 344. — 2) Iowa, Code, sec. 2074; Kansas, Statutes 1897, c. 69, sec. 17; Texas, Rev. Stat., art. 320; Nebraska, Const., art. 11 sec. 4; Kentucky, Const., sec. 196. — 3) Williams v. Central Railroad Co., (1904) 88 N. Y. Supp. 434. In Ohio, Illinois, and Georgia, there must be express assent by the shipper. 5 Am. & Eng. Encyc. Law (2d Ed.) 295. — 4) Cau v. Texas, etc., Railway Co., (1904) 194 U. S., 427. See ante How Assent of Consignor Indicated. — 5) The Majestic, (1887) U. S. 375. — 6) 1 Hutchinson on Carriers, 404. — 7) 1 Hutchinson on Carriers, (3d Ed.) sec. 450; 5 Am. & Eng. Encyc. Law (2d Ed.) 308; N. Y. Central Railroad Co. v. Lockwood, (1873) 17 Wall. 357, (the leading case); Pierce v. Southern Pacific Railroad Co., (1898) 120 Cal. 156. — 8) For the New York law, see Cragin v. New York Central Railway Co., (1872) 51 N. Y. 61; Mynard v. Syracuse, etc., Railroad Co., (1877) 71 N. Y. 180, in which case the New York

court expressly declines to follow the rule of the Lockwood case. (See p. 186 of the opinion.) For the California law, see secs. 2174 and 2175, Civil Code, and the following cases: Pierce v. Southern Pacific Railroad Co., (1898) 120 Cal. 156; Merrill v. Pacific Transfer Co., (1901) 131 Cal. 582; Donlon v. Southern Pacific Railroad Co., (1907) 151 Cal. 763. — 9) Keeney v. Grand Trunk Railway Co., (1872) 47 N. Y. 525. — 10) Pierce v. Southern Pacific Railroad Co., supra; Mynard v. Syracuse, etc., Railroad Co., supra, where the words of the contract excused the carrier from liability for loss "from whatsoever cause arising," and the Court, construing the words against the carrier, held they did not relieve him from the results of the negligence of his servants. A stipulation that goods are "at owner's risk" was held not to excuse for negligence in Canfield v. Baltimore, etc., Railroad Co., (1883) 93 N. Y. 532. — 11) Canfield v. Baltimore, etc., Railroad Co., supra. — 12) 5 Am. and Eng. Encyc. Law (2d Ed.) 319.

case of dynamite and other dangerous goods, his contract of carriage may contain any provisions he may see fit to insert, so far as they are not contrary to public policy¹). But where his public calling is involved, the power to stipulate freely is subject always to the condition that the provisions shall be reasonable. Thus, a provision fixing the time within which claims must be presented is, as has been stated elsewhere, usually sustained²). But where the provision required the claim to be adjusted before removal of the goods from the station of the railroad company, it was held unreasonable and unenforceable³).

The stipulation that has been most frequently before the courts has been the one limiting the amount for which the carrier shall be liable in the event of loss of the goods. The cases on the subject have reached different results, but, generally speaking, the determining element here, as in other cases, is the question whether the limitation was fairly and reasonable made. "Where the contract is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against fanciful and extravagant valuation"⁴). The result is that the carrier may by such stipulation provide for the payment of only limited damages, even though the loss were occasioned by negligence.

The carrier, however, cannot fix an arbitrary standard of value for all goods and declare that he will not be liable above a certain limit for their loss. The shipper must have a real opportunity to agree upon the value, and further, if he wishes, to have the goods carried without limitation as to value⁵). But it does not follow that the carrier must offer the shipper the right of choosing whether he shall have the goods carried under a limit as to liability or without any limit. It is sufficient if such option actually exists⁶).

4. CONFLICT OF LAW WITH REFERENCE TO CONTRACTS LIMITING LIABILITY. — The question by what law the validity of a limitation is to be determined is one of much difficulty. The most general rule that can be laid down upon the subject is that the law of the place where the contract is made governs, unless it appears that the parties intended to be bound by some other law⁷). From this statement it appears that the question is really one of presumption, and the difficult matter in the particular case is to determine whether the parties so dealt that it may be presumed that they intended their contract to be governed by some law other than that of the place where the contract was made⁸). An important limitation upon the right of parties to select their law is imposed by some courts, notably by the United States Supreme Court. That tribunal has held that a contract limiting liability made in Belgium, and by its express terms to be governed by the law of that place, will be interpreted according to the general principles of commercial law prevailing in the courts of the United States, where the law of Belgium is contrary to the view of public policy adopted by the United States courts⁹). A similar doctrine prevails in some of the State courts with reference to the laws of other States of the Union¹⁰).

Aside from this particular matter, it may be said generally that in deciding questions as to the validity of exemptions contained in shipping contracts, the Federal courts, where there is no state Statute to the contrary, do not follow the rules laid down by the local courts, but are governed by rules of their own adoption. Hence, though a contract limiting liability may be valid by the laws of the State where made,

¹) *California Powder Works v. Atlantic & Railroad Co.*, (1896) 113 Cal. 329. — ²) *Black v. Wabash, etc., Railroad Co.*, (1884) 111 Ill. 351 (claim under oath to be presented within five days). — ³) *Capehart v. Seaboard, etc., Railroad Co.* (1879) 31 Am. Rep. 505. — ⁴) *Hart v. Pennsylvania Railroad Co.*, (1884) 112 U. S. 331, 343 (Leading case). — ⁵) *The Kensington*, (1902) 183 U. S. 263, 277; *Donlon Bros. v. Southern Pacific Railroad Co.*, (1907) 151 Cal. 763; *Weinberger v. Compagnie Generale Transatlantique*, (1906) 146 Fed. 516;

The Minnetonka, (1906) 146 Fed. 509. — ⁶) *Cau v. Texas & Pacific Railroad Co.*, (1904) 194 U. S. 427. — ⁷) 1 *Hutchinson, Carriers*, secs. 201, 212 (3d Ed.). — ⁸) *Liverpool etc. Steam Nav. Co. v. Phenix Ins. Co.*, (1889) 129 U. S. 397. — ⁹) *The Kensington*, (1902) 183 U. S. 263. — ¹⁰) See, for example, the doctrine of the Pennsylvania Court, which was sustained by the United States Supreme Court in *Pennsylvania R. R. Co. v. Hughes*, (1903) 191 U. S. 477.

New York, for example, and if the matter be one arising between citizens of that State will be so declared, the same contract, if the question arises between a citizen of New York as plaintiff and an alien or citizen of another State as defendant in a Federal court, will be declared invalid if the Federal courts take the view that it is contrary to public policy or to what they deem the general principles of commercial law. As a citizen of another State or an alien has the right to remove a case from the State to the Federal court, the curious result is presented that such a person has to a certain extent the power of choosing not only his forum but also the system of law by which his case is to be determined. And when he occupies the position of a plaintiff against a citizen of the State he may, in like manner, select the forum which offers him the most favorable rule of law¹).

V. TERMINATION OF CARRIER'S LIABILITY. — The carrier's responsibility of course ends where the goods are delivered in good condition and without unreasonable delay to the consignee, or where a negotiable bill of lading has been issued, to the holder of such bill²). But it is not always the carrier's duty to seek out the consignee in order to make personal delivery. Thus, carriers by sea usually discharge their duty by delivery at their wharf at the place of destination³). As elsewhere pointed out, express companies and carriers by wagon undertake a personal delivery to the consignee⁴). As to what the duties of the railroad carrier are in respect to delivery when the transit is ended, there seems much conflict of opinion. By one line of cases, his duty as carrier ceases when the transit has ended and the goods have been unloaded from the cars, and from that time he becomes a warehouseman and liable only for negligence in caring for the goods. This view is adopted in Massachusetts⁵), Illinois⁶), Pennsylvania⁷), and a few other States⁸). According to another view, the carrier's strict liability continues until the consignee has had a reasonable time to remove the goods, after notice that they have arrived. This view, which has been called the New Hampshire rule, because early formulated in that State⁹) prevails as well in New York¹⁰), Ohio¹¹), Connecticut¹²) and in probably a majority of the jurisdictions. The rule established by statute in California seems to lie midway between these two views. The carrier in that State is under a duty to notify the consignee, but apparently his duty as carrier terminates immediately upon giving the notice, without allowing the consignee a reasonable time to remove the goods¹³).

Even in the jurisdictions which adopt the Massachusetts view, the carrier is held absolutely liable for misdelivery of the goods, where the owner's own act or mistake did not contribute to the wrong delivery¹⁴). It is plain that this should be the rule in jurisdictions following the New Hampshire doctrine, and it is in fact almost universally adopted. "No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person¹⁵)". But where his duty as carrier has determined and his liability merely as a warehouseman has attached, there is some authority to the effect that he should not be held liable unless he is shown guilty of negligence in misdelivery of the goods¹⁶).

¹) *Liverpool, etc., Steam Nav. Co. v. Phenix Ins. Co.* *supra*. See also 45 Am. Law Review, 47 (Jan. Feb. 1911); and a series of articles on What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 1, 79, 194 and 260 (Nov. and Dec. 1909, — Jan. and Feb. 1910) by Professor Joseph H. Beale. The general question is further discussed in the chapter on Contracts, *supra*. — ²) Schouler on Bailments, sec. 487. — ³) 5 Am. and Eng. Encyc. L. (2d Ed.) 212, 219. — ⁴) *Bansemmer v. Toledo, etc., Ry. Co.*, (Indiana, 1865) 87 Am. Dec. 367. — ⁵) *Thomas v. Boston, etc., R. R. Co.*, (1845) 10 Met. 472. — ⁶) *Gregg v. Ill. Central R. R. Co.*, (1893) 147 Ill. 550. — ⁷) *Shenk v. Philadelphia Steam, etc., Co.*, (1869) 60 Pa. St. 109. — ⁸) 5 Am. and Eng. Encyc. L. (2d Ed.) pp. 263—265. — ⁹) *Moses v. Boston, etc., R. Co.*, (1856) 32 N. H. 523. ¹⁰) *Faulkner v. Hart*, (1880) 82 N. Y. 413. — ¹¹) *Lake Erie, etc., R. Co. v. Hatch*, (1895)

52 Oh. St. 408. — ¹²) *Graves v. Hartford, etc., R. Co.*, (1871) 38 Conn. 143. — ¹³) California Civil Code, secs. 2120 and 2121, provides that the carrier shall give notice and keep the goods as warehouseman until a reasonable time elapses; if he does not know the consignee's residence or place of business, he may drop a letter addressed generally to the consignee in the nearest post office. If the consignee neglects to remove the freight within a reasonable time, the carrier may store the same in a warehouse on the consignee's account, giving him notice of the same. — ¹⁴) *Forbes v. Boston, etc., Railroad Co.*, (1882) 133 Mass. 154; *St. Louis, etc., Railway Co. v. Larned*, (1882) 103 Ill. 293; *Cavallaro v. Texas & Pac. Ry. Co.*, (1895) 110 Cal. 348. The first two cases, however, involved liability under bills of lading. — ¹⁵) 2 Hutchinson on Carriers, sec. 668. — ¹⁶) *Id.* sec. 684.

If the mistake in delivery is owing to the fault of the shipper, as where he is induced by a swindler to ship goods to him and the carrier actually delivers the goods to the person intended, the carrier is not liable, it should seem¹), though there is authority to the contrary²).

VI. RIGHTS OF CARRIERS. — A. Right to Compensation. — The carrier may demand a reasonable compensation for his services before they are rendered, and accordingly may refuse to carry unless such reward is tendered in advance³). And if he does not demand payment in advance, he may, at the end of the journey, refuse to surrender the property until paid his charges⁴). From the fact that the carrier may refuse to carry unless paid the full freight in advance, it follows that if the owner of the goods, after the journey has begun, or even before the journey has begun, when the goods have been received by the carrier as carrier, takes the goods from his possession, the latter is entitled to full freight⁵). Suppose, however, that through disaster, the carrier is unable to finish the journey? The rule in such case is that he forfeits his freight; he is not entitled to recover freight until the goods are delivered⁶). If the goods are destroyed, accordingly, the carrier's right to freight perishes with the goods; but where they are merely injured without being destroyed, even though the injury is caused by the carrier's negligence, the freight is regarded as having been earned. In the latter case the shipper would have a set-off or cross action for the injury in a proper case⁷). Where a vessel is injured on the voyage, the master may retain the ship and cargo a reasonable time, while the ship is being repaired, or may transship the cargo to another vessel; if the owner of the cargo refuses to permit this to be done, he becomes liable for the full freight notwithstanding the voyage is not complete⁸).

Sometimes the shipper or consignee is willing to accept the cargo at the intermediate port, in cases where the carrier is unable to finish the voyage. Under these circumstances, he becomes liable *pro rata itineris*, that is, for the proportionate share of the freight earned⁹).

Who is liable for the freight? Primarily the shipper or the person on whose behalf the goods are shipped. Thus, if the bill of lading or charter party be taken out in the name of the consignees the latter are *prima facie* liable for the freight¹⁰). The consignee or assignee of the bill of lading by accepting the goods makes himself liable to the carrier, although the bill was not taken out in his name. One line of cases holds that this result follows as a matter of law¹¹); another view makes the question one of fact for the jury¹²).

B. Lien of Carrier. — The common carrier has a right to detain the goods which are the subject of carriage¹³) until the charges upon the same have been paid¹⁴). This lien, or right of detention, does not exist, however, except for charges in respect to the particular goods which were the subject of carriage, and the carrier is not entitled to hold goods to secure the payment of a general balance of account¹⁵), unless there be a contract to that effect¹⁶). This lien exists only where the owner of the goods or a person having authority from him, delivers the goods to the carrier, and it does not avail the carrier where the goods have been delivered by a wrongdoer, for example, a thief¹⁷). Where, however, the owner has clothed the wrongdoer with an apparent authority over the goods, such apparent authority supplies the place of an actual authority¹⁸).

Upon common law principles, the carrier cannot sell the goods to satisfy his lien; he has merely the right of indefinite detention¹⁹). But statutes quite generally provide for the enforcement of the lien by sale at public auction after due notice²⁰). Where

¹) *Samuel v. Cheney*, (1883) 135 Mass. 278. — ²) *Express Co. v. Shearer*, (1896) 160 Ill. 215. — ³) 2 *Hutchinson on Carriers*, (3d Ed.) sec. 799. — ⁴) *Id.* sec. 864. — ⁵) *The Gazelle*, (1888) 128 U. S. 474. — ⁶) *Schouler on Bailments*, sec. 529. — ⁷) 1 *Parsons, Shipping and Admiralty*, 217. — ⁸) *Hugg v. Augusta Insurance Co.*, (1849) 7 How. 595; *The Maggie Hammond*, (1869) 9 Wall. 435. — ⁹) 7 *Am. and Eng. Encyc. Law* (2d Ed.) 243. — ¹⁰) *Dayton v. Parke*, (1894) 142 N. Y. 391. — ¹¹) *Hatch v. Tucker*, (Rhode Island, 1880) 34 *Am. Rep.* 707. — ¹²) *North German Lloyd v. Heyle*, (1890)

44 *Fed.* 100. — ¹³) *Blanchard v. Page*, (1857) 8 *Gray*, 281; *Grant v. Wood*, (1848) 21 *N. J. L.* 292. — ¹⁴) 2 *Hutchinson on Carriers*, sec. 864; *California, Civil Code*, secs. 2144, 2872, et seq. — ¹⁵) 5 *Am. and Eng. Encyc. Law* (2d Ed.) 400. — ¹⁶) *Pennsylvania Railroad Co. v. American Oil Works*, (1889) 126 *Pa. St.* 485. — ¹⁷) *Hayes v. Campbell*, (1883) 63 *Cal.* 143. — ¹⁸) 5 *Am. & Eng. Encyc. Law* (2d Ed.) 404. — ¹⁹) 2 *Kent's Commentaries* (14th Ed.) 642. — ²⁰) 1 *Stimson's American Statute Law*, secs. 4354—4356.

such statutory provisions are followed, they must be strictly pursued at the risk of the carrier's rendering himself liable for the full value of the goods, besides losing his lien; for, unlike the pledgee, he has not a right of property but a mere right of possession¹).

VII. WAREHOUSEMEN. — A. In General. — The law in regard to warehousemen is based upon the common law of bailments, and the warehouseman is merely a bailee for hire, and, in the absence of statutes regulating his calling, is governed by the ordinary principles of law that control the dealings between private persons²). He is not, like the carrier, engaged in the exercise of a public function, although in a few States persons transacting business as proprietors of grain elevators have been considered as subject to the law of public callings³). As a general proposition, therefore, the warehouseman may make such contracts as he pleases, subject only to the exception that they must not offend public policy⁴). The consequence is that the law governing warehousemen is capable of much simpler statement than that respecting carriers.

As has already been pointed out, the carrier's liability upon the termination of his voyage and before the delivery of the goods becomes that of a warehouseman.

B. Duties of Warehousemen. — The duties of a warehouseman involve 1. his duty with respect to keeping the goods, and 2. his duty with respect to delivering them.

1. The duty of the warehouseman with respect to keeping the goods is to use the ordinary care and diligence that an ordinarily prudent person would exercise towards such property⁵). He is accordingly not liable for the accidental destruction of the property stored through fire or its loss by thieves, or its injury or depreciation while in his custody, provided such loss, destruction, or injury was caused without his fault⁶). And the burden of proof that the loss or injury was caused by his negligence is upon the plaintiff⁷).

The warehouseman's liability may be limited by contract, but not to such an extent as to excuse him from the consequences of the gross negligence of himself or his servants⁸), and certainly not to the extent of relieving him from the exercise of good faith⁹). And the courts seem disposed to interpret such contracts rather strictly. Thus, where the warehouseman by his receipt contracted to deliver the goods "damages by elements excepted," he was held liable for damages caused by a fire of incendiary origin¹⁰). In other words, the warehouseman, instead of limiting his liability as he doubtless intended to do, by the form of his receipt increased it, for he made an absolute promise to deliver qualified by only one condition.

2. As to the duty of delivery: Where a non-negotiable receipt is given, in every case the warehouseman must deliver to the owner or to such person as the owner by his order designates and to no other person. His mistake though not the result of negligence or want of caution, will not protect him, if he delivers to the wrong person. In such a case, he becomes liable to the true owner for the full value of the goods¹¹). In other words with respect to delivery of the goods for which a non-negotiable receipt or no receipt has been given, it may be said that the warehouseman insures the correct delivery of the goods to the owner, though unlike the carrier, he does not insure their safe custody. Where the Uniform Warehouse Receipts Act prevails or where the courts or the legislatures have adopted the view that warehouse receipts are quasi-negotiable, the warehouseman's duty is to deliver to the holder of the receipt, which has been issued deliverable to order and has been properly indorsed, (unless he has received information that such person is not the true owner)¹²).

C. Nature of the Warehouse Receipt. — The same difficulties which beset the bill of lading at common law surrounded the warehouse receipt, indeed, the two instruments stand upon the same footing in all essential characteristics. The warehouse receipt like the bill of lading was regarded as a muniment of title, but it was not given the character of negotiable paper to such an extent as to enable the purchaser or

¹) *Stewart v. Naud*, (1899) 125 Cal. 596. —

²) *Schouler on Bailments*, sec. 96. — ³) *Munn v. Illinois*, (1876) 94 U. S. 113. — ⁴) 30 Am. and Eng. Encyc. Law (2d Ed.) 54. — ⁵) *Taussig v. Bode*, (1901) 134 Cal. 260. — ⁶) *Aldrich v. Boston, etc., Railroad Co.*, (1868) 100 Mass. 31; *Taussig v. Bode*, supra. — ⁷) *Wilson v. Southern Pacific Railroad Co.*, (1882) 62 Cal. 164. — ⁸) *Schouler on Bailments*, sec. 51. — ⁹) *Gash-*

weiler v. Wabash, etc., Railroad Co., (1884) 53 Am. Rep. 558. — ¹⁰) *Pope v. Farmer's Union &c., Co.*, (1900) 130 Cal. 139. Perhaps, the warehouseman might have had the contract reformed so as to express the real meaning in an equitable proceeding. — ¹¹) *Lichtenhein v. Boston, etc., Railroad Co.*, (1853) 11 Cush. 70. — ¹²) *Uniform Warehouse Receipts Act*, secs. 9 & 10.

pledgee to rely upon its genuineness and the title of the holder¹). Statutes of an incomplete nature were passed in many of the States to remedy this defect²), but it was not until the submission of the Uniform Warehouse Receipts Act by the Commissioners on Uniform State Laws that a satisfactory statement of statutory law was to be found. This Act has been adopted in the twenty-two States and Territories of California, Connecticut, District of Columbia, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin.

The Act provides for two forms of receipt, 1. non-negotiable and 2. negotiable; under the former of which the goods are to be delivered to the depositor or some other specified person³), while under the latter they are to be delivered to the order of a specified person or to bearer⁴). The negotiable receipt must be surrendered and cancelled when the goods are drawn⁵), and the warehouseman must not deliver without receiving the receipt⁶). Later sections provide that a negotiable receipt may be negotiated by the owner or by any other person to whom possession and custody of the receipt has been entrusted, if the receipt is then indorsed by the person named in the receipt as depositor. The indorsee of such receipt acquires not only the title of the person thus negotiating it, but also such title as the depositor originally had, or if he had no title then such title as he might convey to a bona fide purchaser for value⁷). The effect of this Statute is to make warehouse receipts negotiable to the same extent as bills of lading under the Bills of Lading Act⁸).

D. Lien of Warehouseman. — Unlike the ordinary bailee for hire, the warehouseman, under the common law as expressed in many American decisions, was allowed the right to detain the goods deposited with him until his charges were paid⁹). No other bailee for custody possessed this right. For example, an agistor of cattle was obliged to surrender them to the owner though the latter did not tender the charges for the services¹⁰). But this so-called lien or right of detention extended only to the particular bailment, and the warehouseman was not allowed to detain the goods for a general balance of account. Statutes in some States extend this lien. In New York, for example, by a statute passed in 1897, the lien extended to the general balance of account¹¹). The common law lien extends only to charges for services and does not include the right to detain for advances made by the warehouseman¹²). The warehouseman had at common law no right to sell the goods to satisfy his lien¹³).

The Uniform Warehouse Receipts Act gives the warehouseman a lien not only for his services but also for his advances, including expenses of transportation and insurance, and further enables him upon the default of the customer to sell the goods at auction. It does not, however, give him a lien for the general balance of account¹⁴).

Statutes on Carriers and Warehousemen.

Introductory.

The statutory law relating to carriers engaged in foreign and interstate commerce is in part contained in the acts of congress reprinted below. Intrastate carriers are governed by state laws¹⁵). Owing to the merely local importance of

¹) 30 Am. and Eng. Encyc. L. (2d Ed.) 71. — ²) In a few States the statutes declared warehouse receipts to be negotiable (unless marked otherwise), but these Statutes were strictly construed and did not effect their purpose. Mohun on Warehousemen gives these statutes at length: Alabama, p. 2; Arizona, p. 23; Arkansas, p. 26; California, p. 38; Colorado, p. 63; Connecticut p. 75; Delaware, p. 83; Indiana, pp. 189, 194; Kansas p. 230; Nebraska, p. 507; Wisconsin, p. 813. In many of these States the Uniform Act has been adopted. — ³) Uniform Warehouse Receipts Act, sec. 4. — ⁴) Id. sec. 5. — ⁵) Id. sec. 11. — ⁶) Id. sec. 9. —

⁷) Id. secs. 40—41. — ⁸) See ante Negotiability of Bill of Lading under Statutes. —

⁹) *Steinman v. Wilkins*, (1844) 7 W. & S. (Pa.) 466. — ¹⁰) *Lewis v. Tyler*, (1863) 23 Cal. 364.

¹¹) Laws, New York, 1897, Art. 6 chap. 418, sec. 73. This law has been repealed by the Uniform Warehouse Receipts Act which confines the lien to charges in respect to the particular goods. — ¹²) 30 Am. & Eng. Encyc. Law (2d Ed.) 65. — ¹³) 5 Id. p. 66. — ¹⁴) Uniform Warehouse Receipts Act, secs. 31—36. — ¹⁵) The statutes of Georgia and Washington reprinted below may be regarded as typical.

these state laws they have not been reprinted, with the exception of the enactments relating to bills of lading.

Nearly all of the states have statutes governing the liability of warehousemen. The uniform warehouse receipts act has been adopted in twenty-two states.

I. Carriers.

1. Acts of Congress.

24 Stat. L. 379. An Act to regulate Commerce (February 4, 1887).¹⁾

Sec. 1. Carriers and transportation subject to the act. Free passes and free transportation prohibited. Railroad companies prohibited from transporting commodities in which they are interested. Timber and products thereof excepted. [As amended June 29, 1906, April 13, 1908, and June 18, 1910.] The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.

The term "common carrier" as used this act shall include express companies and sleeping car companies. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all

¹⁾ An act to regulate commerce, approved February 4, 1887, and in effect April 5, 1887 (24 Statutes at Large, 379), as amended by an act approved March 2, 1889 (25 Statutes at Large, 855), by an act approved February 10, 1891 (26 Statutes at Large, 743), by an act approved February 8, 1895 (28 Statutes at Large, 643), by an act approved June 29, 1906

(34 Statutes at Large, 584), by a joint resolution approved June 30, 1906 (34 Statutes at Large, 838), by an act approved April 13, 1908 (35 Statutes at Large, 60), by an act approved February 25, 1909 (35 Statutes at Large, 648), and by an act approved June 18, 1910 (36 Statutes at Large, 539).

instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, that nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families

of other common carriers subject to the provisions of this act: Provided further, that the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled "An act to further regulate commerce with foreign nations and among the states", approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section thirteen of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

Sec. 2. Unjust discrimination defined and forbidden. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. Undue or unreasonable preference or advantage forbidden. Facilities for interchange of traffic. Discrimination between connecting lines forbidden. That is shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company,

firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. Long and short haul provision. Commission has authority to relieve carriers from the operation of this section. **Water competition.** [As amended June 18, 1910.] That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the interstate commerce commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the interstate commerce commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Sec. 5. Pooling of freights and division of earnings forbidden. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. Printing and posting of schedules of rates, fares and charges including rules and regulations affecting the same, icing, storage, and terminal charges, and freight classifications. Printing and posting of schedules of rates on freight carried through a foreign country. Freight subject to customs duties in case of failure to publish through rates. Thirty days, public notice of change in rates must be given. Copies of contracts, agreements, or arrangements relating to traffic must be filed with commission. No carrier shall engage in transportation unless it files and publishes rates, fares, and charges thereon. Commission may reject schedules. [Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910.] That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property

and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this act, shall, before it is admitted into the United States from said foreign county, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, that the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this act shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word "carrier" occurs in this act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the president of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

The commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the commission shall be void and its use shall be unlawful.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

If any common carrier subject to the provisions of this act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The station agent of the ——— Company at ——— station", together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

Sec. 7. Continuous carriage of freights from place of shipment to place of destination. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Sec. 8. Liability of common carriers for damages. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. Persons claiming to be damaged may elect whether to complain to the commission or bring suit in a United States court. Officers of defendant may be compelled to testify. That any person or persons claiming to be damaged by any common

carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages, the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. Penalties for violations of act. [As amended March 2, 1889, and June 18, 1910.] That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition know-

ing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or to try, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, that the penalty of imprisonment shall not apply to artificial persons.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11. Interstate commerce commissioners—how appointed. That a commission is hereby created and established to be known as the interstate commerce commission, which shall be composed of five commissioners, who shall be appointed by the president, by and with the advice and consent of the senate. The commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the president; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the commissioner whom he shall succeed. Any commissioner may be removed by the president for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation, or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

See sec. 24, *infra*.

Sec. 12. Power and duty of commission to inquire into business of carriers and keep itself informed in regard thereto. Commission required to execute and enforce provisions of this act. Duty of district attorney to prosecute under direction of attorney general. [As amended March 2, 1889, and February 10, 1891.] That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain, from such common carriers full and complete information, necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States

to whom the commission may apply to institute in the proper court and to prosecute under the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation pending before the commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with the commission. All depositions must be promptly filed with the commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 13. Complaints to commission. How and by whom made. How served upon carriers. Reparation by carriers before investigation. Investigations of complaints by the commission. Commission may issue orders in investigations begun on its own motion. [As amended June 18, 1910.] That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or

other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any state or territory at the request of such commissioner or commission, and the interstate commerce commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this act, or concerning which any question may arise under any of the provisions of this act, or relating to the enforcement of any of the provisions of this act. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. Commission must make report of investigations, stating its conclusions and order. Reparation. Reports of investigations must be entered of record. Service of copies on parties. Reports and decisions. Authorized publication competent evidence. [Amended March 2, 1889, and June 29, 1906.] That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof. The commission may also cause to be printed for early distribution its annual reports.

Sec. 15. Commission may determine and prescribe just and reasonable rates and classifications to be observed as maximum charges. Commission may determine and prescribe just and reasonable regulations or practices. Commission may order carriers to cease and desist from full extent of violations found. Orders of the commission effective as prescribed, but in not less than thirty days. Orders shall continue in force not exceeding two years, unless suspended or set aside by commission or court. When carriers fail to agree on divisions of joint rate, commission may prescribe proportion of such rate to each carrier. Burden of proof on carrier as to reasonableness of increased rates. Commission may establish through routes and joint rates and classifications. Selection of route by shipper. [As amended June 29, 1906, and June 18, 1910.] That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, of after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges

whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, that if any such hearing can not be concluded within the period of suspension, as above stated, the interstate commerce commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classi-

fications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the interstate commerce commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: Provided, however, that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

It shall be unlawful for any common carrier subject to the provisions of this act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, that nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and

reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this act.

Sec. 16. Award of damages by commission. Petition to United States court in case carrier does not comply with order for payment of money. Findings of fact of commission shall be prima facie evidence in reparation cases. [Amended March 2, 1889, June 29, 1906, and June 18, 1910.] That if, after hearing on a complaint made as provided in section thirteen of this act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to such plaintiff.

Every order of the commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

The commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this act shall be payable into the treasury of the United States, and shall be recoverable in a civil suit in the name of the United

States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the attorney-general of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

The commission may employ such attorneys as it finds necessary for proper legal aid and service of the commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the commission's own instance or upon complaint, or to appear for and represent the commission in any case pending in the commerce court; and the expenses of such employment shall be paid out of the appropriation for the commission.

If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the interstate commerce commission or any party injured thereby, or the United States, by its attorney-general, may apply to the commerce court for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce shall obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals.

Sec. 16a. Commission may grant rehearings. Application for rehearing shall not operate as stay of proceedings, unless so ordered by commission. [Added June 29, 1906.] That after a decision, order, or requirement has been made by the commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

Sec. 17. Interstate commerce commission. Form of procedure. [As amended March 2, 1889.] That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said commission and be heard in person or by attorney.

Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said commission shall have an official seal, which shall be judicially noticed. Either of the members of the commission may administer oaths and affirmations and sign subpoenas.

Sec. 18. Salaries of commissioners. [As amended March 2, 1889.] That each commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars¹), payable in like manner. The commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the commission.

Sec. 19. Principal office of the commission. Sessions of the commission. Commission may prosecute inquiries by one or more of its members in any part of the United States. That the principal office of the commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the commission may hold special sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

Sec. 20. Carriers subject to act, and owners of railroads engaged in interstate commerce must render full annual reports to commission; and commission is authorized to prescribe manner in which reports shall be made and require specific answers to all questions. What reports of carriers shall contain. [As amended June 29, 1906, February 25, 1909, and June 18, 1910.] That the commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the commission may require; and the commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the commission by order substitute that period

¹) Increased to \$ 5000 by sundry civil act of March 4, 1907, 34 Stat. L., 1311.

for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the state in which the same is taken.

The commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the commission, and it may employ special agents or examiners, who shall have authority under the order of the commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offence and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, that the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine

of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the attorney-general of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said act to regulate commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them.

And to carry out and give effect to the provisions of said acts, or any of them, the commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Sec. 21. Annual reports of the commission to congress. [As amended March 2, 1889.] That the commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to congress, and copies of which shall be distributed as are the other reports transmitted to congress. This report shall contain such information and data collected by the commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary; and the names and compensation of the persons employed by said commission.

Sec. 22. Persons and property that may be carried free or at reduced rates. Mileage, excursion, or commutation passenger tickets. [As amended March 2, 1889, and February 8, 1895.] That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, that no pending litigation shall in any way be affected by this act: Provided further, that nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges,

as aforesaid, it shall file with the interstate commerce commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the interstate commerce commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso.

Sec. 23. Jurisdiction of United States courts to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars or other transportation facilities. [Added March 2, 1889.] That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

Sec. 24. Commission to consist of seven members; terms; salaries. Qualifications and enlargement of commission. [Added June 29, 1906.] That the interstate commerce commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the commission shall be accomplished through appointment by the president, by and with the advice and consent of the senate, of two additional interstate commerce commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not more than four commissioners shall be appointed from the same political party.

Additional provisions in Act of June 29, 1906: **Sec. 9.** That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the act to regulate commerce and all acts amendatory thereof shall apply to any and all proceedings and hearings under this act.

Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Sec. 11. That this act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the act entitled 'An act to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the interstate commerce commission, shall take effect and be in force sixty days after its approval by the president of the United States."

32 Stat. L. 847. An Act to further regulate Commerce with Foreign Nations and among the States (February 19, 1903).¹⁾

Sec. 1. Carrier corporation as well as officer or agent liable to conviction for misdemeanor. Failure of carrier to publish rates or observe tariffs a misdemeanor. Misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination. Rates filed or participated in by carrier shall, as against such carrier, be deemed legal rate. [As amended June 29, 1906.] That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, that any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offence is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the interstate commerce commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or publish-

¹⁾ An act to further regulate commerce with foreign nations and among the states, approved February 19, 1903 (32 Statutes at Large, 847), as amended by an act approved June 29, 1906 (34 Statutes at Large, 584).

ed, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property from one state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the attorney-general of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Sec. 2. Persons interested in matters involved in cases before interstate commerce commission or circuit court may be made parties and shall be subject to orders or decrees. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the interstate commerce commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Sec. 3. Proceedings to enjoin or restrain departures from published rates or any discrimination prohibited by law against carriers and parties interested in traffic. That whenever the interstate commerce commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the attorney-general shall direct, either of his own motion or upon the request of the interstate commerce commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided

by said act approved February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce" and the acts amendatory thereof. And in proceedings under this act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding: Provided, that the provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies', 'An act to regulate commerce', approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the attorney-general in the name of the interstate commerce commission.

Sec. 4. **Conflicting laws repealed.** That all acts and parts of acts in conflict with the provisions of this act are hereby repealed, but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act.

Sec. 5. That this act shall take effect from its passage.

32 Stat. L. 823. An Act to expedite the Hearing and Determination of Suits in Equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies," "An Act to regulate Commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like Purpose that may be hereafter enacted (February 11, 1903).

[This act is reprinted infra, under the statutes relating to trusts and monopolies, in the article on Commercial Corporations.]

35 Stat. L. 1134. An Act to promote the safe Transportation in Interstate Commerce of Explosives and other dangerous Articles, and to provide Penalties for its Violation (May 30, 1908).

[By an act entitled "An act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909, to take effect and be in force on and after the first day of January, 1910, the act entitled "An act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," approved May 30, 1908, is repealed, and the following sections of said act to codify, revise, and amend the penal laws of the United States are substituted therefor¹).]

Sec. 232. **Dynamite, etc., not to be carried on passenger vehicles for hire.** It shall be unlawful to transport, carry, or convey, any dynamite, gunpowder, or other explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between a place in any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, and a place in any other state, territory, or district of the United

¹) Approved March 4, 1909 (35 Statutes at Large, 1134).

States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier, which vessel or vehicle is carrying passengers for hire: Provided, that it shall be lawful to transport on any such vessel or vehicle small arms ammunition in any quantity, and such fuses, torpedoes, rockets, or other signal devices, as may be essential to promote safety in operation, and properly packed and marked samples of explosives for laboratory examination, not exceeding a net weight of one-half pound each, and not exceeding twenty samples at one time in a single vessel or vehicle; but such samples shall not be carried in that part of a vessel or vehicle which is intended for the transportation of passengers for hire: Provided further, that nothing in this section shall be construed to prevent the transportation of military or naval forces with their accompanying munitions of war on passenger equipment vessels or vehicles.

Sec. 233. Interstate commerce commission to make regulations for transportation of explosives. The interstate commerce commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

Sec. 234. Liquid nitroglycerin, etc., not to be carried on certain vehicles. It shall be unlawful to transport, carry, or convey, liquid nitroglycerin, fulminate in bulk in dry condition, or other like explosive, between a place in a foreign country and a place within or subject to the jurisdiction of the United States, or between place in one state, territory, or district of the United States, or a place noncontiguous to but subject to the jurisdiction thereof, and a place in any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, on any vessel or vehicle of any description operated by a common carrier in the transportation of passengers or articles of commerce by land or water.

Sec. 235. Marking of packages of explosives; deceptive marking. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment shall have plainly marked on the outside thereof the contents thereof; and it shall be unlawful for any person to deliver, or cause to be delivered, to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation, any explosive, or other dangerous article, under any false or deceptive marking, description, invoice, shipping order, or other declaration, or without informing the agent of such carrier of the true character thereof, at or before the time such delivery or carriage is made. Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the interstate commerce commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both.

Sec. 236. Death or bodily injury caused by such transportation. When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such articles upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years.

U. S. Rev. Stat.

Sec. 4278. Transportation of nitro-glycerine. It shall not be lawful to transport, carry, or convey, ship, deliver on board, or cause to be delivered on board, the

substance or article known or designated as nitro-glycerine, or glynoil oil, nitroleum, or blasting oil, or nitrated oil, or powder mixed with any such oil, or fiber saturated with any such article or substance, upon or in any vessel or vehicle used or employed in transporting passengers by land or water between a place in any foreign country and a place within the limits of any state, territory, or district of the United States, or between a place in one state, territory, or district of the United States, and a place in any other state, territory, or district thereof.

Sec. 4279. Packing and marking nitro-glycerine. It shall not be lawful to ship, send, or forward any quantity of the substances or articles named in the preceding section, or to transport, convey, or carry the same by a vessel or vehicle of any description, upon land or water, between a place in a foreign country and a place within the United States, or between a place in one state, territory, or district of the United States, and a place in any other state, territory, or district thereof, unless the same shall be securely inclosed, deposited, or packed in a metallic vessel surrounded by plaster of Paris, or other material that will be non-explosive when saturated with such oil or substance, and separate from all other substances, and the outside of the package containing the same be marked, printed, or labeled in a conspicuous manner with the words "Nitro-glycerine, dangerous."

Sec. 4280. Regulation by states of traffic in nitro-glycerine. The two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances, between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits, for sale, use, or consumption therein.

Sec. 4281. Liability of masters, etc., as carriers. If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Sec. 4282. Loss by fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

Sec. 4283. Liability of owner not to exceed his interest. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4284. General average of losses. [As amended 1877.] Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Sec. 4285. Transfer of interest of owner to trustee. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

Sec. 4286. When charterer is deemed owner. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitations of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

Sec. 4287. Remedies reserved. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

Sec. 4288. Shipping inflammable materials. Any person shipping oil of vitriol, unslaked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in river or inland navigation.

Sec. 4289. Limitation of liability of owners to apply to all vessels. [As amended 1875, 1886.] The provisions of the seven preceding sections, and of section eighteen of an act entitled 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes,' approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters.

27 Stat. L. 445. An Act relating to Navigation of Vessels, Bills of Lading, and to certain Obligations, Duties, and Rights in Connection with the Carriage of Property (February 13, 1893).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the revised statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

Sec. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

2. State Acts.

Uniform Bills of Lading Act.

Maryland¹⁾ and Massachusetts.^{2) 3)}

An Act to make Uniform the Law of Bills of Lading.

Part I. The issue of bills of lading.

Sec. 1. **Bills governed by this act.** Bills of lading issued by any common carrier shall be governed by this act.

Sec. 2. **Form of bills. Essential terms.** Every bill must embody within its written or printed terms: a) The date of its issue; b) The name of the person from whom the goods have been received; c) The place where the goods have been received; d) The place to which the goods are to be transported; e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person; f) A description of the goods or of the packages containing them which may, however,

¹⁾ Laws, 1910, c. 336. — ²⁾ Acts, 1910, c. 214. — ³⁾ During 1911 this act was also adopted in Illinois, Ohio, and New York.

be in such general terms as are referred to in section 23; and g) The signature of the carrier. A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable. A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

The provisions of this section are in accordance with business usage. The requirement of printing the words "order of" before the consignee's name is especially desirable in order to prevent the alteration of straight bills into negotiable bills. Though it is desirable that all bills of lading shall conform to the rules here laid down, the essential point is that negotiable bills shall do so, and as to them only is a sanction imposed for failing to insert the terms required by the act.

Sec. 3. Form of bills. What terms may be inserted. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions, shall not: a) Be contrary to law or public policy, or b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Much litigation has arisen over the point involved in 3 (b). The provision as here given is in accordance with the weight of authority (6 Cyc. of Law 393) and is similar to the corresponding section of the warehouse receipts act.

Sec. 4. Definition of non-negotiable or straight bill. A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill.

See note to the following section.

Sec. 5. Definition of negotiable or order bill. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill. Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this act.

This Act makes a fundamental distinction throughout, between negotiable and non-negotiable bills. The former are the negotiable representatives of the goods, the latter merely evidence of the contract between the shipper and carrier. This distinction is clearly recognized in mercantile usage and by much legislation. To some extent it is also recognized by the courts independently of legislation. Negotiable bills are frequently called "order" bills.

Sec. 6. Negotiable bills must not be issued in sets. Negotiable bills issued in this state for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets. If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts.

The issue of bills of lading in parts has often been condemned. It is a direct invitation to fraud in the case of negotiable bills, for one part is as much an original as another. Moreover, it is impossible to guard against the fraud, for it has been held that one who has contracted to buy goods and pay the price on transfer of the bill of lading must pay on having one of a set tendered him. He cannot demand all (*Sanders v. McLean*, 11 Q. B. D. 327), though by so doing alone can he be protected, for the carrier may deliver without liability to the holder who first presents a part. *Glynn v. Dock Co.*, 7 App. Cas. 591. Owing to the fixed practice of international carriers in regard to this matter, it has been thought more conservative to confine the requirements of this section to carriage within the United States.

Sec. 7. Duplicate negotiable bills must be so marked. When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill.

The use of duplicate bills is common, and it is obvious that they should be so marked to avoid fraud or mistake. See *Midland Bank v. Mo. Pac. Ry.*, 132 Mo. 492.

Sec. 8. Non-negotiable bills shall be so marked. A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not negotiable." This section shall not apply, however, to memoranda or acknowledgments of an informal character.

By the statutes of several states the carrier must require the surrender of all bills except those marked "not negotiable." It seems desirable that a bill of lading should indicate very clearly on its face whether it is a negotiable or non-negotiable bill, in view of the marked differences in the legal effect of the two documents. Section 50 provides a criminal penalty for failure to observe this requirement.

Sec. 9. Insertion of name of person to be notified. The insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

This section is adopted with slight changes in wording from House Bill 15,846 of the 1st session of the 59th Congress. The practice is common for a shipper of goods to take a bill to his own order that he may obtain the discount of a draft for the price, inserting also in the bill a request that the carrier notify the prospective buyer of the arrival of the goods, so that the latter may promptly pay the price, get the bill of lading, and remove the goods. Banks sometimes fear to discount a draft for the consignor when such a provision is inserted, questioning whether the prospective purchaser of the goods may not have a better right than one who buys the bill of lading either outright or as security. As the person to be notified may not have even a contract right against the consignor, it seems best to remove any doubt as to the rights of one who purchases or lends money on such a bill.

Sec. 10. Acceptance of bill indicates assent to its terms. Except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.

This section deals with a question upon which there has been much litigation, and expresses the weight of authority, though there are many contrary decisions.

Part II. Obligations and rights of carriers upon their bills of lading.

Sec. 11. Obligation of carrier to deliver. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by: a) An offer in good faith to satisfy the carrier's lawful lien upon the goods; b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable, and c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier. In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

See the definition of holder in sec. 53. The requirement of signature to an acknowledgment that the goods have been delivered is perhaps not the law aside from statute.

Sec. 12. Justification of carrier in delivering. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is: a) A person lawfully entitled to the possession of the goods, or b) The consignee named in a non-negotiable bill for the goods, or c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee.

This section gives the carrier a justification in some cases where he would not, under the preceding section, be bound to deliver, e. g., if a thief presented a negotiable bill properly indorsed, the carrier would be protected if he delivered the goods innocently.

Sec. 13. Carrier's liability for misdelivery. Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions b) and c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he: a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods. A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to en-

able the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

This enacts the well-recognized law in regard to misdelivery generally, and also provides for the case where, owing to notice of the rights of others a delivery of the goods to the consignee is wrongful. See *Southern Express Co. v. Dickson*, 94 U. S., 549; 6 Cyc. 468, et seq.

Sec. 14. Negotiable bills must be cancelled when goods delivered. Except as provided in section 27, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto.

It is an obvious requirement of the mercantile use of negotiable bills of lading that the goods shall remain in the hands of the carrier as long as the bill is outstanding, and statutes similar in effect to this section are in force in some states. See also, as to warehousemen, *Mohun*, 2, 24, 355, 382, 538, 593. The section does not apply to non-negotiable bills, because usage and mercantile necessity frequently require delivery in such cases without surrender of the receipt. See *Forbes v. Boston & Lowell R. R.*, 133 Mass., 154; *Litchfield Bank v. Elliott*, 83 Minn., 469. It is necessary to except compulsion by legal process, not only because in one case such compulsion is contemplated by this act, (see sec. 43) but also because the compulsion may occur in a state which has not passed the Act.

Sec. 15. Negotiable bills must be cancelled or marked when parts of goods delivered. Except as provided in section 27, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either: a) To take up and cancel the bill, or b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

This follows in regard to partial deliveries the rule of sec. 14.

Sec. 16. Altered bills. Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Alteration of a document transferring title to property, or indicating ownership, cannot destroy the vested title to the property. *Wald's Pollock* (3d ed.), p. 845, and cases cited. Accordingly, even though a bill is altered, the goods in the carrier's possession belong to the same person they did before alteration, and though it would be possible to hold that the carrier's only relation to the goods became that of a bailee, bound only to turn over the goods on demand, but not bound to fulfill the contract of carriage, this seems an inconvenient result. No hardship is imposed upon the carrier if he is required to fulfill his obligation to carry the goods to their destination on the terms originally agreed upon.

Sec. 17. Lost or destroyed bills. Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

As in the case of all lost instruments (whether negotiable bills and notes or not) accidental destruction should not relieve the maker or diminish the rights of the holder. Accordingly the holder of a bill should be allowed to compel the delivery of the goods without surrender of the bill. This relief, however, can be given only under equitable conditions. The carrier cannot be required to increase his risk because of the holder's carelessness or accident. Accordingly, a sufficient bond is required. The carrier will still remain liable on the original bill of lading if it should turn up in the hands of a bona fide purchaser, under section 14, but will be able to recoup his liability against the bondsmen. As this act imposes no penalty upon the carrier for failure to take up a negotiable bill of lading on delivery of the goods, other

than making the carrier liable on such a bill which it has not taken up, there is nothing to prevent the carrier from making such arrangement as he deems satisfactory with the holder of a lost or destroyed bill, without requiring the legal proceeding provided for in this section.

Sec. 18. Effect of duplicate bills. A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Duplicate bills of lading seem to have been somewhat confused by some courts, and perhaps by some business men, with bills of lading issued in sets, in which each part is an original. Banks appear sometimes to lend money on duplicate bills, and in *First Bank of Batavia v. Ege*, 109 N. Y. 120, at least the court seemed to treat the duplicate as if it were as good as the original. In *Shaw v. United States*, 101 U. S. 557, the duplicate was treated as of no more value than a copy. See also *Midland Bank v. Mo. Pac. Ry. Co.*, 132 Mo. 492. It is obvious that two separate bills representing the goods cannot be permitted. The duplicate, therefore, must not represent the goods. It should, however, be conclusive upon the carrier that there is an original of the same tenor.

Sec. 19. Carrier cannot set up title in himself. No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

This states the common law as to bailees generally. 3 Am. & Eng. Encyc. of Law, 759.

Sec. 20. Interpleader of adverse claimants. If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defence to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate.

The case of *Crawshaw v. Thornton*, 2 Myl. & C. 1, unfortunately held that interpleader was not a proper remedy in such a case. It is, however, the only adequate remedy, and is probably generally allowed in this country. 3 Am. & Eng. Encyc. of Law, 762.

Sec. 21. Carrier has reasonable time to determine validity of claims. If some one other than the consignee or person in possession of the bill, has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

It seems obviously proper that the carrier should be protected for such brief period as may be necessary to enable him to determine the rights of the claimants.

Sec. 22. Adverse title is no defence, except as above provided. Except as provided in the two preceding sections and in section 12, no right or title of a third person unless enforced by legal process shall be a defence to an action brought by the consignee of a non-negotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand.

Except as qualified by the preceding sections, the common law doctrine is here stated that a bailee cannot set up the title of a third person as an excuse for failure to deliver goods. See 3 Am. & Eng. Encyc. of Law, 758.

Sec. 23. Liability for non-receipt or misdescription of goods. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to: a) The consignee named in a non-negotiable bill, or b) The holder of a negotiable bill, who has given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue. If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor.

The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

This section, perhaps imposes on the carrier a stricter rule than that generally in force in this country in that it makes a carrier liable for an innocent misdescription of the goods. See *Hale v. Milwaukee Dock Co.*, 23 Wis. 276. But as the carrier can readily protect himself by inserting in the bill only what he knows, namely, the marks on the packages or the statements of the shipper regarding them, it seems best to make the carrier responsible for what he asserts. The section also charges the carrier for the improper conduct of an employee in issuing a bill when goods have not been received. The weight of authority, apart from statute, has freed the carrier from liability on the ground that the employee had no authority to issue a bill under these circumstances. But much fault has justly been found with this rule and in some states it has been changed by statute.

Sec. 24. Attachment or levy upon goods for which a negotiable bill has been issued. If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

If the mercantile theory of documents of title, such as bills of lading and warehouse receipts, were carried to its logical extent, no attachment of the goods represented by the document or levy upon them could be permitted while the negotiable document was outstanding. For the mercantile theory proceeds upon the assumption that a negotiable document of title represents the goods and may be safely dealt with on that assumption. For one and the same reason the law cannot permit the bailee to deliver the goods without taking up an outstanding negotiable receipt for them, or allow attachment or levy upon the goods, when they are represented by outstanding negotiable documents. For a similar reason the maker of negotiable notes is protected from garnishment; in most states by absolutely disallowing such garnishment and in other states by making any garnishment subject to the rights of even a subsequent purchaser for value before maturity of the paper. Likewise by statute in some states an attachment of stock is postponed to a subsequent purchaser of the stock certificate. *Clews v. Friedman*, 180 Mass. 556. So in the case of carriers, some protection against garnishment has been given. In most states, if the goods are actually in transit the carrier cannot be garnished, 14 Am. & Eng. Encyc. of Law, 810. A transfer of the bill of lading prevails over a subsequent attachment. *Mather v. Gordon*, 59 Atl. Rep. 424 (Conn.); *Robert C. White Co. v. Chicago & C. R. Co.*, 87 Mo. App. 330; *Union Bank v. Rowan*, 23 S. C. 339; and in *Peters v. Elliott*, 78 Ill. 321, it was held, that an attaching creditor of a consignor was postponed to one who bought the bill of lading subsequently. It was thought best in this act not to take the extreme position that no attachment, garnishment or levy could be made on property for which a negotiable bill was outstanding, but to cover the essential practical point by making it a condition of the validity of such seizure that the negotiation of the bill be enjoined or the document impounded. The following section expressly gives the court full power to aid, by injunction and otherwise, a creditor seeking to get at a negotiable bill and the property covered thereby.

Sec. 25. Creditor's remedies to reach negotiable bills. A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

As the right of legal garnishment of bailed property is limited by sec. 24, the creditor is given by this section such rights as are included under the head of bills of equitable attachment or in aid of execution.

Sec. 26. Negotiable bill must state charges for which lien is claimed. If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage, and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

This section is obviously requisite for the credit of negotiable bills, and is part of the general plan to make such bills indicate as clearly as possible on their face for what they stand.

Sec. 27. Effect of sale. After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

This section necessarily qualifies the right of a purchaser to a negotiable bill; such a purchaser may ordinarily assume that if the document was issued to the owner of goods and has been legally transferred to the purchaser, the latter will get a good title, but this assumption must be qualified by the chance referred to in this section. The age of the bill will, however, ordinarily give warning.

Part III. Negotiation and transfer of bills.

Sec. 28. Negotiation of negotiable bills by delivery. A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

This section should be read in connection with the following four sections. Thus, sec. 29, provides as to the method of negotiating order bills. Sec. 31 provides as to what persons may make effective negotiation, and sec. 32 provides what rights are acquired by a purchaser if such a person, as is described in sec. 31, negotiates the bill in the manner permitted by secs. 28 and 29. In allowing negotiation by delivery of a bill indorsed in blank, the act follows the rule in regard to bills and notes, which is that also applied by mercantile usage to bills of lading.

Sec. 29. Negotiation of negotiable bills by indorsement. A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

As the preceding section adopted the rule of bills and notes as to negotiation by delivery, so this section similarly adopts a rule in regard to negotiation by indorsement.

Sec. 30. Transfer of bills. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A non-negotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right.

As provision is made in several sections for the negotiation of bills, so it is also provided what the effect is of the transfer of bills, including the transfer of non-negotiable bills and of negotiable bills without complying with such formalities as are necessary to make an effective negotiation of them. There is no section providing as to who may transfer a bill, corresponding to sec. 31 as to who may negotiate a bill, since under sec. 33, where a bill is transferred, but not negotiated, the transferee can in no case acquire a greater right than the transferor had. Whoever, therefore, transfers a bill, can give such a right and no more.

Sec. 31. Who may negotiate a bill. A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

This section and the following are of fundamental importance to the mercantile community. They state familiar law in regard to bills and notes, and there is authority for applying the same rules to bills of lading, both in the statutes making bills of lading negotiable and in decisions of courts recognizing mercantile custom. *Commercial Bank v. Armsby Co.*, 120 Ga. 74; *Pollard v. Reardon*, 65 Fed. 848 (C. C. A.); *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. 545; *Tiedeman v. Knox* 53 Md. 612; *Hardie v. R. R. Co.* 118 La. 254; *Scheuerman v. Monarch Fruit Co.* 48 So. Rep. 647. This section is also in harmony with the views expressed by the American Bar Association. See Vol. 33, Reports Am. Bar Association pp. 24, 25, and 506, 507.

Sec. 32. Rights of person to whom a bill has been negotiated. A person to whom a negotiable bill has been duly negotiated acquires thereby: a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Even more than the preceding section, this section raises sharply the issue between what may be called the mercantile theory of bills of lading and the common law theory. The common law theory may be stated in these words: The bill of lading is a symbol of the property. Delivery of the bill of lading has the same effect as delivery of the property, but as property may be delivered without transferring title and without estopping the owner from asserting his title against one who has bought in good faith from the possessor, so in case of a bill of lading the original owner of the goods may always show what the real nature of the transaction was, even against a bona fide purchaser. Merchants and bankers, on the other hand, regard the bill of lading as a representation of title as well as a symbol of possession. See the decisions cited in the note to the preceding section as to the mercantile theory, and compare recent expressions in *The Carlos F. Roses*, 177 U. S. 655, 665; *Washburn-Crosby Co. v. Boston & Albany R. R. Co.*, 180 Mass. 252, 257. This act adopts the mercantile theory in providing that the person to whom the bill has been duly negotiated, acquires not only the title of the person who negotiated the bill, but also such title as the consignor and consignee had. That is, the purchaser may regard the form of the bill as a representation on the part of the consignor that the consignee was the owner of the goods. Subsection (b) provides that the person to whom the bill is negotiated shall succeed to the contract rights under the bill of lading as well as the property rights.

Sec. 33. Rights of person to whom a bill has been transferred. A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification. Prior to the notification of the carrier by the transferor or transferee of a non-negotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor, or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods.

So far as the non-negotiable bill is concerned, this section states the rights at common law of a purchaser of bailed goods. The purchaser, therefore, acquires nothing by the bill of lading except evidence. In case of a negotiable bill, the purchaser has the further right given by the next section.

Sec. 34. Transfer of negotiable bill without indorsement. Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

This follows the analogy of bills and notes. *Crawford's Negotiable Instrument Law*, sec. 79.

Sec. 35. Warranties on sale of bill. A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants: a) That the bill is genuine; b) That he has a legal right to transfer it; c) That he has knowledge of no fact which would impair the validity or worth of the bill, and d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby. In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim.

The clause in the first paragraph beginning "including" was inserted to avoid any possible misapprehension as to the scope of sec. 37. This section except (d) follows the *Negotiable Instrument Law*. *Crawford*, sec. 115. (d) it is believed states the existing law.

Sec. 36. Indorser not a guarantor. The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Mercantile usage in regard to warehouse receipts and bills of lading differs from that in regard to bills and notes in the matter to which this section relates. It states the existing

law even where statutes have made warehouse receipts and bills of lading negotiable. *Shaw v. Railroad Co.*, 101 U. S. 557; *Mida v. Geissmann*, 17 Ill. App. 207.

Sec. 37. No warranty implied from accepting payment of a debt. A mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described.

There are several English decisions to the effect that the holder of a bill of exchange having a forged bill of lading as security is not liable to refund payment of the draft if he receives payment from the drawee. To the same effect are *Hoffmann v. Bank*, 12 Wall. 181; *Goetz v. Bank*, 119 U. S. 551; and see *Daniel on Neg. Inst.* secs. 174, 175. In *Landa v. Lattin*, 19 Tex. Civ. App. 246, however, without referring to these authorities, the court went to the extreme length of holding that the holder of a bill of lading taken for security on the discount of a draft succeeded to all the liabilities of his transferor, the seller of the goods, and was to be regarded as warranting the quality of the goods to the same extent as the seller. This decision, though opposed to both authority and reason, was soon followed in *Finch v. Gregg*, 126 N. C. 176, and *Searles v. Smith Co.* 80 Miss. 688. Contrary decisions, however, have been rendered in *Tolerton-Stetson Co. v. Anglo-California Bank*, 112 Ia. 706, *Hall v. Keller*, 64 Kas. 211; *German-American Bank v. Craig*, 70 Neb. 41; *Leonhardt v. Small*, 117 Tenn. 153, and more recently *Landa v. Lattin* has been overruled in its own State. *Blaisdell Co. v. Citizens Nat. Bank*, 96 Tex. 626; and *Finch v. Gregg*, *supra*, has also been overruled. *Mason v. Nelson Cotton Co.*, 148 N. C. 492. Nevertheless the earlier Texas doctrine has been followed subsequently in *Alabama. Haas v. Citizens' Nat. Bank*, 144 Ala. 562.

Sec. 38. When negotiation not impaired by fraud, accident, mistake, duress or conversion. The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, or conversion.

This section merely elaborates for the sake of clearness certain cases within the terms of sec. 31.

Sec. 39. Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

This is copied from sec. 25 (1) of the English Sale of Goods Act, where it applies to all sales of goods. It is of special importance in the case of negotiable documents of title.

Sec. 40. Form of the bill as indicating rights of buyer and seller. Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows: a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer; b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract; c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer; d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is endorsed in blank or to the buyer by the

consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

It has for centuries been recognized that the form of the bill of lading was evidence of intent on the part of the seller to transfer or retain title. If the seller names himself not only as consignor, but also as consignee of the goods, the carrier is bailee for him and is his agent, in holding possession. It is also a fair presumption that title remains in the seller, as he is entitled to possession. On the other hand, if the seller names the buyer as consignee, the contract of the carrier is to deliver to the buyer; the carrier's possession is, therefore, for the buyer and with the right to possession presumably title also goes. The rules stated in this section are believed to be in accordance with at least the presumptions recognized by existing law. The difficulty with the law as it now exists is, many courts seem disposed to say that an intention contrary to that which the form of the bill indicates, may be shown even as against third persons. See Uniform Sales Act, sec. 20.

Sec. 41. Demand, presentation or sight draft must be paid, but draft on more than three days time merely accepted before buyer is entitled to the accompanying bill. Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming: a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill; b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill. The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.

This section covers a question that has caused some litigation. See Williston on Sales, sec. 290. Drafts on demand, presentation or sight, are assimilated by sec. 7 of the Uniform Negotiable Instruments Act. See Brannan, *Negotiable Instruments*, 1908, pp. 4 and 43.

Sec. 42. Negotiation defeats vendor's lien. Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

This section is covered by the Uniform Sales Act, sec. 59 (2) and 62. It was decided in *Newhall v. Central Pacific R. R.*, 51 Cal. 345, that a railroad re-delivering goods to the seller on receiving notice of stoppage in transitu was liable to a purchaser of a bill of lading issued for the goods, though the purchase was subsequent to the notice to stop. The case has been somewhat criticised by text-writers, but there are no decisions against it, and it seems clearly better to protect the innocent purchaser of the bill than the seller who has voluntarily taken part in the issue of the bill. If the purchaser of the bill is to be protected, the carrier must necessarily be allowed to protect himself by refusing to deliver the goods until the bill of lading is surrendered.

Sec. 43. When rights and remedies under mortgages and liens are not limited. Except as provided in section 42, nothing in this act shall limit the rights and remedies of a mortgagee or lienholder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

This section is declaratory and is intended to make perfectly clear that neither sec. 24 nor any other section is intended to be subversive of established laws governing chattel mortgages and liens on goods prior to the time of their delivery to the carrier; in so far at least as such mortgages and liens are good not simply between the parties, but against third parties.

Part IV. Criminal offences.

Sec. 44. Issue of bill for goods not received. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such

carrier, or by an agent of such carrier or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

To insure the fundamental basis on which the value of negotiable bills of lading must rest, it is necessary to punish criminally misrepresentation or fraud in regard to the existence of the goods behind the bill of lading. Other obvious frauds are aimed at by six following sections.

Sec. 45. Issue of bill containing false statement. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Sec. 46. Issue of duplicate bills not so marked. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section 7, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncanceled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 47. Negotiation of bill for mortgaged goods. Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Sec. 48. Negotiation of bill when goods are not in carrier's possession. Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 49. Inducing carrier to issue bill when goods have not been received. Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

Sec. 50. Issue of non-negotiable bill not so marked. Any person who with intent to defraud issues or aids in issuing a non-negotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

Part V. Interpretation.

Sec. 51. Rule for cases not provided for in this act. In any case not provided for in this act, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern.

Sec. 52. Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

This section is taken from the Sales Act and Warehouse Receipts Act, in order to induce the courts to consider not primarily the law previously existing in one state, but that existing in the states generally, in construing the present act. Although the Negotiable Instruments Act does not contain this section yet the courts of last resort have rightly applied this rule.

See Brannan on Negotiable Instruments Law (1908) page 1, note 2, and cases there cited and Crawford, Neg. I. L. (3rd. ed. 1908) p. 3.

Sec. 53. Definitions. 1. In this act, unless the context or subject matter otherwise requires: "Action" includes counter claim, set-off, and suit in equity. "Bill" means bill of lading. "Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made. "Consignor" means the person named in the bill as the person from whom the goods have been received for shipment. "Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported. "Holder" of a bill means a person who has both actual possession of such bill and a right of property therein. "Order" means an order by indorsement on the bill. "Owner" does not include mortgagee or pledgee. "Person" includes a corporation or partnership or two or more persons having a joint or common interest. To "purchase" includes to take as mortgagee and to take as pledgee. "Purchaser" includes mortgagee and pledgee. "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor. 2. A thing is done "in good faith," within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

The only definitions in this section requiring comment are the last two. The definition of value follows the Uniform Negotiable Instruments Act, the Uniform Sales Act, the Uniform Warehouse Receipts Act, and the Uniform Transfer of Stock Act, and applies the same doctrine to bills of lading. While the weight of authority, aside from statute, may have been opposed to quite so broad a definition of value in transactions in other documents than bills and notes, some courts at least have consistently applied the same rule to all transactions, and certainly so far as bills of lading are concerned, it seems inadvisable to make a distinction. The definition of good faith here given is that recognized by the great weight of authority in the law of bills and notes, and the rule in equity generally seems to be the same.

Sec. 54. Act does not apply to existing bills. The provisions of this act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 55. Inconsistent legislation repealed. All acts or parts of acts inconsistent with this act are hereby repealed.

[Sec. 56. Relates to commencement of act.]

Sec. 57. Name of act. This Act may be cited as the Uniform Bills of Lading Act.

California.

Civil Code.

Sec. 2085. Contract of carriage. The contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another.

Sec. 2086. Different kinds of carriers. Carriage is either: 1. Inland; or, 2. Marine.

Sec. 2087. Marine and inland carriers, what. Carriers upon the ocean and upon arms of the sea are marine carriers. All others are inland carriers.

Sec. 2088. Carriers by sea. Rights and duties peculiar to carriers by sea are defined by acts of congress.

Sec. 2089. Obligations of gratuitous carriers. Carriers without reward are subject to the same rules as employees without reward, except so far as is otherwise provided by this title.

Sec. 2090. Obligations of gratuitous carrier who has begun to carry. A carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage.

Sec. 2100. General duties of carrier. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

Sec. 2101. Vehicles. A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care.

Sec. 2102. Not to overload his vehicle. A carrier of persons for reward must not overcrowd or overload his vehicle.

Sec. 2103. Treatment of passengers. A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, and must treat them with civility, and give them a reasonable degree of attention.

Sec. 2104. Rate of speed and delays. A carrier of persons for reward must travel at a reasonable rate of speed, and without any unreasonable delay, or deviation from his proper route.

Sec. 2110. Freight, consignor, etc., what. Property carried is called freight; the reward, if any, to be paid for its carriage is called freightage; the person who delivers the freight to the carrier is called the consignor; and the person to whom it is to be delivered is called the consignee.

Sec. 2114. Care and diligence required of carriers. A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties. A carrier without reward must use at least slight care and diligence.

Sec. 2115. Carrier to obey directions. A carrier must comply with the directions of the consignor or consignee to the same extent that an employee is bound to comply with those of his employer.

Sec. 2116. Conflict of orders. When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee inconsistent with his own.

Sec. 2117. Stowage, deviation, etc. A marine carrier must not stow freight upon deck during the voyage, except where it is usual to do so, nor make any improper deviation from or delay in the voyage, nor do any other unnecessary act which would avoid an insurance in the usual form upon the freight.

Sec. 2118. Delivery of freight. A carrier of property must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place.

Sec. 2119. Place of delivery. If there is no usage to the contrary at the place of delivery, freight must be delivered as follows: 1. If carried upon a railway owned or managed by the carrier, it may be delivered at the station nearest to the place to which it is addressed; 2. If carried by sea from a foreign country, it may be delivered at the wharf where the ship moors, within a reasonable distance from the place of address; or, if there is no wharf, on board a lighter alongside the ship; or, 3. In other cases, it must be delivered to the consignee or his agent, personally, if either can, with reasonable diligence, be found.

Sec. 2120. Notice when freight not delivered. If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest postoffice.

Sec. 2121. When consignee does not accept. If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him.

Sec. 2126. Bill of lading, what. A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

Sec. 2127. Bill of lading negotiable. All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

Sec. 2128. Same. When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

Sec. 2129. Effect of bill of lading on rights, etc., of carrier. A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

Sec. 2130. Bills of lading to be given to consignor. A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading,

of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the consignor may take the freight from him, and recover from him, besides, all damage thereby occasioned.

Sec. 2131. Carrier exonerated by delivery according to bill of lading. A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer.

Sec. 2132. Carrier may demand surrender of bill of lading before delivery. When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

Sec. 2136. When freightage is to be paid. A carrier may require his freightage to be paid upon his receiving the freight; but if he does not demand it then, he cannot until he is ready to deliver the freight to the consignee.

Sec. 2137. Consignor, when liable for freightage. The consignor of freight is presumed to be liable for the freightage, but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterwards recover the freightage from the consignor.

Sec. 2138. Consignee, when liable. The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it.

Sec. 2139. Natural increase of freight. No freightage can be charged upon the natural increase of freight.

Sec. 2140. Apportionment by contract. If freightage is apportioned by a bill of lading or other contract made between a consignor and carrier, the carrier is entitled to payment, according to the apportionment, for so much as he delivers.

Sec. 2141. Same. If a part of the freight is accepted by a consignee, without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part, though not apportioned in the original contract.

Sec. 2142. Apportionment according to distance. If a consignee voluntarily receives freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freightage, according to distance. If the carrier, being ready and willing, offers to complete the transit, he is entitled to the full freightage. If he does not thus offer completion, and the consignee receives the freight only from necessity, the carrier is not entitled to any freightage.

Sec. 2143. Freight carried further than agreed, etc. If freight is carried further, or more expeditiously, than was agreed upon by the parties, the carrier is not entitled to additional compensation, and cannot refuse to deliver it, on the demand of the consignee, at the place and time of its arrival.

Sec. 2144. Carrier's lien for freightage, services, and advances. A carrier has a lien for freightage and for services rendered at request of shipper or consignee in and about the transportation, care, and preservation of the property, and he also has a lien for money advanced at request of shipper or consignee to discharge a prior lien. His rights to such lien are regulated by the title on liens.

Sec. 2148. Jettison and general average, what. A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard, or otherwise sacrifice, any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison, and the loss incurred thereby is called a general average loss.

Sec. 2149. Order of jettison. A jettison must begin with the most bulky and least valuable articles, so far as possible.

Sec. 2150. By whom made. A jettison can be made only by authority of the master of a ship, except in case of his disability, or of an overruling necessity, when it may be made by any other person.

Sec. 2151. Loss, how borne. The loss incurred by a jettison, when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freightage, and cargo for the benefit of which the sacrifice is made, as well as by the owner of the thing sacrificed.

Sec. 2152. General average loss, how adjusted. The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears

to the value of the whole. But an adjustment made at the end of the voyage, if valid there, is valid everywhere.

Sec. 2153. Values, how ascertained. In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution.

Sec. 2154. Things stowed on deck. The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage.

Sec. 2155. Application of the foregoing rules. The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, or expense necessarily incurred, for the preservation of the ship and cargo from extraordinary perils.

Sec. 2168. Common carrier, what. Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.

Sec. 2169. Obligation to accept freight. A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.

Sec. 2170. Obligation not to give preference. A common carrier must not give preference in time, price, or otherwise, to one person over another. Every common carrier of passengers by railroad, or by vessel plying upon waters lying wholly within this state, shall establish a schedule time for the starting of trains or vessel from their respective stations or wharves, of which public notice shall be given, and shall, weather permitting, except in case of accident or detention caused by connecting lines, start their said trains or vessel at or within ten minutes after the schedule time so established and notice given, under a penalty of two hundred and fifty dollars for each neglect so to do, to be recovered by action before any court of competent jurisdiction, upon complaint filed by the district attorney of the county in the name of the people, and paid into the common-school fund of the said county.

Sec. 2171. What preferences he must give. A common carrier must always give a preference in time, and may give a preference in price, to the United States and to this state.

Sec. 2172. Starting. A common carrier must start at such time and place as he announces to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines of travel.

Sec. 2173. Compensation. A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry.

Sec. 2174. Obligations of carrier altered only by agreement. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

Sec. 2175. Certain agreements void. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants.

Sec. 2176. Effect of written contract. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; and also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same.

Sec. 2177. Loss of valuable letters. A common carrier is not responsible for loss or miscarriage of a letter, or package having the form of a letter, containing money or notes, bills of exchange, or other papers of value, unless he be informed at the time of its receipt of the value of its contents.

Sec. 2194. Liability of inland carriers for loss. Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property

is liable, from the time that he accepts until he relieves himself from liability pursuant to sections two thousand one hundred and eighteen to two thousand one hundred and twenty-two, for the loss or injury thereof from any cause whatever, except: 1. An inherent defect, vice, or weakness, or a spontaneous action, of the property itself; 2. The act of a public enemy of the United States, or of this state; 3. The act of the law; or, 4. Any irresistible superhuman cause.

Sec. 2195. When exemptions do not apply. A common carrier is liable, even in the cases excepted by the last section, if his want of ordinary care exposes the property to the cause of the loss.

Sec. 2196. Liability for delay. A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence.

Sec. 2197. Liability of marine carriers. A marine carrier is liable in like manner as an inland carrier, except for loss or injury caused by the perils of the sea or fire.

Sec. 2198. Same. The liability of a common carrier by sea is further regulated by acts of Congress.

Sec. 2199. Perils of sea, what. Perils of the sea are from: 1. Storms and waves; 2. Rocks, shoals, and rapids; 3. Other obstacles, though of human origin; 4. Changes of climate; 5. The confinement necessary at sea; 6. Animals peculiar to the sea; and, 7. All other dangers peculiar to the sea.

Sec. 2200. Consignor of valuables to declare their nature. A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or chinaware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading.

Sec. 2201. Delivery of freight beyond usual route. If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

Sec. 2202. Proof to be given in case of loss. If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.

Sec. 2203. Carrier's services, other than carriage and delivery. In respect to any service rendered by a common carrier about freight, other than its carriage and delivery, his rights and obligations are defined by the titles on deposit and service.

Sec. 2204. Sale of perishable property for freight. If, from any cause other than want of ordinary care and diligence on his part, a common carrier is unable to deliver perishable property transported by him, and collect his charges thereon, he may cause the property to be sold in open market to satisfy his lien for freightage.

Sec. 3315. Breach of carrier's obligation to receive goods, etc. The detriment caused by the breach of a carrier's obligation to accept freight, messages, or passengers, is deemed to be the difference between the amount which he had a right to charge for the carriage and the amount which it would be necessary to pay for the same service when it ought to be performed.

Sec. 3316. Breach of carrier's obligation to deliver. The detriment caused by the breach of a carrier's obligation to deliver freight, where he has not converted it to his own use, is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled if he had completed the delivery.

Sec. 3317. Carrier's delay. The detriment caused by a carrier's delay in the delivery of freight, is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered, and the day of its actual delivery.

Georgia.

Code, 1911.

Sec. 2711. **Definition.** Any person undertaking to transport goods to another place for a compensation, is a carrier, and as such is bound to ordinary diligence.

Sec. 2712. **Common carrier.** One who pursues the business constantly or continuously for any period of time, or any distance of transportation, is a common carrier, and as such is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the State.

Sec. 2713. **Bailee must show no concurring negligence.** In order for a carrier or other bailee to avail himself of the act of God or exception under the contract as an excuse, he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto.

Sec. 2726. **Effect of notice to limit.** A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby.

Sec. 2728. **Injuries by common carriers, outside of corporate authority.** In all cases where the person or property of an individual may be injured or property destroyed by any corporation engaged as a common carrier in the transportation of freight or passengers, or both, either by land or water, such corporation shall be liable to pay damages to any one whose person or property may be so injured or destroyed, notwithstanding the fact that such corporation was acting without the scope of its charter, if such corporation would be liable for such damages if acting within its chartered powers and authority.

Sec. 2729. **Duty as to reception of goods, etc.** A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public.

Sec. 2730. **Time of responsibility.** The responsibility of the carrier commences with the delivery of the goods, either to himself or his agent, or at the place where he is accustomed or agrees to receive them. It ceases with their delivery at destination according to the direction of the person sending, or according to the custom of the trade.

Sec. 2736. **For delay.** The common carrier is bound not only for the safe transportation and delivery of goods, but also that the same be done without unreasonable delay.

Sec. 2737. **Strikes as excuses to carrier.** Where a carrier receives freight for shipment, it is bound to forward within a reasonable time, although its employees strike or cease to work; but if the strike is accompanied with violence and intimidation so as to render it unsafe to forward the freight the carrier is relieved as to liability for delay in delivering the freight, if the violence and armed resistance is of such character as could not be overcome by the carrier or controlled by the civil authorities when called upon by it.

Sec. 2738. **Stoppage in transitu.** A stoppage in transitu by the vendor or consignor relieves the carrier from his obligation to deliver, nor is he thenceforward responsible for more than ordinary diligence in the care of the goods.

Sec. 2739. **When it exists.** The right of stoppage in transitu exists whenever the vendor in a sale on credit seeks to resume the possession of goods while they are in the hands of a carrier or middleman, in their transit to the vendee or consignee, on his becoming insolvent. It continues until the vendee obtains actual possession of the goods.

Sec. 2740. **Estoppel on carrier.** The carrier can not dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him.

Sec. 2741. **Lien.** The carrier has a lien on the goods for the freight, and may retain possession until it is paid, unless this right is waived by special contract or actual delivery. This lien exists only when the carrier has complied with his contract as to transportation. He can recover pro rata for the actual distance transported when the consignee voluntarily receives the goods at an intermediate point.

Sec. 2744. Fraud on carrier. The carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his customers will release him from liability.

Sec. 2748. Owners of boats may grant bills of lading, etc. It shall be the duty of all owners or agents of boats employed in the navigation of the navigable waters of this state, to grant to each and every boat, respectively, previously to its departure from the wharf or landing, a certificate or bill of lading, showing its destination, contents, and the name of its captain or patroon and consignee, which certificate or bill of lading shall at all times be subject to the examination of any person requiring the same.

Sec. 2749. Failing to grant bill, etc. Any such owner or agent neglecting or refusing to furnish certificate or bill of lading, and any such captain or patroon refusing to exhibit the same on demand as aforesaid, may be severally indicted, and for every offense be fined in a sum not exceeding fifty dollars, one half the penalty in such case to go to the informer, and the other half to the use of the county where such conviction takes place.

Sec. 2752. When there are several. When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as "in good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability.

Sec. 2756. Connecting railroads to receive freights tendered in cars. All railroad companies in this state, at the terminus or any intermediate point, shall receive from the connecting road having the same gauge all cars containing freight consigned to any point on the road to which the same is offered, and shall transport the cars to their destination with reasonable diligence; and any failure or refusal to comply with this requirement shall give to the consignee, shipper or owner of said goods and freight a right of action against the company so refusing, and the damages received in such action shall not be less than ten per cent., nor more than twenty-five per cent of the value of the goods so refused to be received.

Sec. 2761. To prevent unjust discrimination. If any person, or any officer or agent of any company or corporation, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier of freight within this State, or any of its officers or agents, to discriminate unjustly in his, its or their favor, as against any other consignor or consignee in the transportation of property from and to points in this State, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor; and such person, corporation or company shall also, together with said common carrier, be liable jointly or severally in an action on the case to be brought by any consignor or consignee discriminated against, in any court of competent jurisdiction, for all damages caused by or resulting therefrom.

Sec. 2771. Carriers must trace freight. When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon delivery to the next "in good order", has been lost, damaged or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee or their assigns, within thirty days after application, to trace said freight and inform said applicant, in writing, when, where, how and by which carrier said freight was lost, damaged or destroyed, and the names of the parties and their official position, if any, by whom the truth of facts set out in said information can be established.

Sec. 2772. Penalty for failing to trace. If the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage or destruction occurred on its line.

Sec. 2773. Damages for delay. Where a carrier fails to deliver goods in a reasonable time, the measure of damages is the difference between the market value at the time and place they should have been delivered and the time of actual delivery.

Sec. 3528. What is a pawn. A pledge, or pawn, is property deposited with another as security for the payment of a debt. Delivery of the property is essential to this bailment, but promissory notes and evidences of debt, warehouse receipts, elevator receipts, bills of lading, or other commercial paper symbolic of property, may be delivered in pledge. The delivery of title-deeds creates no pledge.

See also Code, 1911, secs. 4133, 4134.

Washington.

Rem. & Bal. Code, 1910.

Sec. 3385. Order bill of lading, form and requisites of. That whenever any common carrier, railroad, or transportation company (hereinafter termed carrier) shall issue a bill of lading for the transportation of property from one place to another within this state, or between places one of which is within this state, which bill shall be, or purport to be, drawn to the order of the shipper or other specified person, or which shall contain any statement or representation that the property described therein is, or may be, deliverable upon the order of any person therein mentioned, such bill shall be known as an "order bill of lading", and shall conform to the following requirements: a) In connection with the name of the person to whose order the property is deliverable, the words "order of" shall prominently appear in print on the face of the bill, thus: "consigned to order of ...". b) The bill shall be printed on yellow paper, eight and one-half inches wide by eleven inches long; c) It shall contain on its face the following provisions: "The surrender of this original order bill of lading properly indorsed shall be required before delivery of the property" d) It shall not contain the words "not negotiable" or words of similar import. If such words are placed on an order bill of lading they shall be void and of no effect; e) Nothing herein shall be construed to prohibit the insertion in an order bill of lading of other terms or conditions not inconsistent with the provisions of this act; but it shall be unlawful to insert in such bill any terms or conditions contrary to, or inconsistent with, such provisions.

Sec. 3386. Straight bill of lading. Whenever a bill of lading is issued by a carrier for the transportation of property from one place to another within this state, or between places one of which is within the state, in which the property described therein is stated to be consigned or delivered to a specified person, without any statement or representation that such property is consigned or deliverable to the order of any person, such bill shall be known as a "straight bill of lading" and shall contain the following requirements: a) The bill shall be printed on white paper eight and one-half inches wide by eleven inches long; b) The bill shall have prominently printed or stamped upon its face the words "not negotiable", and the carrier may deliver the goods under a straight bill of lading to the consignee without requiring the surrender of the bill of lading; c) Nothing herein shall be construed to prohibit the insertion in a straight bill of lading of other terms and conditions not inconsistent with the provisions of this act, but it shall be unlawful to insert in such bill any terms or conditions contrary to or inconsistent with such provisions.

Sec. 3387. Issuance before receipt of goods unlawful; duplicates. It shall be unlawful for any carrier, or for any officer, agent, or servant of a carrier, to issue an order bill of lading or a straight bill of lading, as defined by this act, until the whole of the property as described therein shall have been actually received and is at the time under the actual control of such carrier, to be transported; or to issue a second or duplicate order bill of lading or straight bill of lading for the same property, in whole or in part, for which a former bill of lading has been issued and remains outstanding and uncanceled, without prominently marking across the face of the same the word "duplicate."

Sec. 3388. Liability. Every carrier who himself, or by his officer, agent, or servant authorized to issue bills of lading, issues a false or duplicate bill of lading in violation of the provisions of the preceding section, shall be estopped, as against all and every person or persons injured thereby who shall acquire any such false or duplicate bill of lading in good faith and for value, to deny the receipt of the property as described therein, or to assert that a former bill of lading has been issued and remains outstanding and uncanceled for the same property, as the case

may be; and such issuing carrier shall be liable to any and every such person for all damages which he or they may have sustained because of reliance upon such bill.

Sec. 3389. Fraudulent negotiation of bill; penalty. Every person who receives from a carrier and fraudulently negotiates for value an order or straight bill of lading representing property to which he had no, or an encumbered, title, at the time of the negotiation of such bill, shall be guilty of a misdemeanor and upon conviction shall be punished by fine not exceeding five thousand dollars or imprisonment not exceeding five years, or both.

Sec. 3390. Surrender and cancellation of bill on delivery. It shall be unlawful for any carrier, or officer, agent, or servant of a carrier, to deliver the property described in an order bill of lading without requiring surrender and making cancellation of such bill, or in case of partial delivery, indorsing thereon a statement of the property delivered. And every carrier who by himself, or by officer, agent, or servant authorized to deliver goods upon surrender of an order bill of lading, violates the provisions of this section, shall be estopped as against all and every person or persons injured thereby who shall acquire in good faith and for value any such order bill of lading from asserting that the property as described therein, has been delivered; and such delivering carrier shall be liable to any and every such person for all damages which he or they may have sustained because of reliance upon such bill: Provided, that the provisions of this section shall not apply where the property is replevined or removed from the possession of the carrier by operation of law; or has been lawfully sold to satisfy the carrier's lien; or in cases of sale or disposition of perishable, hazardous, or unclaimed goods in accordance with law or the terms of the bill of lading.

Sec. 3391. Alterations in bills; bona fide holders. Any material alteration, addition, or erasure in or to an order bill of lading or a straight bill of lading, fraudulent or otherwise, shall be without effect and in the hands of a bona fide holder for value, not a party to the alteration thereof, such bill shall be valid and may be enforced according to its original tenor: Provided, however, that an alteration, addition, or erasure in or to any such bill of lading with signature indorsed thereto thereon, by the issuing carrier, or his officer, agent, or servant in his behalf, and with the consent of the holder thereof, shall be valid and effective.

Sec. 8688. Duties of transportation companies. All transportation companies doing business wholly or in part within this state shall, upon receipt of any article of freight, promptly forward the same to its marked destination by the route directed by the shipper, or if no directions are given by shipper, then to any connecting company whose line en route reaches nearest to the point to which such freight is marked.

Sec. 8689. Liability of transportation companies. Any transportation company failing to comply with the last preceding section shall be liable for any damages that may be sustained, either to the shipper or consignee, from any cause, upon proof that said damages resulted on account of a failure of the transportation company to comply with said section.

Sec. 8690. Suits for damages, who may commence and where. Suit for damages may be instituted either at the place of shipping or destination, either by the shipper or consignee, and before any court competent and qualified to hear and determine like causes between individuals resident of the district in which said court is holding.

Sec. 8691. Application for cars. When a shipper makes written application to a railroad company for a car or cars not exceeding ten cars in number during any one day, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its destination, the railroad company shall furnish same within six days from 7 o'clock A. M. the day following such application. Or when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than six days' notice thereof, computing from 7 o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application. For failure to comply with this section, the company so offending shall forfeit and pay to the shipper applying the sum of one dollar per car per day or fraction of a day's delay after expiration of free time, upon demand in writing, made within thirty days thereafter by the shipper.

Sec. 8692. Receiving and moving freight. Whenever freight of any character, proper for transportation, whether in carload lots or less than carload lots is ten-

dered to a railroad company at its customary place for receiving shipments, and correct shipping instructions given, the railroad company's agent must immediately receive the same for shipment, and issue bills of lading or shipping receipt therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, computing time from 7 o'clock A. M. the day following receipt of shipment, and for failure to receive or transport such shipments within the time prescribed, the railroad company so offending shall forfeit and pay to the shipper the sum of one dollar per day, per car, or fraction thereof, on all carload freight and one cent per hundred pounds per day or fraction thereof, on freight in less than carloads, with minimum charge of five cents for any one package, upon demand in writing by the shipper, or some other party whose interest is affected by such delay: Provided, that in computing the time of freight in transit there shall be allowed twenty-four hours at such point where transferring from one railroad to another, or re-handling of freight, is necessary.

Sec. 8693. Unavoidable delays in transporting freight. The period during which the movement of cars of freight is suspended or delayed on account of accident, sudden congestion of traffic, unavoidable detention in other states or in other places within this state or any other cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this act, and counted as additional free time.

Sec. 8694. Notice of arrival of shipment to consignee. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice, by mail or otherwise, to consignee of the arrival of shipments, together with the weight and amount of freight, charges due thereon, and where goods or freight in carload quantities arrive, such notice shall contain, also identifying numbers, letters and initials of the car or cars, and, if transferred in transit the number and initials of the car in which originally shipped. Any railroad failing to give such notice shall forfeit and pay to the shipper, or other party whose interest is affected, the sum of one dollar per car per day, or fraction thereof, of a days delay, on all carload shipments, and one cent per hundred pounds per day or fraction thereof, on freight in less than carloads, with minimum charge of five cents for any one package, after the expiration of the said twenty-four hours: Provided, that not more than one dollar per day be charged for any one consignment not in excess of a carload.

Sec. 8695. Delivery of freight. Railroad companies shall deliver freight at their depots or warehouses, or, in case of shipment for track delivery, shall place loaded cars at an accessible place for unloading within twenty-four hours after arrival, computing time from 7 o'clock A. M. the day following the arrival of freight. Except that carload shipments for track delivery at local stations having not more than one team track, shall be placed at an accessible point for unloading by the conductor of trains on which the car arrives. The shipper or consignee shall be paid one dollar per car per day for each day, or fraction of a day, such delivery is so delayed.

Sec. 8696. Carload freight subject to demurrage. All carload freight or freight carried at carload rates and all freight in cars, whether full carload or not, taking track delivery shall be subject to the demurrage or car service charges prescribed in this act.

Sec. 8697. Time allowed shipper in which to load cars. A shipper, on whose order a car or cars have been placed, for loading, shall be allowed forty-eight hours for the loading of such car or cars, computing the time from 7 o'clock A. M. the day after such car or cars have been placed, subject to the order of the shipper, and thereafter a demurrage of not more than one dollar per car per day, or fraction of a day, may be assessed and collected on all such cars as have not been tendered to the railroad company with shipping instructions within the said forty-eight hours. Railroad companies shall not be compelled to furnish cars for future shipments to parties in default as to the payment of the demurrage charges herein last provided for, until such demurrage charges have been paid, provided the same has been demanded prior to the commencement of the transportation of the car. If, after placing the car or cars required by this section, the railroad company shall, during or after free time, temporarily remove all or any of them, or in any way prevent, obstruct or delay the loading of the same, the shipper shall not be chargeable with the delay caused thereby. When by reason of delay or irregularity on the part of

the railroad in filling orders, cars are bunched in excess of the ability of the shipper to load in the order indicated in his applications, the shipper shall be allowed separate and distinct periods of free time within which to load the car or cars specified in each separate application.

Sec. 8698. Delay through neglect of shipper; demurrage. A car or cars detained or held at point of shipment for want of proper shipping instructions, or by reason of imperfect or excessive loading, where loading is done by shipper, shall be subject to a demurrage charge of one dollar per car per day, or fraction of a day, the said car or cars are so detained or held. In case of imperfect or excessive loading by shipper, the shipper shall be notified thereof as early as practicable after said car or cars have been received from him, in which case car demurrage charges at above rate shall begin from time of notification.

Sec. 8699. Notice, actual or constructive. Legal notice, as referred to in this act, may be either actual or constructive. Where the consignee or his agent is personally served with notice of the arrival of freight at or before 6 o'clock P. M. of any day, free time begins at 7 o'clock A. M. on the day after such notice has been given. Constructive notice referred to shall consist of posting notice by mail to consignee; where this mode of giving notice is adopted there shall be twenty-four hours additional free time: Provided, however, that when, in any case where notice of arrival is given by mail, the consignee shall make oath that neither he, his agents, nor employees, have received such notice, then he will be held not to have received legal notice by reason of posting of said notice by mail.

Sec. 8700. Storage charges. All packages unloaded by railroad companies in their depots or warehouses, and freight which, in order to release cars, is unloaded in the yard space of a railroad company, which is not removed by the owners thereof from the custody of the railroad company within forty-eight hours computing time from 7 o'clock A. M. of the day following legal notice of arrival, may be subject to a charge of storage for each day, or fraction of a day, it may remain in the custody of the railroad company: Provided, such company shall allow means of ingress and egress for such removal. Said charges shall be as follows: In less than carloads, not more than one cent per hundred pounds per day or fraction thereof; in carload quantities not more than ten cents per ton or two thousand pounds per day or fraction thereof, but not exceeding one dollar per car per day, or fraction of a day: Provided, that in no case shall the amount so collected for storage of a less than carload shipment exceed the amount authorized to be charged as storage or demurrage on a carload of similar freight for the same length of time when not unloaded from car, as provided by the demurrage rates of this act.

Sec. 8701. Delay in unloading cars. Demurrage charges. Loaded cars containing hay, coal, coke, brick, lumber, and shingles in covered cars, and the following articles in bulk: meat, potatoes, grain and grain products, taking track delivery, which are to be unloaded by consignee, but are not unloaded within forty-eight hours computing time from seven o'clock A. M. the day following the day legal notice of arrival is given, having been placed at an accessible point for unloading, shall be subject thereafter to a charge for demurrage of one dollar (\$ 1) per car for each day, or fraction of a day, that they may remain loaded in possession of the railroad company. All loaded cars, taking track delivery, to be unloaded by consignee, shall be limited to forty-eight hours of free time: Provided, however, that if after placing a car or cars as required in this section, the railroad company shall, during or after free time, temporarily remove all or any of them, or in any way obstruct the unloading of same, the consignee shall not be chargeable with the delay caused thereby: Provided, that when on account of delay or irregularity in transportation, cars are bunched in transit and delivered to the consignee in numbers beyond ascertained ability to unload within the free time prescribed in this act, he shall be allowed by the carrier such additional time as may be necessary to unload cars so in excess by the exercise of due and usual diligence on the part of consignee, who shall also increase his unloading facilities coextensively with the increase of his business.

Sec. 8702. Unavoidable delay in unloading freight. Whenever the weather, during the period of free time, is so severe, inclement or rainy that it is impossible or impracticable to secure means of loading or unloading freight, or when, from the nature of the goods or freight, loading or unloading would cause injury or damage thereto, such time shall be added to the free period, and no demurrage charges shall

be allowed for such additional free time. This section applies to the state of the weather during business hours.

Sec. 8703. Carload freight, when may be stored in depots. Incoming carload freight, coming under the provisions of section 8701, may be stored by railroad companies in depots or warehouses at the expense of the owner, if same is not removed before demurrage charges attach: Provided, that daily storage charge on such freight shall not exceed the demurrage allowed under this act.

Sec. 8704. Refusal of consignee to accept freight; liability of consignor. If the consignee shall refuse to accept freight tendered in pursuance of the bill of lading, the carrier charged with the duty of delivery shall give legal notice to the consignor of such refusal; and if he shall not, within three days thereafter, give directions for the reshipment or unloading, or other disposition of such goods he shall thenceforth become liable to such carrier for storage on such goods, or demurrage upon the car or cars in which they are stored, to the same extent, and at the same rate as such charges are under like circumstances, by the provisions of this act imposed upon consignees who neglect or refuse, after notice of arrival, to remove freight of like character from the depots or cars of a carrier. A consignee who has once refused to accept a consignment of goods shall not thereafter be entitled to receive the same, except upon payment of all charges for storage or demurrage which have accrued; and if the consignee of freight in carloads, or less than carloads, shall fail or neglect to remove such freight within three days after the expiration of free time, then the carrier shall, through the agent at point of shipment, so notify the shipper, unless the consignee has signified his acceptance of the property. Said notice may either be served personally or given by mail.

Sec. 8705. Goods consigned to order; notice to whom. When consignors ship goods consigned to order, but express in their bills of lading or shipping instructions, the name of a person at destination to notify, it shall be the duty of the railroad or other transportation company, to give legal notice to such party in the same way, and under the same rules, as if the shipment had been made direct to him. But when consignors do not comply with this condition, the railroad or other transportation company shall give notice only to such consignors; except that in shipments of grain or hay notice shall also be given to the local exchanges: Provided, that at the expiration of free time the carrier shall give notice thereof to the consignor.

Sec. 8706. Discrimination prohibited. Railroad companies shall not discriminate between persons, places, or commodities, in storage or demurrage charges. No rebate, refund, drawback, average plan or other similar device shall be lawful: Provided, that this section shall not apply to package freight received in less than carload lots and unloaded in depots or warehouses, and upon proof of the violation of this section, either and each party to such discrimination, rebate, refund, drawback, average plan or other similar device shall be fined in any sum not less than one hundred and not exceeding one thousand dollars for each offense to be found by the jury in an action brought therefor.

Sec. 8707. Private cars and tracks; no demurrage. No demurrage shall be charged on private cars standing on private tracks, when both cars and tracks are owned by the same person or persons.

Sec. 8708. Cars for perishable freight. Nothing in this act shall be held to relieve any railroad company from furnishing cars for transportation of livestock and perishable freight within a reasonable time after demand therefor even if such time is less than the free time prescribed in this act.

Sec. 8709. Computation of time. In all computation of time under this act, Sundays and legal holidays shall be excluded.

Sec. 8710. Venue of actions; attorney's fee. Actions to enforce the provisions of this act may be brought in any court of competent jurisdiction in the county in which the cause of action arose or in which the shipment was tendered to or received or delivered by the railroad company and in case plaintiff recovers judgment in such action a reasonable attorney's fee shall be allowed as part thereof.

Sec. 8711. Acceptance of penalty waives damages. If any complainant rightly entitled thereto received payment of the charges or penalties imposed in this act for failure to comply therewith, such payment shall be in full of any and all claims for damages growing out of such failure: Provided, however, that such complainant may at his election, waive said charges and penalties and claim such actual damages as he may have sustained.

Sec. 8712. Enforcement by commission. Full power and authority is hereby given the railroad commission of Washington to enforce the provisions of this act either upon or without complaint made, and to prescribe and enforce, when not in conflict with this act, all such additional reasonable rules, regulations and orders as may be necessary, and charges or penalties for the violation thereof, and to modify or suspend the same, in order to compel and require the several railroad companies in this state promptly to receive, receipt for, and forward and deliver to destination all lawful freight, and to make prompt delivery thereof at destination to the consignee; and to require and compel railroad companies doing business in this state to provide and supply cars and other railroad equipment sufficient to transport within a reasonable time after demand therefor all lawful freight properly tendered thereto for shipment within or without this state, and to proceed against any railroad company for failure or refusal to provide and supply such sufficient cars and other equipment; and in case of conviction, such railroad company shall be fined for each such failure or refusal in any sum not less than one hundred dollars and not exceeding five thousand dollars to be found by the jury in an action brought therefor: Provided, that upon proof of public calamity, accident, unprecedented increase of business or any other cause of delay not within the power of the railroad company to prevent, no conviction shall be found.

Sec. 8713. Failure of company to pay demurrage; penalty. In case any railroad company shall fail to furnish a car or cars to transport and deliver freight as herein provided, by reason whereof demurrage charges and penalties become due and payable to shipper or consignee as herein provided, such railroad company shall pay to such shipper or consignee such charges within thirty days from and after demand therefor, and in case of the refusal or neglect of such railroad company to pay such charges and penalties so accrued without good and sufficient cause therefor, it shall be subject to a penalty of two hundred and fifty dollars for each failure or refusal to make such payment, which, together with the costs of suit, shall be recoverable by the railroad commission of Washington in the superior court of the state of Washington in any county in this state in or through which said railroad runs or does business.

Sec. 8714. Actions for failure to furnish cars; what shipper must show. When any action against any railroad is brought under the provisions of this act for failure to furnish cars, it shall be shown on the trial by competent testimony that the person applying therefor had on hand at the time it became the duty of the railroad under any application so made to furnish the car or cars required, the kind of freight specified in the application ready for shipment in the said car or cars, to the point of destination in the said application stated.

Sec. 8715. Enforcement by mandamus or injunction. The provisions of this act may also be enforced by mandamus or mandatory injunction on the relation or suit of any party affected by the violation thereof or at the instance of said commission.

Sec. 8716. Unconstitutionality of part of act. If any section, subdivision, sentence, clause, or purpose of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act.

Sec. 8717. Cruelty to stock in transit. Railroad companies in carrying or transporting animals shall not permit them to be confined in cars for a longer period than forty-eight consecutive hours without unloading them for rest, water and feeding for a period of at least two consecutive hours, unless prevented from so unloading them by unavoidable accident. In estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included. Animals so unloaded shall, during such rest, be properly fed, watered by the owner or person having the custody of them, or in case of his default in so doing, then by the railroad company transporting them, at the expense of said owner or person in custody thereof, and said company shall in such case have a lien upon such animals for food, care and custody furnished, and shall not be liable for such detention of such animals. If animals are transported where they can and do have proper food, water, space and opportunity to rest, the foregoing provision in regard to their being unloaded shall not apply. Violators of this section shall be punished by a fine not exceeding one hundred dollars.

II. Warehouse Receipts.

California,¹⁾ Connecticut,²⁾ District of Columbia,³⁾ Illinois,⁴⁾ Iowa,⁵⁾ Kansas,⁶⁾ Louisiana,⁷⁾ Maryland,⁸⁾ Massachusetts,⁹⁾ Michigan,¹⁰⁾ Nebraska,¹¹⁾ New Jersey,¹²⁾ New Mexico,¹³⁾ New York,¹⁴⁾ Ohio,¹⁵⁾ Pennsylvania,¹⁶⁾ Rhode Island,¹⁷⁾ Tennessee,¹⁸⁾ Virginia,¹⁹⁾ and Wisconsin.^{20) 21)}

An Act to make Uniform the Law of Warehouse Receipts.²²⁾

Part I. The issue of warehouse receipts.

Sec. 1. Persons who may issue receipts. Warehouse receipts may be issued by any warehouseman.

This should be read in connection with the definition of warehouseman in sec. 58.

Sec. 2. Form of receipts. Essential terms. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms: a) The location of the warehouse where the goods are stored; b) The date of issue of the receipt; c) The consecutive number of the receipt; d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order; e) The rate of storage charges; f) A description of the goods or of the packages containing them; g) The signature of the warehouseman, which may be made by his authorized agent; h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient. A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required.

This section is in accordance with business custom except (h) and (i). As some abuses have arisen from warehousemen issuing receipts on their own goods, it seemed wise that when they issued negotiable receipts in this way, the document should carry notice of the fact on its face. See sec. 53 in this connection. It is obvious also that negotiable receipts should show on their face what charges are claimed against the goods. See further as to this section 30. Though it is desired that all warehouse receipts shall conform to the rules here laid down, the essential thing is that negotiable receipts shall do so, and as to them only is a sanction imposed for failing to insert the statutory terms.

Sec. 3. Form of receipts. What terms may be inserted. A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not: a) Be contrary to the provisions of this act; b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Public policy demands the limitation in (b). See Schouler on Bailments [1905] secs. 36, 362 et seq.

Sec. 4. Definition of non-negotiable receipt. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

See note to the following section.

¹⁾ Acts 1909, c. 290. — ²⁾ Laws, 1907, c. 220. — ³⁾ Acts, 61st Cong. 2d. Sess. c. 167. — ⁴⁾ Laws, 1907, p. 477. — ⁵⁾ Acts, 1907, c. 160. — ⁶⁾ Laws, 1909, c. 262. — ⁷⁾ Acts, 1908, No. 221. — ⁸⁾ Laws, 1910, c. 406. Laws, 1906, c. 19. relating to bonded distillery warehouses is expressly retained in force. — ⁹⁾ Acts, 1907, c. 582. — ¹⁰⁾ Acts, 1909, No. 303. — ¹¹⁾ Laws, 1909, c. 152. — ¹²⁾ Laws, 1907, c. 133. — ¹³⁾ Laws, 1909, c. 38. — ¹⁴⁾ Laws,

1907, c. 732. — ¹⁵⁾ Gen. Code, 1910, secs. 8457—8509. — ¹⁶⁾ Laws, 1909, No. 13. — ¹⁷⁾ Gen. Laws, 1909, cc. 267—271. — ¹⁸⁾ Acts, 1909, c. 336. — ¹⁹⁾ Laws, 1908, c. 290. — ²⁰⁾ Laws, 1909, c. 291. — ²¹⁾ During 1911 this act was also adopted in Missouri and Utah. — ²²⁾ The annotations to this act are reprinted, by permission, from the draft law published by the Commissioners for Uniform State Laws.

Sec. 5. Definition of negotiable receipt. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void.

This act makes a fundamental distinction throughout between negotiable and non-negotiable receipts. The former is the negotiable representative of the goods, the latter is merely evidence of an ordinary contract of bailment. This distinction accords with mercantile usage. *Hallgarten v. Oldham*, 135 Mass. 1.

Sec. 6. Duplicate receipts must be so marked. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

It is the practice of most if not all careful warehousemen not to issue duplicate negotiable receipts at all, and such issues are to be discouraged, but following a large number of statutes already existing this act instead of forbidding the practice altogether safeguards it by requiring the receipt to be plainly marked.

Sec. 7. Failure to mark "not negotiable." A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

Part II. Obligations and rights of warehousemen upon their receipts.

Sec. 8. Obligation of warehouseman to deliver. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with: a) An offer to satisfy the warehouseman's lien; b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

See the definition of "holder" in sec. 58. The requirement of signing an acknowledgment that the goods have been received is in accordance with universal business usage. The usage is reasonable and is adopted as the rule of this act. The burden imposed on the warehouseman in the last paragraph agrees with the older law. *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184.

Sec. 9. Justification of warehouseman in delivering. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is: a) The person lawfully entitled to the possession of the goods, or his agent; b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

This section gives the warehouseman a justification in some cases where he would not under the preceding section be bound to deliver, e. g., if a thief presented a negotiable receipt properly indorsed, the warehouseman would be protected if he delivered the goods innocently.

Sec. 10. Warehouseman's liability for misdelivery. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions b) and c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either: a) Been requested, by or on behalf of the person lawfully

entitled to a right of property or possession in the goods, not to make such delivery; or b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

See Schouler on Bailments, [1905] secs. 44, 45; *Velsian v. Lewis*, 15 Oreg. 539.

Sec. 11. Negotiable receipts must be cancelled when goods delivered. Except as provided in section 36, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

It is an obvious requirement of the mercantile use of negotiable receipts that the goods shall remain in the warehouse as long as the receipt is outstanding. The section does not apply to non-negotiable receipts, because usage and mercantile necessity frequently require delivery in such cases without surrender of the receipt.

Sec. 12. Negotiable receipts must be canceled or marked when part of goods delivered. Except as provided in section 36, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

This section follows as to partial deliveries the rule of the preceding.

Sec. 13. Altered receipts. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was: a) Immaterial, b) Authorized, or c) Made without fraudulent intent. If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

This section adopts the prevailing rule of the common law. Even fraudulent alteration cannot divest the title of the owner of stored goods, and the warehouseman is therefor liable to redeliver them to the owner.

Sec. 14. Lost or destroyed receipts. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

As it is for obvious reasons forbidden and indeed made a criminal offence [sec. 52] to issue an additional negotiable receipt, it is evident that even when receipts are supposed to have been lost or destroyed, great care must be used in permitting such an issue or what is the same thing the redelivery of the goods without the surrender of the original receipt. It is not enough that the parties agree that the goods shall be given up or a new receipt issued. It is essential that a court shall pass upon the question and make sure that the original is lost or destroyed and that a proper indemnity is taken, for the rights of possible innocent purchasers of the original receipt are involved.

Sec. 15. Effect of duplicate receipts. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and

uncancelled at the date of the issue of the duplicate, but shall impose upon him no other liability.

See note to sec. 6.

Sec. 16. Warehouseman cannot set up title in himself. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

This states the common law. 3 Am. & Eng. Encyc. of Law, 759.

Sec. 17. Interpleader of adverse claimants. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

The case of *Crawshay v. Thornton*, 2 Myl. & C. 1, unfortunately held that interpleader was not a proper remedy in such a case. It is, however, the only adequate remedy and is probably generally allowed in this country. 3 Am. & Eng. Encyc. of Law, 762.

Sec. 18. Warehouseman has reasonable time to determine validity of claims. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

It seems obviously proper that the warehouseman should be protected for such brief period as may be necessary to enable him to determine the rights of the claimants.

Sec. 19. Adverse title is no defense except as above provided. Except as provided in the two preceding sections and in sections 9 and 36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

Except as qualified by the preceding sections, the common law doctrine is here stated that a bailee cannot set up the title of a third person as an excuse for failure to deliver the goods. See 3 Am. & Eng. Encyc. of Law, 758.

Sec. 20. Liability for non-existence or misdescription of goods. A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

This section imposes on the warehouseman a stricter rule than that generally in force in this country in that it makes a warehouseman liable for an innocent misdescription of the goods. See *Hale v. Milwaukee Dock Co.* 23 Wis. 276. But as the warehouseman can readily protect himself by inserting in the receipt only what he knows, namely the marks on the goods or the statements of the depositor regarding them, it is provided that the warehouseman be responsible for what he asserts.

Sec. 21. Liability for care of goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

This states the common law. 3 Am. & Eng. Encyc. of Law, 750.

Sec. 22. Goods must be kept separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the goods deposited.

As to most merchandise, of course, the warehouseman's duty is to keep the goods of each depositor separate. The following section provides for the exception to the rule.

Sec. 23. Fungible goods may be commingled, if warehouseman authorized. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

An exceptional rule prevails in this country by custom as to grain and similar merchandise. See definition of "fungible" in section 58.

Sec. 24. Liability of warehouseman to depositors of commingled goods. The warehouseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

This section and the two preceding sections state the general American law.

Sec. 25. Attachment or levy upon goods for which a negotiable receipt has been issued. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

See note to sec. 39 of the uniform sales act.

Sec. 26. Creditors' remedies to reach negotiable receipts. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

This section is to enable the court to give the fullest relief possible in making the negotiable receipt available to the creditor since the goods cannot otherwise be taken from the warehouseman's possession.

Sec. 27. What claims are included in the warehouseman's lien. Subject to the provisions of section 30, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

Sec. 28. Against what property the lien may be enforced. Subject to the provisions of section 30 a warehouseman's lien may be enforced: a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.

Sec. 29. How the lien may be lost. A warehouseman loses his lien upon goods: a) By surrendering possession thereof, or b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

This section merely states the rule of the common law.

Sec. 30. Negotiable receipt must state charges for which lien claimed. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 27, although the amount of the charges so enumerated is not stated in the receipt.

This section is obviously requisite for the credit of negotiable receipts. See note to sec. 2.

Sec. 31. Warehouseman need not deliver until lien is satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

This is the rule of the common law.

Sec. 32. Warehouseman's lien does not preclude other remedies. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

This section only restates the common law.

Sec. 33. Satisfaction of lien by sale. A warehouseman's lien for a claim which has become due may be satisfied as follows: The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain: a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due; b) A brief description of the goods against which the lien exists; c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

Sec. 34. Perishable and hazardous goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

Sec. 35. Other methods of enforcing liens. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

Sec. 36. Effect of sale. After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

This section necessarily qualifies the right of a purchaser of a negotiable receipt.

Part III. Negotiation and transfer of receipts.

Sec. 37. Negotiation of negotiable receipts by delivery. A negotiable receipt may be negotiated by delivery: a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer. Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

It is not usual for warehouse receipts to be made to bearer but as it seems clear that if a receipt were made in that form it should be negotiable by delivery, it seemed wise to make provision for the case. The rule as to restrictive indorsement is also aimed rather to cover a possible contingency than a usual practice.

Sec. 38. Negotiation of negotiable receipts by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

This section applies the law of bills and notes, as it is in fact applied by mercantile custom, to warehouse receipts.

Sec. 39. Transfer of receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

The three preceding sections follow the terminology of the negotiable instruments law in distinguishing "negotiation" and "transfer." Sec. 39 applies not only to the transfer of non-negotiable receipts, but also to the transfer without a necessary indorsement of negotiable receipts.

Sec. 40. Who may negotiate a receipt. A negotiable receipt may be negotiated: a) By the owner thereof; or b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.

This section and the next are of fundamental importance to the mercantile community. They state familiar law in regard to bills and notes, and there is authority for them in the older statutes making warehouse receipts and bills of lading negotiable and in well recognized mercantile custom. It will be noticed that one who takes by trespass or a finder is not included within the description of those who may negotiate. In the uniform bills of lading act, sec. 31, full negotiability is given to bills of lading.

Sec. 41. Rights of person to whom a receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated acquires thereby: a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

This section follows the mercantile theory of making the negotiable receipt represent not simply the title the person negotiating it had, but also whatever property the depositor had, that being what the receipt represented. See *Shaw v. Railroad Co.* 101 U. S. 557; *Hurt's Case*, 99 Ala. 140; *Bank v. Lee*, 99 Ala. 496.

Sec. 42. Rights of person to whom a receipt has been transferred. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor. If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

So far as a non-negotiable receipt is concerned this states the rights at common law of any purchaser of bailed goods. Therefor the purchaser gets nothing by the warehouse receipt except evidence. In the case of a negotiable receipt the purchaser has the further right given by the next section.

Sec. 43. Transfer of negotiable receipt without indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

This follows the analogy of bills and notes. Crawford, Negotiable Instruments Law, sec. 79.

Sec. 44. Warranties on sale of receipt. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants: a) That the receipt is genuine; b) That he has a legal right to negotiate or transfer it; c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

This section except (d) follows the negotiable instruments law. Crawford, sec. 115.

Sec. 45. Indorser not a guarantor. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfil their respective obligations.

Mercantile usage in regard to warehouse receipts differs from that in regard to bills and notes in the matter to which this section relates. It states the existing law even where statutes have made warehouse receipts and bills of lading negotiable. *Shaw v. Railroad Co.*, 101 U. S. 557; *Mida v. Geissmann*, 17 Ill. App. 207.

Sec. 46. No warranty implied from accepting payment of a debt. A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

See note to sec. 37 of the uniform bills of lading act.

Sec. 47. When negotiation not impaired by fraud, mistake, or duress. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

This section merely elaborates for the sake of clearness certain cases within the terms of sec. 40.

Sec. 48. Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the

previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.

This is copied from sec. 25 (1) of the English Sale of Goods Act, where it applies to all sales of goods. It is of special importance in the case of negotiable documents of title.

Sec. 49. Negotiation defeats vendor's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

This perhaps goes beyond the law as prevailing before this act. *Meehem on Sales*, sec. 1507. See, however, *Newhall v. Central Pac. R. R.*, 51 Cal. 345. The protection of dealings in negotiable receipts clearly requires that a vendor, who has by giving up possession of goods or warehouse receipts allowed negotiable receipts to be outstanding, should not be permitted to defeat one who buys such receipts.

Part IV. Criminal offenses.

Sec. 50. Issue of receipt for goods not received. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

To insure the fundamental basis on which the value of negotiable receipts must rest it seemed necessary to punish criminally any misrepresentation or fraud in regard to the existence of the goods behind the receipt. Other obvious frauds are aimed at by the following five sections.

Sec. 51. Issue of receipt containing false statement. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note to sec. 50.

Sec. 52. Issue of duplicate receipts not so marked. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section 14, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

See note to sec. 50.

Sec. 53. Issue for warehouseman's goods of receipts which do not state that fact. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note sec. to 50.

Sec. 54. Delivery of goods without obtaining negotiable receipt. A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 14 and 36, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note sec. to 50.

Sec. 55. Negotiation of receipt for mortgaged goods. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

See note to sec. 50.

Part V. Interpretation.

Sec. 56. Cases not provided for in act. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

Sec. 57. Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

See note to sec. 74 of the Uniform Sales Act.

Sec. 58. Definitions. 1. In this act, unless the context or subject matter otherwise requires: "Action" includes counter claim, set-off, and suit in equity. "Delivery" means voluntary transfer of possession from one person to another. "Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit. "Goods" means chattels or merchandise in storage, or which has been or is about to be stored. "Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein. "Order" means an order by indorsement on the receipt. "Owner" does not include mortgagee or pledgee. "Person" includes a corporation or partnership or two or more persons having a joint or common interest. To "purchase" includes to take as mortgagee or as pledgee. "Purchaser" includes mortgagee and pledgee. "Receipt" means a warehouse receipt. "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor. "Warehouseman" means a person lawfully engaged in the business of storing goods for profit. 2. A thing is done "in good faith" within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

The only one of these definitions requiring comment is that of value, which follows the Negotiable Instruments Law, and applies the rule generally prevailing in regard to bills and notes to warehouse receipts.

Sec. 59. Act does not apply to existing receipts. The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act.

Sec. 60. Inconsistent legislation repealed. All acts or parts of acts inconsistent with this act are hereby repealed.

[Sec. 61. Relates to commencement of act.]

Sec. 62. Name of act. This act may be cited as the Uniform Warehouse Receipts Act.

Washington.

Rem. & Bal. Code, 1910.

Sec. 3369. Bill of lading or warehouse receipt. A bill of lading or warehouse receipt is an instrument in writing signed by a carrier, warehouse proprietor, or his agent, describing the freight so as to identify it, stating the name of the consignor or owner, the terms of the contract for carriage or storage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

Semble, The provisions of secs. 3369 to 3384, in so far as they relate to bills of lading by carriers, are superseded by secs. 3385—3391, reprinted elsewhere in this volume.

Sec. 3370. To be given by whom, and to show what. It shall be the duty of every person keeping, controlling, managing, or operating, as owner or agent or su-

perintendent of any company or corporation, any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored, to deliver to the owner of such grain, flour, pork, beef, wool, or produce or commodity, a warehouse receipt therefor, bearing the full name of those operating said houses, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same; and the terms and conditions upon which it is stored.

Sec. 3371. General form of warehouse receipt. The receipt required in the last preceding section of this chapter shall be in form as follows:

(Name of firm or company.)

No.

(Place and date.)

Received in store from (name of consignor), (quantity), gross,lbs., tare,lbs., net,lbs., No. (give here grade and name of commodity), at owner's risk of unavoidable damage, to be delivered to this warehouse, upon return of this receipt, properly indorsed, and payment of charges. This receipt negotiable when duly indorsed by consignor. Storage to (here give amount and date).

Signed (name of firm or company).
(Name of agent), Agent.

Sec. 3372. Not to be given, when. Duplicates to be marked. No person shall issue any receipt or other voucher, as provided for in section 3370, for any grain, flour, wool, pork, beef, or other produce or commodity, not actually in store at the time of issuing such receipt, or issue any receipt in any respect fraudulent in its character, either as to its date or the quantity, quality, or grade of such property, or duplicate or issue a second receipt for the same, while any former receipt is outstanding for the same property, or any part thereof, without writing across the face thereof the word "duplicate."

Sec. 3373. Grain not to be mixed so as to destroy identity. No person operating any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored shall mix any grain, flour, beef, pork, wool, or other produce or commodity of different grades together, or deliver one grade for another, or in any way tamper with the same while in his possession or custody, with a view of securing any profit to himself or any other person, and in no case mix different grades together while in store: Provided, that nothing in this act shall be construed to prohibit any person operating any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, pork, wool, or other produce or commodity is stored from keeping, piling, or storing any produce or commodity offered for storage separate and apart from other produce or commodity, by marking such produce or commodity in such a manner that it can be identified and deliver on presentation of the warehouse receipt or voucher which was given for same; in which case the receipt given shall designate the mark on the produce or commodity so stored.

Sec. 3374. Consent of receipt holder necessary for release of goods. No person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage, shall sell, encumber, ship, transfer, or in any manner remove or permit to be shipped, transferred, or removed from the place of storage at which the receipt is given, any grain, flour, beef, pork, wool, or other produce or commodity for which a receipt has been given by him as aforesaid, whether received for storing, shipping, grinding, or manufacturing or other purposes, without the written consent of the holder of the receipt.

Sec. 3375. Goods must be delivered on presentation of receipt. On the presentation of the receipt given by any person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage, for any grain, flour, beef, wool, pork, or other produce or commodity, and on payment of all the charges due thereon, the owner shall be entitled to the immediate possession of the commodity named in such receipt, and it shall be the duty of such warehouseman, wharfinger millman, or other person having the possession thereof, to deliver such commodity, to the owner of such receipt without further expense to such owner, and without unnecessary delay.

Sec. 3376. Criminal prosecutions and actions for damages. Any person who shall violate any of the provisions of this act shall be liable to indictment, and upon conviction shall be fined in any sum not exceeding five thousand dollars, or im-

prisonment in the penitentiary of this state not exceeding five years, or both; and in case of a corporation the person acting for said corporation shall be liable for a like punishment upon indictment and conviction. And all and every person or persons aggrieved by a violation of this act may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this act, to recover all damages, immediate or consequential, which he or they may have sustained by reason of such violation, before any court of competent jurisdiction, whether such person shall have been convicted under this act or not.

Sec. 3377. Receipts, etc., negotiable. Indorsement, effect of. All checks or receipts given by any person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage, for any grain, flour, pork, beef, wool, or other produce or commodity, stored or deposited, and all bills of lading, and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another.

Sec. 3378. Same. Negotiability of warehouse receipt. All the title to the freight which the first holder of a bill of lading or warehouse receipt had, when he received it, passes to every subsequent indorsee thereof in good faith, and for value, in the ordinary course of business, with like effect, and in like manner as in the case of a bill of exchange.

Sec. 3379. When drawn to "bearer," transferred by delivery. When a bill of lading or warehouse receipt is made to "bearer" or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement.

Sec. 3380. Not to affect certain rights. A bill of lading or warehouse receipt does not alter the rights or obligations of the carrier or warehouse proprietor as defined in this chapter, unless it is plainly inconsistent therewith.

Sec. 3381. Duplicate bills of lading, etc. A carrier or warehouse proprietor must subscribe and deliver to the consignor on demand any reasonable number of bills of lading or warehouse receipts, not exceeding three (one original and the balance marked "duplicate", and the original to state the number of duplicates issued) of the same tenor, expressing truly the original contract for carriage or storage, and if he refuses to do so, the consignor may take the freight from him, and recover from him, besides, all damages thereby occasioned.

Sec. 3382. Exoneration of carrier, etc. A carrier or warehouse proprietor is exonerated from liability for freight by delivery thereof, in good faith, to any holder of an original bill of lading or warehouse receipt thereof, properly indorsed, or made in favor of the bearer.

Sec. 3383. Carrier may require bill or indemnity. When a carrier or warehouse proprietor has given a bill of lading, warehouse receipt, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

Sec. 3384. Singular number to import plural. Words used in this act in the singular number shall be construed to import the plural number, whenever such construction is necessary to give force and effect to the provisions of this act.

XI.

MARINE INSURANCE



Marine Insurance.

(By William Reynolds Vance, Ph. D., LL. B., Professor of Law, Yale University
[New Haven].)

Analysis.

- I. SCOPE OF ARTICLE, 567**
- II. SOURCES OF THE AMERICAN LAW OF MARINE INSURANCE, 567**
- III. STATUTORY REGULATION OF MARINE INSURANCE BUSINESS, 567**
- IV. DEFINITIONS, 568**
- V. THE CONTRACT**
 - A. No Specific Form Required, 568*
 - B. Rules of Construction, 569*
- VI. INSURABLE INTEREST**
 - A. In General, 569*
 - B. Lost or Not Lost Policies, 570*
- VII. CHARACTER AND EXTENT OF RISK ASSUMED**
 - A. Property Interests Covered by Insurance, 570*
 - 1. In General, 570*
 - 2. "Ship", 570*
 - 3. Goods and Merchandise, 570*
 - 4. Freight, 571*
 - 5. Profits, 571*
 - B. Beginning and Ending of Risk, 571*
 - 1. Time Policy, 571*
 - 2. Voyage Policy, 571*
 - 3. Loss After Expiration of Policy from Previous Injury, 572*
 - C. What Risks are Assumed, 572*
 - 1. In General, 572*
 - 2. Perils Insured Against and Proximate Causes of Loss, 572*
 - 3. Perils of the Sea, 573*
 - 4. Collision, 573*
 - 5. Barratry, 574*
 - 6. Thieves, 574*
 - 7. Arrests, Restraints, and Captures, 574*
 - D. Risks Excepted, 575*
- VIII. CONCEALMENTS, REPRESENTATIONS, AND WARRANTIES**
 - A. In General, 575*
 - B. Concealments and Representations, 575*
 - C. Warranties, 575*
 - 1. Express Warranties, 575*
 - 2. Implied Warranties, 576*
 - a) In General, 576*
 - b) Seaworthiness, 576*
 - c) Deviation, 577*
 - d) Illegality, 577*
- IX. MEASURE OF INSURER'S LIABILITY**
 - A. In General, 578*
 - B. Particular and General Average Losses, 578*
 - C. Under Open Policies, 578*
 - 1. In General, 578*
 - 2. Total and Partial Losses, 578*
 - 3. One-third off New for Old, 578*
 - D. Under Valued Policies, 579*
 - E. Total Loss, 579*
 - 1. Actual Total Loss, 579*
 - 2. Constructive Total Loss, 579*
 - F. Abandonment, 580*
 - G. Sue and Labor Clause, 580*

I. SCOPE OF ARTICLE. — In this article no attempt is made to consider the general rules of law applicable to all kinds of insurance, save in so far as may be necessary for the adequate treatment of those special rules peculiar to marine insurance. Furthermore it has been the purpose of the author to confine the treatise, so far as practicable, to those doctrines of marine insurance law which are peculiar to the United States of America. For a complete statement in detail of that part of the law governing marine insurance which is identical with that in force in England, the reader is referred to the article on the marine insurance law of England.

II. SOURCES OF THE AMERICAN LAW OF MARINE INSURANCE. — While the business of making insurances against marine risks is extensively regulated by statute in all the States, yet the law of marine insurance in the United States is derived almost entirely from the English precedents, which, in turn, adopted to a large extent the rules of the law merchant as it was enforced in the making of insurances throughout the maritime world in the seventeenth and eighteenth centuries¹). Hence, it is not unusual for maritime cases to be decided in American courts by reference to such Continental authorities as the Laws of Oleron, of Wisby, and of the Hanse Towns, and the Marine Ordinances of Louis XIV²).

With the exception of the States of California³), Georgia⁴), North Dakota⁵) and South Dakota⁶), which have attempted to codify the common law of insurance, the law of marine insurance in the United States has been little affected either in its development or its present form by statute⁷). The Federal government, under the constitution of the United States, has no control over the business of insurance, and hence the law is wholly unaffected by Federal statutes.

III. STATUTORY REGULATION OF MARINE INSURANCE BUSINESS. — In each of the United States extensive statutory regulations for the conduct of the business of insurance have been enacted for the purpose of protecting the public from dishonest and insolvent insurers, and these regulations are made applicable to the underwriting of marine risks by all of those States that border upon or contain navigable waters⁸). These statutory regulations ordinarily provide a special department of insurance, presided over by a commissioner or otherwise entitled official, charged with the duty of seeing to the proper execution of the insurance law. All marine insurance companies, whether domestic or foreign, are compelled to make to this officer annual reports showing their financial condition and the general state

¹) See *New England Mut. Ins. Co. v. Dunham*, (1870) 11 Wall, 1. — ²) See *The Osceola*, (1903) 189 U. S. 158. — ³) Cal. Civ. Code, (1909), secs. 2527—2746. — ⁴) Georgia Civ. Code, (1911), secs. 2515—2528. — ⁵) North Dak. Civil Code, (1905), secs. 5986—6052. — ⁶) South Dak. Civil Code, (1908), secs. 1883—1949. — ⁷) In this country the courts have judicially established rules that required adoption by parliamentary enactment in England. For example, compare statute 19 Geo. II., c. 37 (1746), declaring wager policies void, and *Amory v. Gilman*, (1806) 2 Mass. 1. — ⁸) For general statutory provisions regulating insurance corporations and associations, equally applicable to those engaged in marine insurance, see: *Alabama*: Ala. Code, (1907), secs. 4543—4596; *Arkansas*: Ark. Dig., (1904), secs. 4335—4397; *California*: Cal. Polit. Code, (1903) supplement 1905), secs. 594—643; *Connecticut*: Conn. Stat., (1902), secs. 3485—3526, 3596—3636; *Delaware*: Del. Code, (1852) Rev., (1893), pp. 301—306, 777; *District of Columbia*: D. C. Code, (1902), secs. 645—652; *Florida*: Fla. Stat., (1906), secs. 2756—2779; *Georgia*: Ga. Code, (1911), secs. 2388—2399, 2413—2417, 2418—2432, 2443—2449; *Hawaii*: Hawaii Gen. Law, (1905), secs. 2599—3621; *Illinois*: Ill. Revised Stat., (1899), secs. (11—26, 40, 43—46, chapter 73); *Indiana*: Ind. Revision, (1908), secs. 4601—4646; *Iowa*: Iowa Stat., (1897), secs. 1684—1758; *Louisiana*: La.

Acts, 1908, No. 105, p. 132 et seq. — *Maine*: Me. Stat., (1903), 49, secs. 1—3, 41—49, 59—94; *Maryland*: Md. Pub. Gen. Laws, (1904), Art. 23, secs. 112, 144—147, 151—153; *Massachusetts*: Mass. Pub. Laws, (1902), c. 118, secs. 1—40; *Michigan*: Mich. Comp. Laws, (1897), c. 130; *Minnesota*: Minn. Rev. Laws, (1905), secs. 1594—1625; *Mississippi*: Miss. Code, (1906), secs. 2550—2576; *Missouri*: Mo. Rev. Stat., (1909), secs. 6995—7039; *New Hampshire*: N. H. Publ. Laws, (1901), c. 167—170; *New Jersey*: N. J. Gen. Stat., (1895), Vol. 2. pp. 1742—1786; *New York*: N. Y. Consolidated Laws, (1909), vol. III, pp. 1681—1717; *North Carolina*: N. C. Revisal, (1906), vol. II, secs. 4677—4753; *North Dakota*: N. D. Civil Code, (1905), secs. 4417—4428; *Oklahoma*: Okla. Compiled Law, (1909), secs. 3721—3762; 4463—4481, 4508—4513; *Ohio*: Ohio Gen. Code, (1910), secs. 9559—9592; *Oregon*: Oreg. Codes and Statutes, (1901), secs. 3706—3719; *Rhode Island*: R. I. Gen. Laws, (1899), c. 220; *South Carolina*: S. C. Code, (1902), secs. 1796—1829; *Tennessee*: Tenn. Acts, 1899, c. 430; Acts 1899, c. 31; Acts 1903, 442; Acts 1903, c. 539; *Texas*: Tex. Acts, 1875, p. 34, sec. 8; Acts 1897, p. 197 sec. 1; *Virginia*: Va. Acts, 1906, c. 112; *Washington*: Wash. Law, 1901, p. 389, sec. 2; Law 1901, p. 390, secs. 5—6; *Wisconsin*: Wis. Statutes, (1898), secs. 1915—1921; 1975—1978.

of their business. Each State has the absolute power to exclude foreign insurance corporations, or to admit them on such terms and conditions as may seem best to it. Since the business of insurance is not interstate commerce, the Federal government can impose no restraint upon this power of the States, though it be exercised capriciously and unjustly¹). In the exercise of this power all of these States prohibit foreign insurance corporations from doing business within their borders without being first licensed so to do, and punish severely any failure to comply with this requirement. As a condition of securing the license required in order to carry on its business within the State, every foreign insurance corporation, in addition to making the annual report of its business, as stated above, is compelled to appoint some person within the State as its attorney, upon whom service of process may be made in any suit that may be brought against it within the State. The foreign insurance corporation, if chartered by a state not within the American Union, is also required to prove, as a condition precedent to its being allowed to do business, that it has deposited with the treasurer of the State in question, or of some other of the United States, a designated large sum, as security for claims that may arise against it in favor of citizens of the United States. As a general rule license fees are exacted of the agents of such foreign insurers, and in most of the states premiums collected within the State are subjected to taxation²).

IV. DEFINITIONS. — For the purposes of this article marine insurance may be adequately defined as a contract of insurance providing indemnity for loss or damage due to marine perils. In those States that have codified the law of insurance, marine insurance is defined as "an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time"³).

In the definition first given above the term "marine perils" must be understood as extending in the United States to all those perils, incident to navigation upon inland waters and the Great Lakes, as well as upon the high seas⁴). So insurance against the single peril of fire is none the less marine insurance provided the subject of the insurance is a vessel or property used in navigation⁵), and hence is within the jurisdiction of a court of admiralty⁶). But insurance against loss or damage by fire to a vessel in course of construction and not yet launched is not a maritime contract⁷).

V. THE CONTRACT. — **A. No Specific Form Required.** — In England all marine insurances must be in writing, the time-honored, though verbose Lloyd's policy having been prescribed by statute as the standard form⁸). In the United States, however, such legislation has never been thought necessary. There is, therefore, no reason why contracts for marine insurance should not be legally made by parol, and such indeed

¹) Security Mut. Ins. Co. v. Prewitt, (1906) 202 U. S. 246, 639; Nutting v. Massachusetts, (1901) 183 U. S. 553; Hooper v. California, (1894) 155 U. S. 648; Doyle v. Insurance Co., (1876) 94 U. S. 535; Paul v. Virginia, (1868) 8 Wall 168. — ²) For statutory regulations especially governing marine insurance, see: *Alabama*: Ala. Code, (1907), secs. 4589—4593; *Connecticut*: Conn. Stat., (1902), secs. 3496—3517; *District of Columbia*: D. C. Code, (1902), sec. 646; *Georgia*: Ga. Code, (1911), secs. 2515—2528; *Hawaii*: Hawaii Gen. Laws, (1905), sec. 1320; *Illinois*: Ill. Rev. Sts., (1899), c. 73, secs. 47—80; *Louisiana*: La. Acts, 76 (1886), p. 115 et seq; *Maine*: Me. Stats., (1903), c. 49, sec. 41; *Maryland*: Md. Pub. Gen. Laws, (1904), Art. 23, sec. 165; *Massachusetts*: Mass. Pub. Laws, (1902), c. 118, sec. 29; *Minnesota*: Minn. Rev. Laws, (1905), secs. 1679—1682; *Mississippi*: Miss. Code, (1906), sec. 2576; *Missouri*: Mo. Rev. Stat., (1909), secs. 6995, 7004; *New York*: N. Y. Consolidated Laws, (1909), vol. III, pp. 1805—1811; *Oklahoma*: Okla. Comp. Laws, (1909), sec. 3723; *Oregon*: O. Codes and Stat., (1901), secs. 3709, 3718. — ³) Cal. Civ. Code, (1909), sec. 2655; Mont. Civ. Code, (1895),

sec. 3540; N. D. Rev. Codes, (1899), sec. 4537; S. D. Civ. Code, (1903), sec. 1883. The following garrulous definition of insurable interest is found in the Georgia Civil Code, (1911), sec. 2472. "Interest of Assured To sustain any contract of insurance, it must appear that the assured has some interest in the property or event insured, and such as he represented himself to have. A slight or contingent interest is sufficient, whether legal or equitable, and several having different interests may unite in procuring one policy; so a husband or parent may insure the separate property of his wife or child, the recovery being held by him in trust for them; but a mere expectation of an interest is not insurable." — ⁴) Caldwell v. St. Louis Perpetual Ins. Co., (1846) 1 La. Ann. 85; Dwinnell v. Minneapolis, etc., Ins. Co., (1903) 90 Minn. 383. — ⁵) Dwinnell v. Minneapolis, etc., Ins. Co., (1903) 90 Minn. 383. — ⁶) North German Fire Ins. Co. v. Adams, (1905) 142 Fed. 439. — ⁷) Eureka Ins. Co. v. Robinson, (1867) 56 Pa. St. 256. — ⁸) See 35 Geo. III, c. 63; 30 Vic. c. 23; 54 & 55 Vic. c. 39, sec. 93 (1).

is the law¹). But such parol insurances, being contrary to the custom of merchants, are exceedingly infrequent. Since no standard form of policy is required by law, the parties to a written contract of insurance may give it any form and include any terms they may desire, yet in practice considerations of convenience, particularly with reference to the adjustment of losses in case of concurrent policies, have standardized usage and thus developed a conventional form of policy that is in almost universal use. This conventional marine policy may be best described as a simplified and modernized form of the English Lloyd's.

The special provisions of this general form of policy may vary according as the parties agree that the policy shall be valued²), or open³); for a specified voyage or for a certain time⁴); or that it shall be upon certainly designated property or one of the many forms of what are known as "floating" or "running" policies, that is, policies covering property afterwards to be determined according to the provisions of the contract⁵).

B. Rules of Construction. — The general rules of construction applicable to other contracts of insurance apply with equal force to marine policies. Each of the parties is held to the exercise of the highest degree of good faith in dealing with the other⁶), but when the intention of the parties as expressed in the policy is doubtful, that construction will be strongly favored which will uphold the contract⁷). It is worthy of note, however, that since marine insurance is so peculiarly derived from the law merchant, in construing sea policies the courts are disposed to give greater weight to the usages of merchants than is accorded to such usages in determining the intention of the parties to other insurance contracts⁸). This tendency is best illustrated by the rule well established that a marine policy is freely assignable with the property insured, irrespective of the consent of the insurer⁹), while an assignment of any other kind of policy is, as a general rule, invalid unless the insurer has assented to it. Likewise the courts enforce the peculiar custom, prevailing among maritime insurers, that the owner of the property insured shall be deemed co-insurer to the extent to which the value of the property exceeds the amount of insurance carried upon it. As a result of this customary implied term, the insurer is liable only for such proportion of a loss as the total insurance bears to the total value of the property insured¹⁰). In construing marine policies the generally prevailing rule applies that a party to such a contract will not be bound by a usage unless it is so general and widely extended that all merchants must be deemed to be cognizant of it¹¹).

It is scarcely necessary to add that no usage can be shown that is inconsistent with any of the express terms of the policy, since the terms of a written instrument cannot be contradicted or altered by parol testimony¹²).

VI. INSURABLE INTEREST. — **A. In General.** — While it seems that wager policies were enforceable in England prior to the statute of 19 Geo II, c. 37 (1746), they have never been tolerated in the United States¹³). On the contrary it has uniformly been held that a substantial interest in the property insured must be shown on the part of the policy holder, as an absolute prerequisite to the validity of any insurance contract¹⁴). The principles that determine what shall constitute a sufficient insurable interest to sustain a policy of marine insurance are not different from those applicable to other kinds of insurances upon property¹⁵). For the purposes of the present

¹) See *Sanford v. Orient Ins. Co.*, (1899) 174 Mass. 416; *Emery v. Boston Marine Ins. Co.* (1885) 138 Mass. 398; *Boice v. Thames, etc. Marine Ins. Co.*, (1885) 38 Hun. (N. Y.) 246; *Northwestern Iron Co. v. Aetna Ins. Co.*, (1870) 26 Wis. 78; *Merchants' Mut. Ins. Co. v. Lyman*, (1872) 15 Wall 664. — ²) *Williams v. Continental Ins. Co.*, (1885) 24 Fed. 767. — ³) *Snowden v. Guion*, (1886) 101 N. Y. 458. — ⁴) *Leeds v. Mechanics Ins. Co.*, (1853) 8 N. Y. 351. — ⁵) *Orient Ins. Co. v. Wright*, (1859) 23 How 401; *Arnold v. Pacific Mut. Ins. Co.*, (1879) 78 N. Y. 7; *Marine Fire Ins. Co. v. Barnett*, (1867) 29 Tex. 433. — ⁶) See *People v. Dimick*, (1887) 107 N. Y. 13. — ⁷) *Imperial Shale Brick Co. v. Jewett*, (1901) 169 N. Y. 143; *Western Ins. Co. v. Cropper*, (1859) 32 Pa. St. 351. 456. — ⁸) See 1 Duer,

Insurance, p. 158 et seq. — ⁹) *Earl v. Shaw*, (1800) 1 Johns. Cas. (N. Y.) 314. — ¹⁰) *Egan v. British Mar. Ins. Co.*, (1901) 193 Ill. 295; *American Ins. Co. v. Griswold*, (1835) 14 Wend. (N. Y.) 399; *Saelberg v. Western Assur. Co.*, (1902) 119 Fed. 23. — ¹¹) *Cobb v. Lime Rock Ins. Co.*, (1870) 58 Me. 326; *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, (1868) 100 Mass. 301; *Red Wing Mills v. Mercantile Mut. Mar. Ins. Co.*, (1884) 19 Fed. 115. — ¹²) *Hartshorn v. Insurance Co.*, (1860) 15 Gray (Mass.) 240; *Hearne v. New England Mut. Mar. Ins. Co.*, (1874) 20 Wall. 488. — ¹³) *Amory v. Gilman*, (1806) 2 Mass. 1. — ¹⁴) *Phoenix Ins. Co. v. Parsons*, (1891) 129 N. Y. 86; *London Mar. Ins. Co. v. Walsh-Upstill Coal Co.*, (1903) 68 Ohio St. 469; *Hooker v. Robinson*, (1878) 98 U. S. 528. — ¹⁵) See *Vance on Insurance*, pp. 106—124.

article it is enough to say that any person has a sufficient insurable interest in property covered by a marine policy when he is so situated with reference to that property that by its destruction he will suffer an actual loss of money or legal right, or incur a liability.

B. Lost or Not Lost Policies. — An apparent exception to the general rule stated above is found in the so-called "lost or not lost" policies. As a general principle it is true that a person cannot require indemnity for loss of an interest unless he was possessed of that interest at the time of the inception of the policy or had acquired it thereafter, for the simple reason that one cannot make a valid contract of insurance unless he has something to insure. Therefore it is clear that a contract of insurance made in ignorance that the vessel insured was already lost would not be binding upon either party. But it is universally held that if the parties expressly agree, by inserting in the policy the words "lost or not lost", that the insurer shall indemnify for a loss that may already have happened, their agreement will be enforced, always provided neither party had knowledge of the actual state of the risk¹). By the same reasoning the insurer under such a policy may retain his premium though at the time of the contract the vessel lay safe at anchor, and the insurer was never put to his risk, unless the insurer had secret knowledge of the vessel's safety²). While the intention of the parties that the policy shall thus operate retroactively is usually expressed by the words "lost or not lost", any other phrase of similar import will be given the same effect³).

VII. CHARACTER AND EXTENT OF RISK ASSUMED. — A. Property Interests Covered by Insurance. — 1. IN GENERAL. — It is clear that the parties to a marine policy may stipulate for insurance upon any legal risk whatever arising from marine perils, and may so draw the policy that it will cover any kind of property interest exposed to such perils; but as a matter of practice many difficult questions arise as to whether the words actually used to describe and designate the interests intended to be protected do in fact properly include interests with respect to which loss or damage has been suffered. The formal descriptive words found printed in the marine policy customarily used in the United States are: "The body, tackle, apparel, and other furniture of the good ship — — — or upon all kinds of lawful goods and merchandise laden or to be laden upon the good ship — — — or upon the freight, etc." The significance of these general terms, may, of course, be enlarged or restricted by the further words of description written in each policy according to its particular subject matter. In case of any discrepancy between the printed and written terms of description, the latter will necessarily prevail⁴).

2. SHIP. — If instead of the customary descriptive words quoted above, the general term "ship" is used, it is held to include not only the hull of the vessel, but all those things essential to her navigation as a ship, such as her sails, tackle and stores⁵), her boats and other furniture⁶). But the special outfit of a whaler is held not to be covered by a policy on the vessel⁷), though it is otherwise where the "outfit" is expressly mentioned⁸). The fact that the name of the vessel, is incorrectly written in the policy will not exempt the insurer from liability if the vessel intended to be insured is sufficiently identified without reference to the name⁹).

3. GOODS AND MERCHANDISE. — These words, as descriptive terms, are very broad, and include not only all articles laden upon the vessel for mercantile purposes, but also shipments of specie and of precious stones and metals¹⁰). But a vessel in tow of that insured is not included within the term "goods and merchandise laden or to be laden",¹¹) nor is she protected by insurance upon the "cargo" of the towing vessel¹²). Since it is customary to describe specially shipments of live stock and provender, they are not included within the term "goods and merchandise"¹³)

¹) Gauntlett v. Sea Ins. Co., (1901) 127 Mich. 504; Hooker v. Robinson, (1878) 98 U. S. 528. — ²) People v. Dimick, (1888) 107 N. Y. 13. — ³) See Mercantile Mut. Ins. Co. v. Folsom, (1873) 18 Wall. 237. — ⁴) Parker v. China Mut. Ins. Co., (1895) 164 Mass. 237; Chadsey v. Guion, (1884) 97 N. Y. 333; Hogan v. Scottish Union Ins. Co., (1901) 186 U. S. 423. — ⁵) Perry v. Ohio Ins. Co., (1832) 5 Ohio, 305; Hancox v. Fishing Ins. Co., (1838) Fed. Cas. No. 6013. — ⁶) Hall v. Ocean Ins. Co., (1839) 21 Pick. (Mass.) 472. — ⁷) Faber v. China Mut. Ins. Co., (1881) 131 Mass. 239. — ⁸) Macy v. Whaling Ins. Co., (1845) 9 Metc. (Mass.) 354. — ⁹) Hughes v. Mercantile Mut. Ins. Co., (1873) 55 N. Y. 265. — ¹⁰) See American Ins. Co. v. Griswold, (1835) 14 Wend. (N. Y.) 399. — ¹¹) Oteri v. Horne Mut. Ins. Co., (1880) Mc. Gloin (La.) 198. — ¹²) Barry v. Boston Mar. Ins. Co., (1886) 62 Mich. 424. — ¹³) Wolcott v. Eagle Ins. Co., (1827) 4 Pick. (Mass.) 429.

though they may be covered by the term "cargo" if clearly so intended by the parties¹). By a condition implied from usage, to stow all cargo below deck on sea-going vessels, insurance upon "goods and merchandise" or "cargo" does not protect goods stowed on deck²), unless there is an agreement to the contrary expressly made³), or implied from a special custom, known to the insurer, to carry such cargo on deck⁴).

4. FREIGHT. — The term "freight" as used in the marine policy is far broader than the ordinary sense of that word. It means the benefit derived by the owner of the vessel from its use in the contemplated voyage. Hence, it includes the freight money to be earned and payable by the shipper at the end of the voyage, the hire of the vessel payable by the charterer, and the increased value of the owner's own goods because of the transportation in his vessel⁵). A policy that insures the freight on a trading voyage covers freight money that may be earned upon substituted cargo taken in during the voyage⁶).

5. PROFITS. — In the absence of an express provision for the insurance of expected profits upon a venture about to be undertaken, the loss of such profits cannot form an element in adjusting the amount of loss under a general insurance of the property from which they are to accrue⁷). But such profits may be expressly insured under either an open or a valued policy. In England no recovery for loss of profits is allowed under either kind of policy unless the insured shows affirmatively that profits would have been earned if the voyage had been successfully completed, but in the United States in an action upon a valued policy, no such showing of probable profits need be made⁸).

B. Beginning and Ending of Risk. — 1. TIME POLICY. — There is ordinarily little difficulty in determining the beginning and ending of the risk assumed by the underwriter under a time policy, covering a period between two fixed dates. In the absence of a clause providing otherwise, the risk ceases at the moment specified in the policy, though the vessel be still at sea⁹). It is frequently stipulated, however, that in case the vessel is at sea at the end of the period fixed by the policy, the risk shall not terminate until she arrives at her "port of destination". By her port of destination is meant the next successive port at which she is destined to call, and not her home port¹⁰), unless such port is specifically designated¹¹). Another question has arisen under the ordinary time policy as to whether the insurer was liable for a loss which occurred after the hour set for the termination of the risk as reckoned by the time of the place where the disaster occurred, but before that hour when reckoned by the time of the place where the contract was made, far to the westward. It was decided, with manifest correctness, that a time policy begins and ends in accordance with the time of the place where the contract was made¹²).

2. VOYAGE POLICY. — Voyage policies upon vessels usually stipulate that the risk shall commence "at and from" a designated port. The exact time at which the risk under such a policy attaches to a vessel within the port designated depends somewhat upon the conditions existing at the time the policy is issued. When the vessel is lying in the port at the time the contract is made, the risk attaches at once¹³), unless she has lain for a considerable time in port without reference to the voyage insured, in which case the risk does not attach until preparations for the voyage are begun¹⁴). When the contract is made in contemplation of the vessel's arriving at the port designated, the policy attaches as soon as she arrives in good safety, physically, within the natural boundaries of the port¹⁵). When it is stipulated that the insurance is "from" a designated port, the underwriter is not put to his risk until the vessel weighs anchor in readiness for departure upon the voyage specified¹⁶).

¹) *Allegre v. Maryland Ins. Co.*, (1830) 2 Gill & J. (Md.) 136. — ²) *Adams v. Warren Ins. Co.*, (1839) 22 Pick. (Mass.) 198; *Allen v. St. Louis Ins. Co.*, (1881) 85 N. Y. 473. — ³) *Brice v. Thames Mar. Ins. Co.*, (1885) 38 Hun. (N. Y.) 246. — ⁴) *Merchant's Ins. Co. v. Shillito*, (1864) 15 Ohio St. 559. — ⁵) *Wolcott v. Eagle Ins. Co.*, (1827) 4 Pick. (Mass.) 429; *Riley v. Dilafield*, (1811) 7 Johns. (N. Y.) 522. — ⁶) *Hugg v. Augusta Ins. Co.*, (1849) 7 How. 595. — ⁷) *Niblo v. Insurance Co.*, (1843) 1 Sandf. (N. Y.) 551. — ⁸) *Patapsco Ins. Co. v. Coulter*, (1830) 3 Pet. 222. — ⁹) *Melcher v. Ocean Ins. Co.* (1871) 59 Me. 217. — ¹⁰) *Cole*

v. Union Mut. Ins. Co., (1859) 12 Gray (Mass.), 501; *Hutton v. American Ins. Co.*, (1843) 7 Mill (N. Y.) 321. — ¹¹) *Ellery v. New England Ins. Co.*, (1829) 8 Pick. (Mass.) 14. — ¹²) *Walker v. Protection Ins. Co.*, (1849) 29 Me. 317. — ¹³) *Seamans v. Loving*, (1816) Fed. Cas. No. 12 583. — ¹⁴) *Taylor v. Lowell*, (1807) 3 Mass. 330; *Snyder v. Atlantic Mut. Ins. Co.*, (1884) 95 N. Y. 196. — ¹⁵) *Snyder v. Atlantic Mut. Ins. Co.*, (1884) 95 N. Y. 196. — ¹⁶) *Union Ins. Co. v. Tysen*, (1842) 3 Hill (N. Y.) 118. See also *Mey v. South Carolina Ins. Co.*, (1816) 3 Brev. (S. C.) 329.

Voyage policies upon vessels usually provide that the insurance shall continue until the ship is moored in good safety for some specified period, usually twenty-four hours, in the port of ultimate destination. This provision contemplates that the vessel shall be protected until she is moored at the place where she is to be discharged, and not merely temporarily anchored in the harbor¹). And the vessel is deemed to be in good safety if she rides safely at anchor, though seriously damaged²). Policies upon cargo usually continue until "safely landed". It is usually held that under this provision the underwriter is discharged from liability as to each parcel of goods when it is landed³), but there is authority holding that his liability continues as to the cargo until the whole of it is landed⁴).

3. LOSS AFTER EXPIRATION OF POLICY FROM PREVIOUS INJURY.

— In England there has been much question whether the underwriters should be held liable for a loss that occurred after the expiration of a time or voyage policy but necessarily consequent upon an injury suffered during the term of such policy⁵). But in the United States it has been consistently held that if the vessel has received her death wound during the currency of the policy, the insurer is liable even though her death struggle may have outlasted the term of the policy⁶).

C. What Risks are Assumed. — 1. IN GENERAL. — It is of course, purely a matter of contract between the parties to determine what are the perils as to which the underwriter shall assume the risk of loss. In the conventional form of the American marine policy these perils are designated as follows: "perils . . . of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detentions of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof." The clause "all other perils, losses, and misfortunes", in accordance with a familiar rule of construction is held to mean other marine perils of the same kind as those specifically enumerated, but no others⁷). Thus, the looting of a vessel by a mob is covered by insurance against "thieves", because it is a peril of the same kind⁸). But this general clause will not render the insurer liable for deterioration of the vessel insured because the ordinary wear and tear due to the strain and stress of navigation⁹), nor for losses due to inherent defects in the subject matter of the insurance¹⁰).

2. PERIL INSURED AGAINST AND PROXIMATE CAUSE OF LOSS. — It often happens that an insured adventure suffers loss or damage by the successive or concurrent operation of several perils, some of which are within and some without the terms of the policy. In such cases the insurer is liable only when the loss suffered is proximately or predominantly caused by the peril insured against. It is not sufficient that such peril contributed to the loss if another, for which the insurer is not chargeable, is the proximate or predominant cause¹¹). The question when a given peril is the proximate and when the remote cause of a loss within the maxim "*causa proxima non remota spectatur*", must be resolved by reference to the general rule, which may be stated as follows¹²): "When several causes contributed to the loss suffered, that one is deemed to be proximate, which set in motion the force, that without the intervention of any new and independent agency, brought about the loss complained of." But the practical application of the rule to insurances against marine disasters has been found not less difficult than in other legal relations. Thus, it well may be that the peril proximate in point of time may be more remote as an efficient cause than another of earlier occurrence¹³). The rule for determining which of two con-

¹) *Dickey v. United States Ins. Co.*, (1814) 11 Johns. (N. Y.) 358; *Bramhole v. Sun. Mut. Ins. Co.*, (1870) 104 Mass. 510. — ²) *Bill v. Mason*, (1810) 6 Mass. 313. — ³) *Mobile Ins. Co. v. Mc. Millan*, (1855) 27 Ala. 77; *Mansur v. New England Mut. Ins. Co.*, (1859) 12 Gray (Mass.) 520. — ⁴) *Fletcher v. St. Louis Marine Ins. Co.*, (1853) 18 Mo. 193. — See also *Gardiner v. Smith*, (1814) 1 Johns. Cas. (N. Y.) 141. — ⁵) Cf. *Lockyer v. Offley*, (1786) 1 T. R. 252; *Shawe v. Felton*, (1801) 2 East, 109; *Knight v. Faith*, (1885) 15 Q. B. 649. — ⁶) *Duncan v. Great Western*

Ins. Co., (1867) 3 Keyes (N. Y.) 394. — ⁷) *Swift v. Union Mut. Ins.*, (1877) 122 Mass. 575; *Moses v. Sun Mut. Ins. Co.*, (1852) 1 Duer (N. Y.) 159. — ⁸) See *Babbitt v. Sun Mut. Ins. Co.*, (1871) 23 La. Ann. 314. — ⁹) *Washington Mut. Ins. Co. v. Reed*, (1851) 20 Ohio 200. — ¹⁰) *Providence Washington Ins. Co. v. Adler*, (1885) 65 Md. 162. — ¹¹) *Lewis v. Aetna Ins. Co.*, (1909) 129 Fed. 1006. — ¹²) *Vance on Insurance*, p. 542. — ¹³) For illustrations see *North-west Transportation Co. v. Boston Marine Ins. Co.*, (1890) 41 Fed. 793; *Dole v. New England Mut. Mar. Ins. Co.*, (1864) Fed. Cas. No. 3966.

current causes is predominant is thus stated by the Supreme Court of the United States in a leading case¹): "When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating, efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. . . . And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant."

When a loss is properly attributable to a peril assumed by the underwriter, he is liable not only for the immediate loss or damage, but also for such other incidental losses and expenditures as are naturally and legally consequent upon the happening of the principal disaster, such as salvage, expenses, towage charges, repairs, and other similar expenses²).

When a loss is consequent upon the concurrent operation of two causes, one within the terms of the policy and one without, the loss will be apportioned between the two causes if such a discrimination is possible, and the underwriter required to pay such part of the loss as may be apportioned to the cause against which he has insured. Thus a steamer, in consequence of a collision, took water into her engine-room. Steam was formed, and the explosion which ensued causing the ship to take fire, she burned rapidly and sank. The ship was insured against fire, but not against collision. The insurer was required to pay the amount of the loss, less the amount of the damage caused by the collision³). So if the several concurrent causes of loss are insured by different underwriters, the court will if possible, apportion to each such part of the loss as may be shown to be due to the peril assumed by him⁴).

3. "PERILS OF THE SEA." — The term "perils of the sea" as used in the customary marine policies includes only those casualties due to the unusual violence or extraordinary causes connected with navigation⁵). Damage due to the ordinary wear and tear and the usual incidents of navigation, or consequent upon negligence in the ordinary use of the vessel's tackle and machinery, are not included. Hence, it has been held that the insurer who has assumed the risk of loss from perils of the sea is not liable for damage done by rats and worms⁶), by such dampness as is ordinarily to be expected upon the sea⁷), or by seas not heavier than are usually encountered upon the ocean⁸). So fire⁹) is not a peril of the sea, nor is accidental injury to the vessel's machinery, or the bursting of her boiler¹⁰). But under inland navigation policies, which usually insure against "perils of rivers, lakes and canals", it has been held that damage caused by the bursting of boilers and the escape of steam was chargeable to the underwriter¹¹). And in American policies a special clause is usually inserted extending the insurer's liability to damage caused to the machinery of a ship¹²). There is to be noted a tendency in the American cases arising upon policies connected with the navigation of rivers and other inland waters, to include the multitudinous risks incident to such navigation within the general terms "perils of the sea" and "perils of navigation", rather more freely than in the case of policies affecting navigation upon the high seas¹³).

4. COLLISION. — Collision is a peril of the sea, but is usually specified as a peril assumed. Under such a term the insurer is liable for any damage suffered by vessel or rigging on account of her coming into violent contact with another vessel

¹) *Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.*, (1870) 12 Wall. 194. —

²) See *Providence Steamship Co. v. Phoenix Ins. Co.*, (1882) 89 N. Y. 559; *Mc. Coldin v. Greenwich Ins. Co.*, (1887) 10 N. Y. 390; *Lamar Ins. Co. v. Mc. Glashen*, (1870) 54 Ill. 513; *Nelson v. Suffolk Ins. Co.*, (1851) 8 Cush. (Mass.) 477. — ³) *Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.*, (1870) 12 Wall. (U. S.) 194. — ⁴) *Fuller v. Detroit Fire & Mar. Ins. Co.*, (1888) 36 Fed. 469. — ⁵) See Vance on Insurance p. 550. For examples of perils of the sea, see Richlieu, etc., *Nav. Co. v. Boston Mar. Ins. Co.*, (1889) 136 U. S. 408; *Hagar v. New England Mut. Mar. Ins. Co.*, (1871) 59 Me. 460. The California Civil Code (sec. 2199) broadly defines perils of the sea as those which "are from storms and waves; rocks, shoals and rapids; other obstacles

though of human origin, changes of climate; the confinement necessary at sea; animals peculiar to the sea; and, all other dangers peculiar to the sea." — ⁶) *Hazard v. New England Marine Ins. Co.*, (1834) 8 Pet. 557. — ⁷) *Baker v. Manufacturer's Ins. Co.*, (1859) 12 Gray (Mass.) 603. — ⁸) *The Gulnare*, (1890) 42 Fed. 861. — ⁹) *Gilmore v. Carman*, (1843) 1 Sm. & M. (Miss.) 279. — ¹⁰) *Miller v. California Ins. Co.*, (1888) 76 Cal. 145. — ¹¹) *Union Ins. Co. v. Groom*, (1868) 4 Bush (Ky.) 289; *Citizen's Ins. Co. v. Glasgow*, (1845) 9 Mo. 411; *Perrin v. Protection Ins. Co.*, (1842) 11 Ohio. 147. — ¹²) See *Cleveland Transit Co. v. Insurance Co.* — ¹³) *North Carolina*, (1902) 115 Fed. 431. — ¹⁴) For example, see *Seaman v. Enterprise Ins. Co.* (1884) 21 Fed. 778; *Underwriter's Agency v. Sutherland*, 55 Ga., (1875) 266.

or other thing capable of being navigated¹). It is not necessary that the other vessel be in motion, or in a condition to be moved at the time of the collision²). But contact with any immovable object such as a pier, or land, or ice, is not a collision within the meaning of the policy³). It is generally held in the United States that damages required to be paid by the vessel insured to the other in collision, because of the negligence of the former in causing the collision, are not such a proximate consequence of the collision as to make the insurer liable to repay them as an element of the loss suffered⁴). But the courts of Massachusetts have reached a different conclusion⁵).

5. **BARRATRY.** — Barratry is defined as "any willful misconduct on the part of the master or crew, in pursuance of some unlawful or fraudulent purpose, without the consent of the owners, and to the prejudice of the owner's interest"⁶). Since barratry is a common law crime, it cannot be committed unintentionally. Hence, while a serious blunder or negligence on the part of the master of a vessel may be highly prejudicial to the owner, yet it cannot be barratry⁷). As the barratrous act must be prejudicial to the owner's interests it cannot be committed with the consent of the owner, or by a master of a vessel who is also owner⁸), though a master who is part owner of a vessel may commit barratry as against his absent co-owners⁹).

6. **THIEVES.** — The thefts covered by the marine policy are held in England to be only such as take place when the vessel is forcefully robbed by persons outside the vessel. The term does not include thefts by persons within the vessel, whether passengers or crew. But in the United States it seems to be settled that by inserting such a term the insurer becomes liable for any losses by theft whether by persons within or without the vessel¹⁰).

7. **ARRESTS, RESTRAINTS, AND CAPTURES.** — Insurance against "takings at sea, arrests, restraints, and detentions of all kings, princes and people" is intended to protect the insured only against those fortuitous damages which may be caused by extraordinary acts done by virtue of sovereign authority in time of war, or under other unusual international conditions. It is not intended to protect the insured against loss suffered by reason of such seizures under due process of law as usually happen under similar conditions. There is nothing unexpected about the seizure under libel of a vessel that fails to pay her debts, and there is no good reason why the underwriter should be charged with loss directly due to the default of the insured¹¹). While the clause in question has reference primarily to those risks incident to a state of war, it includes also those arising from the existence of abnormal and strained international relations, as from embargoes¹²), and even from improper arrests under revenue laws¹³). Neither is it necessary in order that the arrest shall be included within the risks assumed, that any actual force shall be employed¹⁴). The terms "kings, princes, and people" mean any officer acting in accordance with the command of the sovereign authority, whatever be his rank or character¹⁵). The term "capture" means any taking hostile to the owner's interest, and with intent on the part of the captor to make some beneficial use of the thing taken¹⁶). Such a hostile taking is none the less a capture, whether it be by friend or foe¹⁷), or even by pirates¹⁸). A seizure by officers of a de facto government, such as that of the Confederate States, is not covered by insurance against pirates¹⁹).

¹) *Cline v. Western Assur. Co.*, (1903) 101 Va. 490. — ²) *London Assurance v. Companhia de Morgans do Barreiro*, (1897) 167 U. S. 149. — ³) *Newtown Creek Towing Co. v. Aetna Ins. Co.*, (1900) 163 N. Y. 114; *Cline v. Western Assur. Co.*, (1903) 101 Va. 496. — ⁴) *Mathews v. Howard Ins. Co.*, (1854) 11 N. I. 9; *General Mut. Ins. Co. v. Sherwood*, (1852) 14 How. 351. — ⁵) *Whorf v. Equitable Ins. Co.*, (1887) 144 Mass. 68. — ⁶) See Justice Story's definition in *Marcadier v. Insurance Co.*, (1814) 8 Cr., 39; *Vance on Insurance*, p. 551. — ⁷) *Wiggin v. Amory*, (1817) 14 Mass. 1; *Atkinson v. Great Western Ins. Co.*, (1875) 65 N. Y. 531. — ⁸) *Hallet v. Columbian Ins. Co.*, (1811) 8 Johns. (N. Y.) 272; *Marcadier v. Insurance Co.*, (1814) 8 Cr. 39. — ⁹) *Hutchins v. Ford*, (1890) 82 Me. 363. — ¹⁰) *Spinetti v. Steamship Co.*, (1880) 80 N. Y. 71; *America Ins. Co. v. Bryan*,

(1841) 26 Wend. (N. Y.) 563. — ¹¹) See *Richardson v. Maine F. & M. Ins. Co.*, (1809) 6 Mass. 102; *Corp. v. United States Ins. Co.*, (1811) 8 Johns. (N. Y.) 277. — ¹²) *Delano v. Bedford Mar. Ins. Co.*, (1813) 10 Mass. 347. — ¹³) *Magoun v. New England Mar. Ins. Co.*, (1839) 1 Story (U. S. C. C.) 157. — ¹⁴) *Salts v. U. S. Ins. Co.*, (1818) 15 Johns. (N. Y.) 523. — ¹⁵) See *Simpson v. Charleston, F. & M. Ins. Co.* (1838), *Dudley* (S. C.) 239. — ¹⁶) *Steamship Co. v. Ins. Co.*, (1908) 161 Fed. 166; *Lee v. Boardman*, (1807) 3 Mass. 238. — ¹⁷) *Lee v. Boardman*, *supra*; *Murray v. U. S. Ins. Co.*, (1807) 2 Johns. Cas. (N. Y.) 263. — ¹⁸) *Dole v. New England Mut. Mar. Ins. Co.*, (1874) Fed. Cas. No. 3966. — ¹⁹) *Mauran v. Alliance Ins. Co.*, (1867) 6 Wall. 1; *Dole v. Merchant's Mut. Mar. Ins. Co.*, (1863) 51 Me. 465.

D. Risks Excepted. — The underwriter may by express stipulation in the policy, except specified risks which would otherwise be included under the general provisions in the policy. The phrase customarily used to introduce such exceptions is "warranted free from", but any other language clearly showing the same intent is sufficient¹). In determining what risks are included within an exception expressly stated the same rules of construction as those heretofore discussed are applicable²). The special exceptions most frequently giving rise to litigation are probably those against "leakage"³) and "want of ordinary care"⁴).

VIII. CONCEALMENTS, REPRESENTATIONS, AND WARRANTIES. —

A. In General. — On account of the peculiar conditions under which the contract of marine insurance is ordinarily made each of the parties has a right to expect of the other the exercise of the highest degree of good faith. In this confidence the insurer has a right to assume that all representations made by the insured with reference to the risk are true and accurate, and that nothing material to the risk known to the insured, or which ought to be known to him in due course of business, has been concealed. Hence, it is peculiarly true that any fraudulent misrepresentation or concealment will avoid the contract. But the principle underlying the law as to concealments and representations is much deeper than mere fraud, and may be stated as follows: In every contract of marine insurance there are implied conditions that the policy shall be void unless all material statements made descriptive of the risk are in accordance with the facts, and unless all material facts which the insured knows or ought to know, have been communicated to the insurer, the question of intent on the part of the insured, whether fraudulent or innocent, being in each case wholly immaterial⁵). It is sometimes stated that a fraudulent misrepresentation as to an immaterial fact will avoid a policy, but such a statement is contrary to reason and is not supported by any adequate authority⁶). Therefore we may conclude that every policy of marine insurance is subject to implied conditions against the concealment or misstatement of material facts, just as it may be made subject to express conditions by the insertion of warranties.

B. Concealments and Representations. — The law of concealments and representations as affecting marine policies has developed in the United States along lines exactly parallel with that in England, and therefore calls for no special consideration here. It is worthy of note, however, that in so far as concealments are concerned the law of marine insurance differs somewhat in the United States from that governing other kinds of insurance. As stated above, a concealment though innocent⁷), is fatal to a marine policy, as it is in England, but it does not affect a fire or life policy unless it be proved fraudulent⁸).

C. Warranties. — **1. EXPRESS WARRANTIES.** — An express warranty is a representation or a promise written in the policy, or by proper reference incorporated therein, which by the terms of the policy is made a condition of its existence. Hence, unless the warranted statement is literally true, or the warranted promise is strictly performed, the policy is avoided without reference to the materiality of the warranty, or whether the insurer has been in any wise damaged by its breach⁹). It should be noted, however, that the underwriter may by his conduct estop himself to set up the breach of a warranty inserted in bad faith. Thus, where an underwriter with full knowledge that a vessel was unseaworthy exacted an unusually high premium on that account, he was not allowed to take advantage of a warranty of seaworthiness in the policy issued¹⁰). The rules applicable to warranties in marine policies are not

¹) *Swinerton v. Columbia Ins. Co.*, (1867) 37 N. Y. 174. — ²) *Union Ins. Co. v. Smith*, (1887) 124 U. S. 67. — ³) As to what is "leakage," see *Cory v. Boylston F. M. Ins. Co.*, (1871) 107 Mass. 140; *McLaughlin v. Atlantic Mut. Ins. Co.*, (1869) 57 Me. 170. — ⁴) Loss due to navigating a vessel at excessive speed, or without proper look-outs, is within this exception. *Richelieu Nav. Co. v. Boston Mar. Ins. Co.*, (1889) 136 U. S. 408; and so is that from overloading of the vessel. *Empire Parish Packet Co. v. Union Ins. Co.*, (1880) 32 La. Ann. 1081. — ⁵) See *Phillips on Insurance*, sec. 537, approved in *Blackburn*

v. Vigers, (1886) L. R. 17 Q. B. Div. 553, 561. — ⁶) See this whole question fully discussed in *Vance on Insurance*, pp. 267—285. — ⁷) *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, (1882) 107 U. S. 485; *Snow v. Mercantile Mut. Ins. Co.*, (1874) 61 N. Y. 160. — ⁸) See opinion of Taft, J., in *Penn. Mut. Life Ins. Co. v. Mechanics Savings & Trust Co.*, (1896) 72 Fed. 413. — ⁹) *Lovett v. China Mut. Ins. Co.*, (1899) 174 Mass. 108; *Burritt v. Insurance Co.*, (1843), 5 Hill (N. Y.) 193. — ¹⁰) See *Farmer's Feed Co. v. Insurance Co. of North America*, (1908) 162 Fed. 379; *Thebaud v. Great Western Ins. Co.*, (1898) 155 N. Y. 516.

different from those governing in the general law of insurance, nor is the law as enforced in the United States different in this respect from that obtaining in England¹).

2. IMPLIED WARRANTIES. — *a) In general.* — It is usually said that in every contract of marine insurance there are three implied warranties, as follows: that the vessel insured is seaworthy at the inception of the insurance; that the voyage designated will be prosecuted without unnecessary deviation; and that the adventure is legal. It would be more accurate to say that these are conditions, implied from custom, upon which the validity of the contract depends.

b) Seaworthiness. — It is settled law, both in England and the United States, that the risk of the underwriter never attaches under a voyage policy upon ship or cargo unless the vessel at the beginning of the voyage insured leaves port in a seaworthy condition²). But when the vessel was seaworthy at sailing the condition is satisfied, and the fact that she becomes unseaworthy in the course of the voyage will not affect the validity of the insurance³), unless, perchance, the master, whose duty it is to keep the vessel in seaworthy condition if possible⁴), is negligent in this respect, and the vessel is lost on account of such negligence⁵), or because of the master's bad faith⁶). When the voyage insured is a round voyage returning to the port of departure, the vessel must at the commencement of the voyage be in a condition fit for the whole voyage without intervening repairs; but if the voyage insured is to be made in successive stages, as part on the high seas, and part on inland waters, there is no breach of the warranty if the vessel is seaworthy for each successive stage as she enters upon it⁷).

The warranty of seaworthiness is implied in the case of insurance upon cargo as well as upon a vessel⁸), but it is referable to the vessel carrying the cargo, and not to the cargo itself. There is no implied warranty that goods insured are in a fit condition for the voyage contemplated⁹).

It seems now to be settled in England and Canada that the warranty of seaworthiness is not implied in the case of a time policy¹⁰), although the insurance is entitled to rely upon the diligence and good faith of the master in using every reasonable effort to keep his ship in a seaworthy condition¹¹). But in America the law has been thrown into great confusion in this respect by widely divergent decisions. A few of the states have adopted the English rule¹²), while others have declared that the rule stated as to voyage policies is equally applicable to time policies¹³). But the generally prevailing rule is that if at the inception of the time policy the insured vessel is in a port at which she might be refitted, it is impliedly warranted that she shall not leave that port until she is seaworthy¹⁴), but if the risk first attaches when she is at sea, there is no implied warranty as to her condition¹⁵). And even under the prevailing rule just stated it is held that the implied warranty arises only at the beginning of the risk, and does not arise at the beginning of each subsequent stage of the voyage upon which the vessel is engaged¹⁶), although this heavy condition is imposed upon the insured by the California code¹⁷). A vessel is deemed to be seaworthy when she is sufficiently strong and tight to resist the perils reasonably incident to voyage for which she is insured, and is properly manned and equipped for such a voyage¹⁸). In order to be seaworthy it is not necessary that a vessel shall

¹) On the law of insurance warranties see generally, 3 Joyce on Insurance, secs. 1942, 2183; Vance on Insurance, p. 285 et seq. — ²) Draper v. Commercial Ins. Co., (1860) 21 N. Y. 328; Long Dock Co. v. Mannheim Ins. Co., (1903) 123 Fed. 861. — ³) Copeland v. New England Marine Ins. Co., (1841) 2 Metc. (Mass.) 432; Marine Fire Ins. Co. v. Burnett, (1867) 29 Tex. 433. — ⁴) Hazard v. New England Mar. Ins. Co., (1834) 8 Pet. 557. — ⁵) Starbuck v. New England Mar. Ins. Co., (1837) 19 Pick. (Mass.) 198; Adderly v. American Mut. Ins. Co., (1847) Fed. Cas. No. 75; Taney, 126. — ⁶) Union Ins. Co. v. Smith, (1887) 124 U. S. 405. — ⁷) Dupeyre v. Western F. & M. Ins. Co., (1847) 2 Rob. (La.) 457. — ⁸) Donnelly v. Merchants' Mut. Ins. Co., (1876) 28 La. Ann. 939; Van Wickle v. Mechanics' Ins. Co.,

(1884) 97 N. Y. 350. See Cal. Civ. Code, sec. 2681. — ⁹) See Koebel v. Saunders, (1864) 17 C. B. N. S. 71. — ¹⁰) See Gibson v. Small, (1853) 4 H. L. Cas. 353; Anchor Mar. Ins. Co. v. Keith, (1883) 9 Can. Sup. Ct., 483. — ¹¹) Thompson v. Hopper, (1856) 6 El. & Bl. 192. — ¹²) See Merchants' Ins. Co. v. Morrison, (1871) 62 Ill. 242. — ¹³) Hoxie v. Home Ins. Co., (1864) 32 Conn. 21. — ¹⁴) Hoxie v. Pacific Mut. Ins. Co., (1863) 7 Allen (Mass.) 211; Union Ins. Co. v. Smith, (1887) 124 U. S. 405. — ¹⁵) Hathaway v. Insurance Co., (1861) 8 Bosw. (N. Y.) 33; Capen v. Washington Ins. Co., (1853) 12 Cush. (Mass.) 517. — ¹⁶) Capen v. Washington Ins. Co., (1853) 12 Cush. (Mass.) 517; Union Ins. Co. v. Smith, (1887) 124 U. S. 405. — ¹⁷) See Cal. Civ. Code, sec. 2683. — ¹⁸) Hughes, Admiralty, p. 56.

be without defect or weakness. It is sufficient if she is fit to meet safely the perils reasonably to be expected on the voyage contemplated. A steamer fitted to navigate the Ohio River with perfect safety would be in grave danger of disaster on Chesapeake Bay while a Chesapeake liner would scarcely survive a storm upon the Atlantic.

But on the other hand the warranty of seaworthiness is more than a guaranty of diligence in equipping the vessel. If in fact she puts to sea not fit for the voyage, the insured cannot impose liability upon the insurer by showing himself ignorant of the defect at sailing. Thus, where a vessel sailed with a compass which, without the knowledge of the master, was defective, it was held that the underwriter could not be held liable for her loss¹).

c) *Deviation*. — There is a striking analogy between the effect of deviation from an insured voyage in the law of marine insurance, and a change of the contract assured in the law of suretyship. Just as a change made without the surety's consent in the contract assured discharges the surety, so any change by deviation in the voyage insured discharges the insurer, for the simple reason that he had never assumed the altered risk. Any departure from the course contemplated by the parties at the time of making the contract of insurance is a deviation, and fatal to the policy unless such deviation was due to stress of weather or other unavoidable cause²), or was made in exercise of a sound discretion on the part of the master for the purpose of avoiding capture or some other imminent peril³), or for the purpose of securing repairs necessary to preserve the vessel in a seaworthy condition⁴). A deviation for the purpose of saving life is excused⁵), but if the master departs from his regular course in order of save property only, the policy is avoided⁶). So strictly is this implied condition against deviation enforced that the insurer is discharged by a deviation, even though it did not in any wise contribute to the loss suffered⁷). Indeed, the insurer is discharged upon proof of an unnecessary deviation even though it clearly appears that such deviation did not increase the risk in the slightest degree, or even that it decreased the risk borne by the underwriter⁸).

What constitutes the proper course to be pursued in prosecuting an insured voyage depends upon the circumstances. If the terminal ports, or the terminal and intermediate ports, are set forth in the policy the vessel is expected to follow the customary course between such ports⁹). In case the voyage is in unfrequented waters the vessel must pursue that course which would be selected by a mariner of prudence and skill as the most direct and safest¹⁰). Furthermore, the underwriter naturally expects that the voyage insured will be prosecuted with all reasonable dispatch, and he has good right to complain if the term of the risk is unnecessarily extended. Hence, it is everywhere held that any unreasonable delay in the voyage is such a deviation as will discharge the insurer from liability¹¹).

d) *Illegality*. — It is very clear that if an insured adventure is illegal to the knowledge of both parties it will be void under the general rules of contract law. If the illegality of the voyage is unknown to the underwriter the policy is void because of the condition implied that the adventure is legal¹²). The question usually arises in insurance upon smuggling voyages. Where the purpose of the voyage is to

¹) *Richelieu & O. Nav. Co. v. Boston Mar. Ins. Co.*, (1889) 136 U. S. 408. — ²) *Graham v. Insurance Co.*, (1814) 11 Johns (N. Y.) 352; *American Ins. Co. v. Francia*, (1848) 9 Pa. St. 390. The rule governing deviation is thus stated by the Georgia Civil Code, (1911), sec. 2520. "A deviation from the voyage, if voluntary and not from necessity, voids the policy. This necessity may arise from: 1. Stress of weather; 2. Want of necessary repairs; 3. Joining convoy; 4. Succoring ships in distress; 5. Avoiding capture or detention; 6. Sickness of master or crew; 7. Mutiny on board; 8. Any similar cause founded upon reason." — ³) *Whitney v. Hayden*, (1816), 13 Mass. 172; *Savage v. Pleasants*, (1813) 5 Binn. (Pa.) 403; *Riggin v. Insurance Co.*, (1826) 7 Har. & J. (Md.) 279. — ⁴) *Turner v. Protection Ins. Co.*, (1846) 25 Me. 515; *Wiggin v. Amory*, (1816)

13 Mass. 118. — ⁵) *Dabney v. Insurance Co.*, (1867) 14 Allen (Mass.) 300; *The Schooner Boston*, (1833) Fed. Cas. Mo. 1, 673. — ⁶) *Mason v. The Blaireau*, (1804) 2 Cr. 240; *Settle v. Insurance Co.*, (1841) 7 Mo. 379. — ⁷) *Burgess v. Equitable Marine Ins. Co.*, (1878) 126 Mass. 70. — ⁸) *Wiggin v. Amory*, (1816) 13 Mass. 118; *Maryland Ins. Co. v. Le-Roy*, (1812) 7 Cr. 26. — ⁹) *Commonwealth Ins. Co. v. Cropper*, (1863) 21 Md. 311. — ¹⁰) *Hearne v. Insurance Co.*, (1874) 20 Wall. 488. — ¹¹) *Burgess v. Equitable Marine Ins. Co.*, (1878) 126 Mass. 70; *Arnold v. Insurance Co.*, (1879) 78 N. Y. 7. — ¹²) See *Warren v. Manufacturers' Ins. Co.*, (1833) 13 Pick. (Mass.) 518. But a policy upon a privateer of piratic tendencies is not illegal. *Ward v. Wood*, (1816) 13 Mass. 539.

violate the revenue laws of a country, the contract is unenforceable in the courts of such country¹). But it is settled law in England that the English courts will not so far enforce the revenue laws of foreign countries as to hold void policies upon vessels engaged in the violation of such laws²). This question seems not to have been squarely presented for decision in an American court, but it seems scarcely possible, in view of the decisions on analogous questions, that the doubtful morality of the English rule will be accepted³).

IX. MEASURE OF INSURER'S LIABILITY. — A. In General. — It is needless to say that the measure of the marine insurer's liability under his policy is determined in accordance with its terms. The application of this simple rule, however, is made quite difficult in some cases by reason of the fact that many terms are annexed to the policy by implication from ancient customs current among sea-faring people. It will be necessary, therefore, to consider the application of the most important of these customary rules to the determination of the insurer's liability.

B. Particular and General Average Losses. — The frequency with which the terms "particular average" and "general average" are used in marine policies necessitates an explanation of the customary significance of these terms. Particular average losses are merely those that are partial, as distinguished from general average losses, which are total. What constitutes a total loss is considered in a subsequent section. Hence, the expression "warranted free of particular average", as often found in marine policies, and as used in the "memorandum clause"⁴) merely means that the underwriter is not chargeable with any partial losses of the property insured. A general average loss means that suffered by the owner of any marine venture when he is compelled to pay his proportionate share of the value of such articles as have been sacrificed, by jettison or otherwise, for the common benefit of the whole venture⁵).

C. Under Open Policies. — 1. IN GENERAL. — The open policy is so called because the value of the property insured, which serves as a basis for calculating the underwriter's liability, is left by the policy open for determination in case of a loss suffered. In determining such value in the case of a ship, the value of the vessel at the time of the inception of the policy is to govern and not her value immediately prior to the loss⁶). In the case of cargo the basis of calculation is the cost of the goods to the shipper when fully laden on board, including payments for insurance and such commissions as were necessary⁷).

2. TOTAL AND PARTIAL LOSSES. — When the loss of the property insured is total the ascertainment of the underwriter's share of the loss is usually not difficult, but where the loss is only partial, some peculiar problems arise. When the ship is damaged and no repairs have been made, the amount of the loss is easily determined to be the difference between her value at the time of insurance and her value in her damaged condition⁸). But when repairs have been made, either temporary or permanent, a very different case is presented. If temporary repairs have been made, in the exercise of reasonable prudence and good faith, to enable the vessel to complete her voyage or to reach a port where she may be suitably refitted, the insurer is liable for the cost of the temporary repairs as well as for the repairs permanently made⁹).

3. ONE-THIRD OFF NEW FOR OLD. — Since the vessel repaired with new material in place of the old is presumably of greater value than before the damage

¹) *Richardson v. Maine F. & M. Ins. Co.*, (1809) 6 Mass. 102; *Gray v. Sims*, (1814) Fed. Cas. No. 5729. — ²) *Planché v. Fletcher*, (1779) 1 Doug. 251. — ³) See *Hughes, Admiralty* p. 56. — ⁴) This clause, usually found in cargo policies, is intended to avoid disputes over damage to, or partial loss of, perishable articles. It reads as follows: "It is also agreed, that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, brooms, wickerware and willow (manufactured or otherwise), straw goods, salt, grain of all kinds, rice, tobacco, indian meal, fruits, (whether preserved or otherwise), cheese, dry-fish, hay, . . . [specifying various

other articles], and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general." — ⁵) See *Hughes, Admiralty*, p. 39; *Vance on Insurance*, p. 556. — ⁶) *Snell v. Delaware Ins. Co.*, (1805) 4 Dall. (U. S.) 430; *Carson v. Marine Ins. Co.*, (1811) Fed. Cas. No. 2465. — ⁷) *Warren v. Franklin Ins. Co.*, (1870) 104 Mass. 518; *American Ins. Co. v. Griswold*, (1835) 14 Wend. (N. Y.) 399. — ⁸) See *Williams v. Smith*, (1804), 2 Cai. (N. Y.) 13. — ⁹) *Paddock v. Commercial Ins. Co.*, (1870) 104 Mass. 521; *Sewall v. U. S. Insurance Co.*, (1831) 11 Pick. (Mass.) 90.

suffered, a customary rule of law has arisen by which, in estimating the amount of the loss, one-third of the cost of the repairs, including therein all expenses properly incidental to such repairs, is deducted from the total expense and the resulting balance fixed as the liability of the underwriters¹). It seems that this rule cannot be varied by showing that the difference between the old and new values is either greater or less than the customary one-third²); but in England the rule is held not to apply to a new vessel on her first voyage³). This exception appears, however, not to have been accepted in the United States⁴).

D. Under Valued Policies. — A valued policy is one in which the parties have, at the time of making the contract, agreed upon the value of the property insured, such valuation to become the basis of calculation of the insurer's liability in case of loss or damage. In the absence of fraud or mistake, such valuation is conclusive upon the parties in the event of a total loss⁵). The agreed valuation, if made in good faith, will not be set aside because it is overestimated⁶). Neither can the underwriter diminish his liability by showing that at the time of loss the value of the vessel had been greatly lessened by the operation of perils which were excepted from his policy⁷). The principles just stated are equally applicable to constructive total losses⁸).

By the prevailing rule the agreed valuation is also conclusive in calculating the amount of a partial loss⁹), although in some jurisdictions partial losses are adjusted in the same manner as if the policy were open¹⁰). In England and a few of the American States¹¹) the amount payable by the underwriters for general average and salvage losses is not calculated upon the agreed valuation, but in a majority of the States the valuation fixed by the policy is conclusive in determining payments because of these losses also¹²).

E. Total Loss. — **1. ACTUAL TOTAL LOSS.** — The underwriter is chargeable in accordance with the terms of his policy, as for a total loss when the loss is either actually or constructively total. A loss is said to be actually total when the subject matter of the insurance is wholly destroyed or lost, or when it is so damaged that it cannot be said to have any existence in its original character¹³). If a vessel is sunk in such deep water that she cannot be raised, or if she has been so wrecked that she is but a worthless heap of material¹⁴), she is deemed to be an actual total loss; but it is otherwise if she retains her identity as a vessel, and is capable of being repaired¹⁵). The determination of what constitutes a total actual loss of goods is much more difficult. It is also very important because many policies on cargo are warranted free of particular average. Generally speaking, a shipment of goods is not totally lost so long as any part of it remains in specie, though such remnant be badly damaged and of little value¹⁶). But if the portion saved is of no value in its original character the loss is total. Thus where machinery, constituting a single apparatus, was submerged in a wrecked vessel, the fact that the underwriters subsequently recovered some portions of the machinery and tendered them to the consignee, was held not to prevent the loss from being total. Here the salvaged parts of the machinery were so badly rusted as to have no value as machinery, and they were of only trifling value as scrap iron¹⁷).

2. CONSTRUCTIVE TOTAL LOSS. — It is obvious that cases may easily occur in which a vessel may be wrecked under such circumstances as not to destroy her

¹) *Hagar v. New England Mut. Mar. Ins. Co.*, (1871) 59 Me. 460; *Paddock v. Commercial Ins. Co.*, (1870) 104 Mass. 521. — ²) *Aitchison v. Lohre*, (1879) L. R. 4 App. Cas. 755. — ³) See *Pirie v. Steele*, (1837) 8 C. & P. 200. — ⁴) See *Fiske v. Commercial Ins. Co.*, (1866) 18 La. 77; *Sewall v. U. S. Insurance Co.*, (1831) 11 Pick. (Mass.) 90; *Kerr v. Quaker City Ins. Co.*, (1862) 33 Mo. 158. — ⁵) *Beardman v. Boston Marine Ins. Co.*, (1888) 146 Mass. 442; *Plyer v. German-American Ins. Co.*, (1890) 121 N. Y. 689. — ⁶) *Clark v. Ocean Ins. Co.*, (1835) 16 Pick. (Mass.) 289; *Sturm v. Atlantic Mut. Ins. Co.* (1875) 63 N. Y. 77. — ⁷) *Mutual Marine Ins. Co. v. Munroe*, (1856) 7 Gray (Mass.) 246. — ⁸) *Murray v. Great Western Ins. Co.*, (1895) 147 N. Y. 711. — ⁹) *Ursula Bright Steamship Co. v. Amsinck*, (1902)

115 Fed. 242; *Natchez Ins. Co. v. Buckner*, (1839) 4 How. (Miss.) 63. — ¹⁰) *Orrock v. Commonwealth Ins. Co.*, (1839) 21 Pick. (Mass.) 456. — ¹¹) See *Brooks v. Oriental Ins. Co.*, (1828) 7 Pick. (Mass.) 259. — ¹²) *Steamship Co. v. Phoenix Ins. Co.*, (1882) 89 N. Y. 559. — ¹³) *Williams v. Cole*, 16 Me. 207; *Carr v. Providence Washington Ins. Co.*, (1888) 109 N. Y. 504. — ¹⁴) *Soelberg v. Western Assur. Co.*, (1902) 119 Fed. 23; *Merchants' S. S. Co. v. Insurance Co.*, (1873) 51 N. Y. Super. Ct. 444. — ¹⁵) See *Carr v. Providence Washington Ins. Co.*, (1888) 109 N. Y. 504. — ¹⁶) *Washburn & Moen Mfg. Co. v. Reliance Mar. Ins. Co.*, (1900) 179 U. S. 1. — ¹⁷) *Great Western Ins. Co. v. Fogarty*, (1873) 19 Wall. 640. See also *Canton Ins. Office v. Woodside*, (1898) 90 Fed. 301.

identity as a vessel, but to render the cost of salving and repairing her greater than her value after reparation. In such a case the law does not require of the insured that he shall make such unprofitable expenditure as would be involved in saving her. He is allowed to notify the insurer, and abandon her as a constructive total loss¹). The general principle is clear, but the determination of the question whether in any given case the wrecked venture is so seriously damaged that it may be abandoned as a constructive total loss has proved very difficult. It seems clear that the basic principle upon which the question should be determined is that if an uninsured owner would abandon the venture without effort to save it, it should be regarded as constructively a total loss; and such is the test that has finally been established by the English courts²). But this rule has been found to be uncertain in operation and difficult to administer. As a result of this experience the American courts have worked out a different rule which, though somewhat arbitrary, is more certain in statement, and more satisfactory in practice. It is ordinarily termed the "fifty per cent rule", and is sometimes roughly stated as follows; whenever the vessel or other property insured is damaged to an extent greater than fifty per cent of its value, the insured may claim a total loss³). This statement, however, is not quite accurate, since the rule is based upon the valuation to be put upon the vessel or other things after it has been saved and repaired. Therefore, the rule should be stated thus: If the expenditures estimated to be necessary to put the vessel again in serviceable condition, or to make the cargo merchantable, would amount to more than fifty per cent. of the value of the vessel or cargo when restored, the loss may be considered total⁴).

F. Abandonment. — When the loss of the property insured is actually total the right of the insured to require payment of the underwriter on the basis of a total loss becomes absolute⁵). But such is not ordinarily the rule when the insured is claiming a constructive total loss. In such case the underwriter is entitled to take possession of the wreck and to exercise his own discretion as to whether he should attempt to save it. Therefore the insured is not allowed to charge the underwriter with a constructive total loss unless he has given him timely notice of the disaster, and of his abandonment of the wreck, so that the latter may exercise his right of salvage⁶). It seems, however, that failure to give notice of abandonment will not defeat the recovery of the insured when the circumstances were such that the underwriter could not by any possibility have received benefit from the notice⁷).

Upon notice of abandonment the underwriter is put to his election to accept or reject the abandonment. If he accepts he thereby admits the existence of a total loss, and becomes liable on that basis⁸). He is also by such acceptance at once vested with all of the rights which the insured possessed in respect to the vessel at the moment of abandonment. He may, therefore, save and repair the vessel, and pass good title to a purchaser⁹). He may also bring an action against any tort-feasor whose wrongful conduct caused the loss, and may retain the whole amount of the judgment secured even though it be in excess of the amount of the insurance paid¹⁰).

Upon refusal of the insurer to accept the abandonment after due notice the insured may bring his action as for total loss, and upon proof that the abandonment was justified he may recover on the basis of a total loss, and, in any event, the amount of the loss proved¹¹).

G. Sue and Labor Clause. — One of the most curious provisions of the marine policy is the so called "sue and labor" clause. In the American policy this clause reads as follows: "And in case of any loss or misfortune, it shall be lawful and necessary to

¹) *Globe Ins. Co., v. Sherlock*, (1874) 25 Ohio St. 50. — ²) See *Sailing Ship Co.*, (1898) A. C. 593; *Rankin v. Potter*, (1765) L. R. 6 H. L. 83. — ³) *Jones v. Western Assur. Co.*, (1901) 198 Pa. St. 206; *Fiedler v. New York Ins. Co.*, (1857) 6 Duer (N. Y.) 282. See 26 Cyc. 689. — ⁴) *Fulton Ins. Co. v. Goodman*, (1858) 32 Ala. 127; *Bradlie v. Insurance Co.*, (1838) 12 Pet. 378. — ⁵) *Prince v. Ocean Ins. Co.*, (1855) 40 Me. 481; *Carr v. Providence Washington Ins. Co.*, (1888) 109 N. Y. 504. — ⁶) *Gomila v. Hibernia Ins. Co.*, (1888) 40 La. Ann. 553; *Macy v. Whaling Ins. Co.*, (1845) 9 Metc. (Mass.) 354; *New Orleans Ins. Co. v. Piaggio*, (1872) 16 Wall. 378. — ⁷) *Roux v.*

Salvador, (1836) 3 Bing. N. C. 266. — ⁸) *Phoenix Ins. Co. v. Copelin*, (1869) 9 Wall. 461; *Buffalo City Bank v. Northwestern Ins. Co.*, (1864) 30 N. Y. 251; *Citizens' Ins. Co. v. Glasgow*, (1845) 9 Mo. 411. — ⁹) *Mercantile Marine Ins. Co. v. Clark*, (1875) 118 Mass. 288; *Northwestern Transp. Co. v. Insurance Co.*, (1886) 59 Mich. 214; *Cincinnati Ins. Co. v. Duffield*, (1856) 6 Ohio St. 200. — ¹⁰) See *Mercantile Marine Ins. Co. v. Clark*, (1875) 118 Mass. 288. — ¹¹) See *Fuller v. Kennebec Mut. Co.*, (1850) 31 Me. 325; *Pierre v. Ocean Ins. Co.*, (1836) 18 Pick. (Mass.) 83; *The Sarah Ann*, (1835) Fed. Cas. No. 12, 342.

and for the assured, his factors, servants, and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance — — — to the charges whereof, the said insurance company will contribute according to the rate and quantity of the sum herein insured". This remarkable provision, which is found in Lloyd's policy, and is of ancient origin, is not properly a part of the contract of indemnity, but is really a collateral agreement whereby the insurer authorizes the insured and his representatives to make every effort in their power to save and protect the insured property in case of loss or misfortune, and promises to re-imburse them for expenditures in that behalf¹). In order that a claim of compensation may be made against the underwriter under this clause it is to be observed that two essential facts must exist: 1. The person claiming compensation for his suing and laboring must be the insured, or some separate one employed by him or representing him. It follows that salvors cannot claim compensation for their work under this clause, unless they were employed by the insured and make their claim through him²). 2. The claim must be made for expenditures made in the effort to save the insured property from some peril against which the underwriter is insured³).

The liability of the underwriter under the sue and labor clause is independent of his liability to indemnify any loss actually suffered. Therefore, the underwriter must compensate the insured for expenditures made in a successful effort to save the property from a peril for which the underwriter is liable, even though it be subsequently lost because of an excepted peril⁴). So, if a vessel is lost in spite of the insured's efforts to save her, the underwriter must nevertheless compensate him for his suing and laboring, in addition to indemnifying him for the loss suffered. It may thus happen that the marine insurer may become liable to pay a sum greater than that specified in the policy as the measure of his liability⁵).

¹) *Cory v. Boylston F. & M. Ins. Co.*, (1871) 107 Mass. 140, *Alexandre v. Sun Mut. Ins. Co.*, (1873) 51 N. Y. 253. — ²) See *International Nav. Co. v. Atlantic Mut. Ins. Co.*, (1900) 100 Fed. 304. — ³) *Pride v. Providence Washington Ins. Co.*, (1897) 6 Pa. Dist. 227; *Biays*

v. Chesapeake Ins. Co., (1813) 7 Cr. 415. —

⁴) *Kidston v. Insurance Co.*, (1877) L. R. 2 C. P. 357. See *Vance on Insurance*, p. 562. —

⁵) *Alexandre v. Sun Mut. Ins.*, (1873) 51 N. Y. 253; *Christie v. Buckeye Ins. Co.*, (1872) Fed. Cas. No. 2700.

XII.

PARTNERSHIP

Partnership.

(By **James Buchanan Lichtenberger**, A. B., LL. B., of the Philadelphia Bar, late Gowen Fellow at the University of Pennsylvania.)

Analysis.

I. NATURE OF PARTNERSHIPS

- A. *The Partnership Relation*, 587
 - 1. *General Discussion*, 587
 - 2. *Definition*, 587
- B. *The Contract*, 587
 - 1. *In General*, 587
 - 2. *Parties to the Contract*, 588
 - 3. *Substance of the Contract*, 588
 - 4. *Intention of the Parties*, 588
 - 5. *The Contract Implied*, 588
 - 6. *Sharing Profits*, 589
 - 7. *Executory Contracts*, 589
 - 8. *The Contract as between the Parties*, 589
- C. *Sub-partnerships*, 590
- D. *Partners*, 590
 - 1. *Ostensible Partners*, 590
 - 2. *Secret Partners*, 591
 - 3. *Nominal Partners*, 591
 - 4. *Silent Partners*, 591
 - 5. *Dormant Partners*, 591
 - 6. *Retiring Partners*, 591
 - 7. *Incoming Partners*, 591
 - 8. *General Partners*, 591
 - 9. *Special Partners*, 591
- E. *The Firm*, 591
 - 1. *The Firm Name*, 593
 - a) *In General*, 593
 - b) *Partnerships as Proprietors of Newspapers, etc.*, 594
 - c) *Fictitious Names — Registration*, 594
 - 2. *The Partnership Property*, 595
 - a) *In General*, 595
 - b) *Personal Property*, 595
 - c) *Real Property*, 595
 - 1. *Conveyance*, 595
 - 2. *Conversion*, 596
 - d) *Statutory Provisions*, 596

II. RELATIONS OF PARTNERS WITH PERSONS DEALING WITH THE PARTNERSHIP

- A. *Authority of the Partners to Act for the Firm*, 597
 - 1. *In General*, 597
 - 2. *Scope of Authority*, 597
 - 3. *Acts without the Scope of Partnership Business*, 598
 - 4. *Restrictions upon the Authority of a Partner*, 599
 - 5. *Authority to do Particular Acts*, 599
 - a) *Deeds of Obligation and Conveyance*, 599
 - b) *Bills and Notes*, 600
 - c) *Assignments for the Benefit of Creditors*, 600
 - d) *Confession of Judgment*, 600
 - e) *Admissions*, 601
 - f) *Notice*, 601
 - g) *Wrongful Act or Omission*, 601
 - h) *Breach of Trust*, 601

- 6. *Firm Acts*, 601
 - a) *In Firm Name*, 601
 - b) *Obligations*, 602
- 7. *Agents and Servants*, 602

III. LIABILITY

- A. *Criminal Liability*, 602
- B. *In Tort*, 602
- C. *On Contract*, 602
- D. *Statutory Provisions*, 603
- E. *By Estoppel*, 603
 - 1. *In General*, 603
 - 2. *Operation and Effect of Holding-out*, 604
 - a) *As to Third Persons*, 604
 - b) *Rights of Partners by Estoppel inter se*, 605
- F. *Liability of Incoming Partner*, 606
- G. *Exoneration from Future Liability*, 606
 - 1. *In General*, 606
 - 2. *As to all Future Contracts*, 606
 - 3. *As to Particular Future Contracts or Transactions*, 607
 - 4. *Of Partner by Estoppel*, 607
 - 5. *Damages to Copartners*, 607
- H. *Application of Assets to Liabilities*, 607
 - 1. *Marshalling Firm and Individual Assets*, 607
 - 2. *Partners Surety for Firm Debt*, 608
 - 3. *Firm as an Ostensible Sole Trader*, 608
 - 4. *Rights of Creditors in Firm Assets*, 608
 - 5. *Rights of Partners as to Firm Assets*, 608
 - 6. *Rights of Firm Creditors through Partners*, 608
 - 7. *Rights of Creditors of Individual Partners*, 609
 - 8. *Transactions of Partners Affecting Creditors*, 609
- I. *Actions by or against Firms*, 610
 - 1. *In General*, 610
 - 2. *Firm as Plaintiff*, 610
 - 3. *Firms with Common Partners*, 610
 - 4. *Dormant Partners*, 610
 - 5. *Effect of Death or Dissolution*, 611
 - 6. *Service of Process*, 611

IV. RELATIONS OF PARTNERS TO ONE ANOTHER

- A. *In General*, 611
- B. *Relations Varied by General Consent*, 611
- C. *Construction of Partnership Articles*, 611
- D. *Rules Determining Rights and Duties of Partners*, 611
- E. *Use of Partnership Property*, 613
 - 1. *In General*, 613
 - 2. *Duty to Render Accounts*, 613
 - 3. *Partner Accountable as a Fiduciary*, 614
 - 4. *Partner Accountable for Profits from a Rival Business*, 614
- F. *Nature of Partner's Interest in Partnership Property*, 614
- G. *Partner's Share*, 615
- H. *Assignment of Partner's Share*, 615
 - I. *Rights of Individual Creditors against Partner's Share*, 616

V. DISSOLUTION OF PARTNERSHIP

- A. *In General*, 616
- B. *Definition*, 616
- C. *Continuance beyond Fixed Term*, 617
- D. *Power of Partners to dissolve*, 617
- E. *Methods of Effecting Dissolution*, 617
 - 1. *By Act of the Partners*, 617
 - 2. *Wrongfully under the Contract*, 618
 - 3. *By Operation of Law*, 618
 - 4. *By Decree of Court*, 618

- F. When Effective, 619*
 - 1. In General, 619*
 - 2. As to Third Persons, 619*
- G. Character of Notice, 619*
 - 1. In General, 619*
 - 2. Persons Entitled to Notice, 620*
 - 3. Bankrupt Partners, 620*
 - 4. Dormant Partners, 620*
- H. Right of Partners to Give Notice of Dissolution, 620*
- I. Discharge of Partner from Liability, 621*
 - 1. In General, 621*
 - 2. Discharge from Liability by Agreement, 621*
 - 3. Retired Partners Sureties, 621*
- J. Authority of Partners after Dissolution, 622*
 - 1. In General, 622*
 - 2. Authority of Bankrupt Partner, 622*
 - 3. Surviving Partners, 622*
- K. Rights of Partners to Take Part in Liquidation, 622*
- L. Rights of Partners in the Application of Partnership Property, 623*
- M. Rights to Profits Accruing after Dissolution, 624*
- N. Rights on Dissolution for Fraud or Misrepresentation, 624*

VI. LIQUIDATION

- A. Rules for Liquidation, 624*
- B. The Assets, 625*
- C. Conversion, 625*
- D. Premiums, 625*
- E. Contributions, 625*
- F. Liabilities, 626*
- G. Capital, 627*
- H. Profits, 627*
- I. Final Settlement by Agreement, 627*
- J. Settlement without Satisfaction of Liabilities, 627*
- K. Actions for Dissolution and Account, 628*
 - 1. Jurisdiction, 628*
 - 2. Conditions precedent to Right, 628*
 - 3. Set-off and Counter-claim, 628*
 - 4. Limitation and Laches, 628*

VII. LIMITED PARTNERSHIPS

- A. In General, 629*
 - 1. Purpose and Construction, 629*
- B. Formation, 630*
 - 1. Purposes, 630*
 - 2. Membership, 630*
 - 3. Classification and Liability, 630*
 - 4. The Certificate, 630*
 - 5. Formalities, 631*
 - 6. Firm-name and Sign, 631*
- C. Duration, 632*
- D. Continuance or Renewal, 632*
- E. Mutual Rights, Duties, and Liabilities of Partners, 633*
- F. Rights and Liabilities as to Third Persons, 633*
 - 1. Alteration in Business or Membership, 634*
 - 2. Withdrawal of Contribution, 634*
 - 3. Estoppel, 634*
 - 4. Activities of Special Partner in the Business, 635*
 - 5. Preferential Transfers, 636*
 - 6. Application of Assets, 637*
- G. Actions by and against Limited Partnerships, 638*
- H. Assignment of a Partner's Share, 638*
- I. Dissolution, 639*
- J. Authority of Partners after Dissolution, 639*

I. NATURE OF PARTNERSHIPS. — A. The Relation. — 1. GENERAL DISCUSSION. — Partnerships in the United States fall into two general classes: those which have grown up under the common law and those which are the result of statutes. Those formed under the common law generally include all partnerships not defined as falling under a limited statutory class. Those taking their incidents from statutes are usually defined as limited partnerships, mining partnerships, registered partnerships, or partnership associations. Of these, limited and mining partnerships partake of the nature of common law partnerships, except for the statutory modifications; registered partnerships and partnership associations partake more of the nature of corporations, fall rather under the American joint-stock companies, and are like the English companies. When the term "partnership" is used, the common law partnership is intended. The term "partner" or "general partner" designates one having the rights, duties, and liabilities of the common law partner.

The foregoing applies to the laws of all the States, except Louisiana, which adheres to the Civil or Roman Law as derived from the Code Napoleon; Louisiana is properly named a "code" State and its code is the "Civil Code." Other States are also called "code States;" but their codes are grounded upon the English common law and frequently expressly preserve the common law, including the rules of equity and the law merchant, as to matters not specifically provided for in the code.

2. DEFINITION. — Neither the courts nor the legislatures are agreed as to the proper definition of a Partnership. All the jurisdictions, however, excepting Georgia, have discarded, either by statute or decision, the erroneous idea adopted from the earlier English law, that sharing profits is the differentiating characteristic of a partnership. Georgia holds "a joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not¹." This definition differs from that of most of the States in that it creates a partnership as to third persons even though there is none in fact between the parties²). The general law and the prevalent movement is opposed to both these positions³). In States where the legislature has not attempted a definition, the courts either refuse to define a partnership or, if they attempt to do so, fail to secure the approval of their contemporaries. Of the authorities, not official, two should be noted, — Kent, who defines a partnership as "a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions⁴)," because it is considered to be most accurate and comprehensive⁵), and James Parsons, who defines a partnership as "a property relation, whereby two or more competent persons associate for the purpose of carrying on a business, as co-owners, for profit." This latter idea deserves consideration because of its originality and inherent possibilities⁶).

Under the Civil Law of Louisiana, a partnership is defined as "a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry furnished in determined proportions by the parties⁷).".

New York declares "a partnership as between the members thereof, is the association, not incorporated, of two or more persons who have agreed to combine their labor, property, and skill, or some of them, for the purpose of engaging in any lawful trade or business, and sharing the profits and losses, as such, between them⁸).".

California holds a "partnership is the association of two or more persons, for the purpose of carrying on business together and dividing its profits between them⁹)." With this definition the western code States agree¹⁰).

B. The Contract. — 1. IN GENERAL. — A partnership arises entirely out of contract. This contract is subject to the same rules of law as any other contract. It is not necessarily a formal act, nor need it be in writing. It may be by parol and will even be implied from the facts as resulting from the conduct of the parties. For the creation of the partnership, writing is not required by any State; but there are

¹) Ga. Code, 1911, sec. 3158. — ²) *Brandon v. Connor*, (1903) 117 Ga. 759. — ³) *Miller v. Simpson*, (1907) 107 Va. 476; 18 L. R. A., N. S., 962, and note. — ⁴) 3 Kent Comm. 23. — ⁵) 30 Cyc. 349. — ⁶) *Parsons, (Jas.) on Partnerships*, p. XV, secs. 54, 64, 97. — ⁷) *Saunders's Rev. Civil Code of La.*, (1909) art.

2801. — ⁸) 3 Consol. Laws of N. Y., (1909) p. 2671. — ⁹) *Deering's Civil Code of Cal.*, (1909) sec. 2395. — ¹⁰) *Rev. Codes of N. Dak.* (1905) sec. 5818; *Gen. Stat. of Okla.*, (1908) sec. 4838; *Comp. Laws of S. Dak.*, (1908) sec. 1723; *Rev. Codes of Mont.*, (1907) sec. 5466.

statutes requiring writing as to particular partnerships or for particular purposes. Thus the universal partnership of Louisiana must be formed by a written contract duly recorded¹). A contract for the sharing of profits in consideration of a sale or loan must be in writing if a partnership is not to result, in Pennsylvania²).

2. **PARTIES TO THE CONTRACT.** — There are no statutory restrictions upon the persons who may become partners. The courts, however, have required that the parties must have the capacity to contract. Thus, infants, lunatics, and alien enemies are always excluded. Corporations must possess the power under their charter. The capacity of married women depends upon the local laws, the tendency being to grant her the rights of a *feme sole*³).

3. **THE SUBSTANCE OF THE CONTRACT.** — All States require that the parties must be persons capable of contracting and that the trade or business of the partnership must be lawful. The essential element appears to be that the partners shall be co-proprietors, or co-owners of the business and of the profits resulting from their business⁴). The subject-matter of the contract may be real or personal property. But where land is the entire basis of the transactions the courts incline to construe it to be some relation other than a partnership⁵). Where the relation is not that of co-proprietors, or co-owners, but that of lessor and lessee, or creditor and debtor, or separate independent proprietors regulating the independent businesses, no partnership exists. So also, ship-owners must be found to be more than mere co-tenants⁶). The court will always investigate the substance of the contract; and this is especially true where it is considered as to persons not parties to the contract, who assert rights by reason of the contract.

4. **THE INTENTION OF PARTIES.** — The intention of the parties to the contract is said to control and to be the true test of partnership⁷). This is, however, not borne out by the cases. The intention is one of the elements necessary to be considered, especially where the rights of the parties to the contract are under consideration. It is not the intention to form or not to form a partnership, as such, that is to be considered; but the intention to do certain acts, or to obtain certain rights, which is vital. The intention to secure the rights and privileges of a partner, or to create a partnership without specifying the rights and privileges, having been found, the law declares, in the first case, that a partnership exists; and, in the second case, raises the rights and duties incident to partnership⁸). The intention is of importance only so far as certain facts are intended, and that it has been manifest by sufficient acts to cause the partnership to come into existence. Thereafter, the law attaches the resulting consequences and incidents, as to third persons at least, irrespective of this intent⁹).

5. **THE CONTRACT IMPLIED.** — Where the contract is express or the intention of the parties to form a partnership or to enjoy the rights and incidents of a partnership are admitted or clearly in evidence, no difficulty arises. As between the parties, the rights and duties are as agreed in the contract, or, in the absence of the agreement, those which arise in law; and, as to third persons, each is the agent of his co-partners and is unlimitedly liable. When the existence of the partnership is denied and the contract creating the partnership must be implied from the facts, a very difficult problem arises. No one characteristic or incident can be named, the discovery of which conclusively proves the existence of a contract creating a partnership. The one fact which appears to be most conclusive of such a contract is the sharing of profits. When in addition to this it further appears that they share the profits as co-owners or co-proprietors of a business, but not under authority of any statute, then the contract conclusively creates a partnership. "Sharing profits" is taken as evidence of a partnership, because it is the outward manifestation of an ownership which may be otherwise successfully concealed. Furthermore, it is the

¹) *Saunders's Rev. C. C. of La.*, sec. 2834; *Murrell v. Murrell*, (1881) 33 La. Ann. 1233.

— ²) *Act. Apr.*, 6, 1870, P. L. 56; *Wessels v. Weiss*, (1895) 166 Pa. 190; *Jordan v. Patrick*, (1903) 207 Pa. 245. — ³) 30 Cyc. 353.

— ⁴) *Eastman v. Clark*, (1872) 53 N. H. 276; *Beecher v. Bush*, (1881) 45 Mich. 188; *Meehan v. Valentine*, (1892) 145 U. S. 611; *Merrill v. Dobbins*, (1895) 169 Pa. 480. — ⁵) *State Bank v. Butler*, (1894) 149 Ill. 575; *Heard*

v. Wilder, (1890) 81 Ia. 421; *Baremore v. Selover, Bates, & Co.*, (1907) 100 Minn. 23. —

— ⁶) 30 Cyc. 355. — ⁷) 22 *Amer. & Eng. Enc. L.* 24; *Beale's Parsons on Partnership*, (4th Ed.) sec. 54. — ⁸) *Beecher v. Bush*, (1881) 45 Mich. 188, 30 Cyc. 360; *Jas. Parsons on Partnership*, sec. 1; *Burdick on Partnerships* (2d Ed.) 17, et seq. — ⁹) *Jas. Parsons on Partnership*, sec. 45; but see *Russell v. Herrick*, (1908) 127 N. Y. App. D. 503.

one incident or consequent of partnership which the partners seldom or never waive by their agreement. Because of this fact and the frequent difficulty of discovering the true relation, "sharing profits" raises a presumption of the existence of a contract of partnership¹).

6. SHARING PROFITS. — *Not as Partners.* — Excepting in Georgia²) and in Pennsylvania³), the rules of the English Partnership Act of 1890, sec. 24⁴) may be said to be followed in all the States. Thus it may be stated that:

I. Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

II. The sharing of gross returns does not of itself create a partnership, whether the person sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

III. The receipt by a person of a share of the profits of a business or of a payment contingent on or varying with the profits of a business raises a presumption of the existence of a partnership to be rebutted by other evidence; but

IV. a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of the business does not of itself make him a partner in the business or liable as such; b) A contract for the remuneration of an employee, or agent, or landlord of a person engaged in a business by a share of the profits of the business does not of itself make the employee, or agent, or landlord a partner in the business or liable as such; c) A person, being the legal representative, widow, or legatee of a deceased partner, and having by way of annuity or otherwise a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such; d) The advance of money by way of loan to a person or partnership engaged or about to engage in any business on a contract with that person or partnership that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner with the person or in the partnership carrying on the business or liable as such; e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of a business or other property is not by reason only of such receipt a partner in the business or liable as such.

These rules are merely for the purpose of assisting the court in determining the existence of a partnership; are not statutory; but are the result of the decisions⁵). Excepting in Pennsylvania⁶), the English law⁷), making a person who lends for a share of the profits to a partner, a postponed creditor of the borrower or borrowers for the amount of the loan, is not followed in the United States⁸).

7. EXECUTORY CONTRACTS. — Whether a partnership has actually come into existence or not, as a result of the contract, is a question of fact, depending on the wording of the contract, the acts done under the contract, and the party claiming the existence of the partnership. Where a contract expressly states that the partnership should take its beginning at a future day certain, that day marks the beginning of the partnership. But a subsequent agreement, either express or implied from the facts, may create the relation before that day. However, while the intention of the parties, as manifested by their agreement and conduct, controls as between the parties, their conduct may manifest a different intent and produce a different result as to persons not parties to the agreement. This question is governed by the general law of estoppel⁹).

8. THE CONTRACT AS BETWEEN THE PARTIES. — As between the parties the rights and duties are as in other contracts. Thus, fraud, accident, or mistake makes the contract voidable as in other cases, though the proof of fraud need not be so clear because of the high degree of mutual confidence demanded¹⁰). The remedy

¹) 30 Cyc. 369—372; 22 Amer. & Eng. Enc. of Law 27; Note in 18 L. R. A., N. S., 963. — ²) Brandon v. Connor, (1903) 117 Ga. 759. — ³) Act of Apr. 6, 1870, P. L. 56, Lord Bovill's Act; Wessels v. Weiss, (1890) 166 Pa. 490. — ⁴) 53 & 54 Vic. cap. 39; Lindley on Partnership, (7th Ed.) 872. — ⁵) See note in 18 L. R. A. (N. S.) 963. — ⁶) Act of Apr. 6, 1870,

P. L. 56. — ⁷) Bovill's Act, 28 & 29 Vict. c. 86; Partnership Act, 1890, sec. 3. — ⁸) 30 Cyc. 369 et seq. — ⁹) 30 Cyc. 358; 22 Amer. & Eng. Enc. 52; Parsons on Partnerships (4th Ed.) sec. 12; Martin v. Baird, (1896) 175 Pa. 540. — ¹⁰) Harlow v. La. Brum, (1897) 151 N. Y. 278; Powell v. Cash, (1896) 54 N. J. Eq. 218.

is, of course, the ordinary equitable one. If the partnership is an existing one already doing business, the right to an account also exists; and the plaintiff possesses the right to an indemnity, for all amounts paid or personal liabilities incurred, out of the property contributed; and to be subrogated to the rights of the persons whose claims he has paid or may be compelled to pay as against the defrauding party or his estate¹). Though fraud affects the contract *ab initio*, the relief is as in cases of the dissolution of an existing partnership because, though the contract may thus be deprived of power, the parties have effectually brought into existence a partnership by their conduct aside from the contract. From this it results, that the ordinary rules of dissolution obtain and the damage under the contract for the fraud is merely an additional allowance²). Where the partnership has not actually entered upon the business and no necessity for an account exists, the remedy for any breach of the contract is the ordinary action for damages at law; no specific performance can be obtained except to compel the execution of some instrument required under the terms of the agreement³).

As between the parties, the contract entirely controls the rights and duties, no matter what the law declares these to be in the absence of contract. Thus the parties may agree that all the property shall belong to one partner only; that all liability shall be borne by him; that he shall be entitled to all assets on dissolution. These restrictions, however, are binding only as between the parties, and not as to any third person who has no actual notice thereof; nor as to persons who have actual notice with respect to particular matters only. One of the implied terms of every partnership contract is, that only the parties to the contract may be partners in the business. This is because of the principle of *delectus personarum*. This right also is subject to express waiver in the contract⁴).

C. Sub-partnerships. — When a partner contracts with a stranger to the partnership agreement for the sharing of the profits of that partner's share in the partnership, the stranger secures no rights or privileges in the original partnership, and is not liable to the creditors of that partnership. This results from the principle of *delectus personarum*, and was expressed by the Civilians by "*Socius mei socii, socius meus non est.*" In customary terminology this relation is called a "sub-partnership⁵)." This use of the word "sub-partner" or "sub-partnership" can hardly be sanctioned; nor does it generally carry the meaning it might imply. It has been properly criticised⁶). The word, however, has an established usage in the law. The decisions generally discuss such person not as a partner in the principal firm but merely as a partner of a partner. This last statement is usually merely dicta, and there is considerable doubt as to whether the sub-partners could be held as partners in any case. There are a few authorities for the proposition that the "sub-partnership" is a true partnership⁷). If the persons are associated for the purpose of carrying on a business, then they might be held to be partners. The usual agreement, however, is merely one of co-ownership of an interest, all the control and management of which is in the member of the principal partnership. If the sub-partners are true partners, then their liability should properly be only to the principal partnership and not to its creditors. Generally they would be merely joint or co-owners and not partners at all. It is, however, possible that the agreement may be such as to make them partners. This fact must be found under the same rules as govern the existence of the principal partnership.

D. Partners. — Partners are designated in the decisions and statutes as: 1. Ostensible, 2. Secret, 3. Nominal, 4. Silent, 5. Dormant, 6. Retiring, 7. Incoming, 8. General, 9. Special, 10. Limited, and 11. Partners in Commendam.

1. OSTENSIBLE PARTNERS. — An ostensible partner is a person who is or may be readily known by the public generally as a partner. It is not necessary that he should actually be a partner; it is sufficient that he is reputed as such generally

¹) Bates on Partnership, sec. 595. — ²) Bates on Partnership, sec. 595; 30 Cyc. 364. — ³) 30 Cyc. 359; Bates on Partnership, secs. 1009, 1013, 1014; Crockett v. Burleson, (1906) 60 W. Va. 252. — ⁴) English Act of 1890, sec. 19; Lindley on Partnership, (7th Ed.) 442; 30 Cyc. 360, 363; Parsons on Partnerships, secs. 106, 107; Bates on Partnership, secs. 207, 211 et seq. — ⁵) Wood's Col-

lier on Partnership, sec. 27; 30 Cyc. 381; Story on Partnership, (7th Ed.) sec. 70; Burnett v. Snyder, (1898) 43 N. Y. Super. Ct. 238; 76 N. Y. 344; Boimare v. St. Geme, (1904) 113 La. 898. — ⁶) Prof. Burdick, in 30 Cyc. 396; Parsons on Partnership, (4th Ed.) sec. 106. — ⁷) Bates on Partnership, sec. 164 et seq.; Wood's Collier on Partnership, (6th Ed.) sec. 27; Fitch v. Harrington, (1859) 79 Mass. 468.

or that he has been held out as such to the person who sets up the reliance on his being a partner. When such a person is not in fact a partner, he is described as a "partner by estoppel."

2. **SECRET PARTNERS.** — A secret partner is an actual partner, who is, under the terms of the agreement, concealed or to be concealed from the general public and from the particular person claiming a right against him. There are also decisions which designate a partner as a secret partner even though it is not a condition of the partnership agreement that his relationship should be concealed. Where part of the firm name is "and Co.," or some other general term, there can be no secret partners¹). The purpose of being a secret partner generally is to escape liability and more easily to terminate liability upon retirement. This purpose is thwarted as to any given person who has actual knowledge of his membership²).

3. **NOMINAL PARTNERS.** — A nominal partner is one who is partner in name only and falls within the term "partner by estoppel." He incurs liability through the acts of the others and binds them by his acts because he has held himself out or has been held out by them with his consent as a partner and not because he is a partner in fact³). There is, however, no support for the use of the term nominal in the cases cited by Parsons, and, though it is used in common speech, it is described as "a term unknown to the law of partnership⁴."

4. **SILENT PARTNERS.** — A silent partner is described as one who takes no active part in the business other than to receive his share of the profits; secrecy is not essential⁵). This is, however, rather a term of common speech than one established in the law.

5. **DORMANT PARTNERS.** — A dormant partner has diverse meanings in the different States. All agree that he must be secret and unknown to the party claiming the right. If he is a partner and is held out as such, it is immaterial whether the plaintiff knew that he was a partner⁶). The better definition, however, appears to be that he must be a secret partner, that is, under the terms of the agreement not to be disclosed, and that he must be also inactive⁷). The same purpose is the basis for such a relation as exists in the case of secret partners. The tendency appears to compel such persons to resort to the statutory limited partnerships, which is, in fact, the more expedient practice in most States.

6. **RETIRING PARTNERS.** — A retiring partner is a partner who terminates his associations in the business. There is an opinion prevalent in some States that the partnership continues in existence after his retirement; this, however, is doubtless incorrect, as shall be pointed out under "Dissolution" *infra*.

7. **INCOMING PARTNERS.** — An incoming partner is the person who becomes a partner of the members of an existing partnership. As in the preceding case, this is a definition of common speech rather than of law, for in law, he does not become a member of an existing firm but merely joins with the members of an existing firm who terminate that firm and form a new partnership⁸).

8. **GENERAL PARTNERS.** A partner or general partner is a general term, including all actual partners not special or limited partners or partners in commendam. It is frequently used as designating "partners by estoppel."

9. **SPECIAL PARTNERS.** A special partner, a limited partner and a partner in commendam are co-extensive terms, and describe the partner who has secured or attempted to secure the privilege of limited liability by reason of compliance with some statutory provision. Such a partner is called a partner in commendam in Louisiana⁹).

E. The Firm. — A partnership is, in commercial usage and legal terminology, called a firm. In Louisiana under the Civil Code, the firm is a legal entity separate and

¹) Godard v. Pratt, (1835) 16 Pick. 428; Shamburg v. Ruggles, (1876) 83 Pa. 148. —

²) Lieb. v. Craddock, (1888) 87 Ky. 525; Lindsey v. Edmirston, (1861) 25 Ill. 359. —

³) See "Partner by Estoppel," *infra*; Parsons on Partnership, (4th Ed.) sec. 29. — ⁴) In re Swift, (1908) 118 Fed. 348. — ⁵) Parsons on Partnership, (4th Ed.) sec. 30. — ⁶) Elmira Co. v. Harris, (1891) 124 N. Y. 80; Austin v. Appling, (1891) 88 Ga. 54; Elkton v. Booth, (1887) 143 Mass. 479; Wait v. Dod-

ge, (1861) 34 Vt. 181; McDonald v. Millandson, (1832) 5 La. 403; Bates on Partnership, sec. 153. — ⁷) Elmira Co. v. Harris, (1891) 124 N. Y. 280; Bank v. Winship, (1831) 5 Pet. 573; Shamburg v. Ruggles, (1876) 83 Pa. 148; Reab v. Pool, (1888) 30 S. C. 140; Elkinton v. Booth, (1887) 143 Mich. 479. — ⁸) 30 Cyc. 614; Parsons on Partnership, (4th Ed.) sec. 33; Bates on Partnership, sec. 217. — ⁹) See Statutes, *infra*.

distinct from the partners. It is maintained by many persons of considerable ability in the legal profession that this same meaning does or should exist in all the States. These persons contend that such is the result of the decisions and the understanding of commercial men. Most judges and an equally great, if not a greater number of the profession, adhere to the common law view as declared in the English Partnership Act of 1890, sec. 4 (1), that the persons who have entered into partnership with one another are, for convenience of expression, called collectively a firm, and the name under which their business is carried on is called the firm name.

The entity idea occurs in the decisions of almost every State, as has been pointed out in an exhaustive study by Mr. Cowles¹); but that same author is compelled to declare: "All this looks very unanimous. Such an array of authority ought to suffice to establish in the common-law a doctrine supported by all the other civilized law in the world, as well as by the acceptance of business men in all civilized countries. But curiously enough, it is quite as easy to make up from these jurisdictions just cited (in support of the legal person idea) and from others equally weighty, a similar list of authorities to the effect that the property of the firm is the property of the partners, and the debts of a firm are the debts of the partners, and common law courts know nothing about any entity in a partnership other than the individuals who compose it." This curious result, noted above, is due rather to a loose use of terms and imperfect classification, than to any uncertainty in the law.

The legal person idea does pervade the Louisiana law because of the influence of the Code Napoleon; it does occur in some of the decisions of the other States; and under some sections of the Federal Bankruptcy Act, generally cases where the partnership has ceased to exist for the purpose of conducting a going business; and in cases where accounts or actions are to be had concerning completed transactions. It is the common terminology of business men and of the partners composing the firm. But they have never conceived it to be closely allied to a corporation. The idea is one rather of convenience of thought and expression than of substance. Even the judges whose decisions most strongly support the legal person idea²), abandon it when the substance is in question³). In proprietary suits, even business men discard the idea and aver a personal title or interest. Just as the legal person needs the power or authority of a statute in Continental Europe and in Louisiana, so also the idea can only be established in the States by means of a statute. None of the States have, however, in their recent codes or statutes, so enacted, except for purposes of convenience in actions and proceedings and for the purpose of settling the affairs of a dissolved partnership, as will appear in the statutes.

The legal person idea occurs in various authorities. "The personal property belonging to a partnership is not owned by the individual partners but by the firm⁴). " "A partnership is to any intelligent man familiar with mercantile ideas, in the Roman law, in the law of Continental Europe, of Scotland, and of Louisiana, an entity separate and distinct from its members⁵). " "The capital, in whatever shape contributed, becomes at once the property of the firm and is no longer individual property⁶). " "A partnership, in contemplation of law, is an entity distinct from the members who compose it⁷). " "In equity a partnership is for some purposes deemed a single entity⁸). " "There can be no controversy as to the rule of law governing the relations between an insolvent firm and its creditors, and their mutual rights in respect of the firm property. The partnership, as such, has its own property and its own creditors, as distinct from the individual property of its members and their individual creditors⁹). " "The title to personal property of a partnership is not in the individual members of the firm so that they may convey an individual share in any specific article to another; but it is in the firm as an entirety, subject to the equities of the different members and their rights to have it applied to the payment of the debts of the partnership¹⁰). "

As against the foregoing, may be stated the following: "Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members; but we have no doubt that our merchants are

¹) The Firm as a Legal Person, in 57 Cent. L. J. 343. — ²) In re Bertenshaw, (1907) 157 Fed. 363. — ³) Sargent v. Blake, (1908) 160 Fed. 57. — ⁴) Prof. Beale in Parsons on Partnership, (4th Ed.) 231. — ⁵) W. H. Cowles Esq., in 57 Cent. L. J. 343. — ⁶) Bates on Partnership, § 256. — ⁷) Teaguy v. Lindsey, (1894) 106 Ala. 278. — ⁸) Arnold v. Haggerman, (1888) 45 N. J. Eq. 197. — ⁹) Bulger v. Rosa, (1890) 119 N. H. 465. — ¹⁰) Pratt v. McGuinness, (1899) 173 Mass. 170.

perfectly aware that claims against their firms are claims against them¹).” “The firm is not recognized by lawyers as distinct from the members composing it²).” “There are two theories upon which it is sometimes claimed that creditors of a partnership have a right to have a preference on firm assets. The first is that the partnership property was obtained through credits given to the firm . . . the other is that it ought to be treated as a person in contradistinction to the persons composing it; and therefore its property ought to be first subject to the payment of the partnership debts, without reference to the will of the partners. But a partnership cannot be so conceived simply because such is not its nature. As every partner is liable for the debts of his firm and owns its property in common with the other partners, it is his right to have the common property applied to the payment of partnership debts and all the other partners, without his consent, cannot take this right from him³).” “Partners are joint tenants of their stock in trade but without the *jus accrescendi* or right of survivorship⁴).” “Partners are joint owners and possessors of all the capital, stock, funds, and effects belonging to the partnership, as well those which belong to it at the time of its first formation and establishment as those which are acquired during the partnership. There is an entire community of right and interest therein between them, each has a concurrent title to the whole⁵).” “Partners are joint tenants in the stock and all effects. They are seized, *per my et per tout*, but there is no survivorship⁶).” “The firm is not recognized in law as a person, and can neither sue nor be sued. The French resort to the fiction of making the firm a person. The legal person contracts debts, and charges its assets for their payment. If the fiction had a legal basis for its existence, and was consistently carried out, a partnership would become a corporation . . . What is the polarity of mind of a lawyer who advocates making a partnership by turns a corporation and a number of individuals? If he comprehended the elemental distinction of kind, he would not expose his confusion by making this suggestion; but he would disguise the proposition in the jargon of lawyers, who speak of a man *quo modo a horse*⁷).”

The various views are reviewed by Professor Burdick, who recognizes that the theory that the firm is an association of persons, and not an entity prevails in England and in most of the jurisdictions of this country⁸). Despite this apparent conflict of authorities, the more authoritative of whom deny the legal person theory certain safe deductions may be made: 1. That the present general law does not consider a partnership as a legal entity. 2. That the constitutions of some of the States possibly prohibit the adoption of any such theory at present. 3. That, if such theory is adopted, it can be done only by statute, and such statute must modify the law in detail and be modelled on the German Code. 4. That, in the present general law, the idea is employed only in cases of insolvency, bankruptcy, and in discussions concerning procedure. 5. That the use of the legal person idea in the present decisions is merely a convenient form of expression, as in cases where accounts are to be had or a differentiation is to be made between the separate and partnership estates. 6. That, if the legal person idea should become the general law, then the liability of the partner must cease to be an original liability and become a secondary liability; and new law must be created for the segregation of the rights of separate and firm creditors.

1. THE FIRM NAME. — *a) In General.* — Under the common and statute law, a partnership may exist and do business without having formally adopted any name. In such case, the firm name is the name under which the business is carried on; and the name would be the names of the parties to the contract⁹).

The partners may, however, in their agreement, establish a firm name in which all transactions should be made. Such name may be the full names of all the partners, the surnames of some or all of the partners, the names of one or more of the partners

¹) Holmes, J., in *Hallowell v. Blackstone*, (1891) 154 Mass. 359. — ²) *Bank v. Thompson*, (1890) 121 N. Y. 280. — ³) *Wiggins v. Blackshear*, (1894) 86 Tex. 668. The use of the phrase “owns in common” is perhaps inaccurate or incorrect as noted by Prof. Burdick in his work on *Partnership*, (2d Ed.) p. 106. — ⁴) 3 Kent Com. 37. —

⁵) *Story on Partnership*, (1881) sec. 91. — ⁶) *Collier on Partnership*, (6th Ed.) sec. 108. — ⁷) *Jas. Parsons on Partnership*, secs. 76, 100. — ⁸) *Burdick on Partnership*, (2d Ed.) c. 3. — ⁹) *Le Roy v. Johnson*, (1829) 2 Pet. 186; *Pursley v. Ramsey*, (1860) 31 Ga. 403; *Wright v. Hooker*, (1854) 10 N. Y. 51; *Getchel v. Foster*, (1870) 106 Mass. 42.

with a general term to designate those not named, or any general term which need not designate any one partner¹).

Where, however, a general name is employed, which is not the name of a partner of the firm using it, any other firm, corporation, or business association having an established business or a charter right to the use of the name may restrain such use as an unfair competition or as liable to cause confusion. The same is true where a new partnership employs the name of a dissolved partnership without having a contract right so to do²). Under these cases the names need not be identical, but it is sufficient if they are so similar as to deceive the public or to cause confusion. Under the statutes in numerous States, the use of the name of a person who is not a partner in the firm, or of any general term which does not represent an actual partner, is forbidden. In some States, this prohibition is by means of a penalty to be recovered by any person who may bring action for the same³); or by making such act to be a misdemeanor⁴); or by merely making it to be unlawful and to be restrained by the court at the instigation of the party injured thereby⁵).

b) *Partnerships as Proprietors of Newspapers, etc.* — Where a newspaper, magazine, or other periodical is published by a partnership, the full names and addresses of all the partners must, in certain States, be printed on the outer cover or at the head of the editorial page⁶), under penalty of a misdemeanor punishable by fine for each issue.

c) *Fictitious Names — Registration.* — Where a partnership transacts its business under a fictitious name or a designation not showing the names of the persons interested as partners in such business, some States require that the full names and addresses of all such persons must be recorded⁷). The sanction for compliance with most of the statutes is that the partnership cannot begin or maintain any action upon or on account of any contracts made or transactions had in their partnership name until they shall have first filed the certificate and made the publication required. According to California decisions, however, the provisions of the statute may be avoided by assigning the chose in action, and this though the assignment be to one of the partners⁸). Under the decisions, the provision is penal⁹), and will be construed strictly. It has no application to an action based on tort¹⁰). Filing the certificate cures the disability¹¹). Under the Nebraska statute, however, failure to file the certificate is made a misdemeanor punishable by a fine¹²). In Virginia, where one does business with a partner and such partner has property in the business, the existence of the partner must appear in the business sign and be duly published, otherwise all property employed in the business is subject to the rights of the creditors of the

¹) Bank v. Monteath, (1845) 1 Denio (N. Y.) 402; West v. Bank, (1856) 6 Ohio St. 169; Hoskins v. De Este, (1882) 133 Mass. 356; Crawford v. Collins, (1866) 45 Barb. (N. Y.) 269; Kitner v. Whitlock, (1878) 88 Ill. 513; Berkshire Woolen Co. v. Juillard, (1879) 75 N. Y. 535; McConeghy v. Kirk, (1871) 68 Pa. 200; Brown v. Jewett, (1846) 18 N. H. 230; Jurgens v. Ittmann, (1895) 47 La. Ann. 367; Ex parte Nason, (1880) 70 Me. 363. — ²) Higgins Co. v. Higgins Soap Co., (1895) 144 N. Y. 462; Cement Co. v. Le Page, (1888) 147 Mass. 206; McLean v. Flemming, (1877) 96 U. S. 245; Amer. Waltham Watch Co. v. U. S. Watch Co., (1899) 173 Mass. 85; 43 L. R. A. 826; Bissell Chilled Plow Co. v. T. M. Bissell Plow Co., (1903) 121 Fed. 357. — ³) Ga. Civil Code, (1897), sec. 2686. — ⁴) Saunders' Rev. Civil Code of La., sec. 2838; N. Y. Penal Code, sec. 363; N. Dak. Rev. Codes, (1905) sec. 8995; S. Dak. Penal Code, (1908) Rev., sec. 420. — ⁵) Mass. Rev. Laws, (1902) p. 620; Me. Rev. Stat., (1903) p. 396. — ⁶) N. Y. Cons. Laws, (1909) sec. 330; Pa. Act of May 2, 1907, P. L. 157; Com. v. Short, (1909) 38 Pa. Super. Ct. 562. — ⁷) New York Cons. Laws, (1909) p. 2809; Deering's Cal. C. C. sec. 2466 et seq.; Saunders' Rev. Civil Code

of La., secs. 2834, 2838, 2845; N. Dak. Rev. Codes, (1905) secs. 5858 et seq.; Wash. Gen. Stat. (Remington, 1910) secs. 8369, 8393; Comp. Laws of S. Dak., (1908) secs. 1762 et seq.; Cobbe's Comp. Laws of Neb., (1907) secs. 9700, 9703; Gen. Stat. of Okla., (1908) secs. 4876, 4881; Nev. Comp. Laws, (1900) secs. 2768, 2785; Ariz. Rev. Stat., (1901) secs. 3620—3624; Gen. Code of Ohio, (1910) secs. 8099 et seq.; Rev. Codes of Mont., (1907) secs. 5504—5508. — ⁸) Cheny v. Newberry, (1885) 67 Cal. 126; Gray v. Wells, (1897) 118 Cal. 11. — ⁹) Cochran v. Hirsh, (1896) 6 C. P., Ohio Dec. 41. — ¹⁰) Ralph v. Lockwood, (1882) 61 Cal. 155. — ¹¹) Hartzell v. Warren, (1896) 5 Ohio, Dec. 183; Cobble v. Bank, (1900) 63 Ohio St. 528; Va. Nat. Bank v. Carrigan, (1895) 91 Va. 347; Walker v. Stimmel, (1906) 15 N. D. 484; Pendleton v. Cline, (1890) 85 Cal. 142; Meade v. Lasar, (1891) 92 Cal. 21; McClean v. Crow, (1890) 88 Cal. 644; Carlock v. Cagnacci, (1891) 88 Cal. 600; Goldtree v. Swinford, (1888) 74 Cal. 586; North v. Moore, (1902) 135 Cal. 621; Loeb v. Fireman's Ins. Co., (1903) 78 N. Y. App. Div. 113. — ¹²) Cobbe's Comp. Laws of Neb., secs. 9700—9703.

business¹). The same statute may obtain in Mississippi, though the statute has not been located in the last revision²).

2. THE PARTNERSHIP PROPERTY. — *a) In General.* — The partnership property is all property and rights and interests in property originally contributed to the partnership stock or subsequently acquired, whether by purchase or otherwise on account of the firm or for the purposes and in the course of the partnership business. Unless the contrary intention appears, property, whether real or personal, acquired with the partnership funds, is deemed to be partnership property³).

But a person, by becoming a member of a firm, does not vest the firm with the ownership of his knowledge or information, or with the ownership of his inventive genius⁴).

b) Personal property. Where personal property, which is owned by one of the parties on creation of the partnership, is thereafter used in the partnership business or for partnership purposes, whether it has been contributed to the partnership stock and has become partnership property, or is merely the separate property of the partner, depends upon the agreement of the partners. This agreement may be expressed or implied from the facts or conduct of the parties⁵).

The mere fact that property, whether real or personal, is habitually used in the partnership business, or even that it is reputed to be a part of the partnership property, does not, in the absence of an estoppel or a statute relating to reputed or apparent ownership, make such property partnership property. This is especially true of the real property used in the business, the tools and machinery used in the plant, and such property as is in the possession of the firm for the right of use only and not for the purpose of sale⁶).

But when the property is in the possession of the partnership for the purposes of a use involving a destruction or sale in the ordinary course of the business of the firm, then there is ample evidence that the property is possessed as partnership property and not as separate property. The intent must be found where property passes from the possession of the separate partner to that of the partners collectively⁷).

c) Real property. — Real property has, in the United States, lost some of its formal common law incidents. Thus, it is as much the subject of partnership ownership as personal property, though generally the transfer is hampered by the common law formality that it can be conveyed only by deed and that it can be held only by one or more of the partners taking the legal title in trust for the use of the firm. Formerly real property could not be the subject of partnership transactions; but at present, the partnership is frequently formed for the purpose of the purchase and sale of real estate⁸).

1. *Conveyance of Real Property.* — Whether real property is partnership property or not depends upon the intention of the parties. Where the intention is not manifest, it is deemed partnership property if purchased with partnership funds. While in law it is deemed to be the property of the person in whose name it stands, in equity

¹ Va. Code of 1902, sec. 2877. — ² Yale v. Taylor, (1886) 63 Miss. 598; Quin v. Myles, (1882) 59 Miss. 375. — ³ Robinson Bank v. Miller, (1894) 27 L. R. A. 449, Note. See the statutes of the various States, *infra*. — ⁴ 30 Cyc. 425. — ⁵ Baxter v. Rollins, (1894) 90 Iowa, 217; In re Bailey, (1898) 187 Pa. 341; Buckingham v. Chicago Bank, (1904) 131 Fed. 192; Filkins v. Blackmore, (1876) 13 Blatch (U. S.) 440; Hill v. Miller, (1889) 78 Cal. 149; In re Murtens, (1906) 144 Fed. 818; In re Swift, (1902) 118 Fed. 348; Lamb v. Hall, (1905) 147 Cal. 44; Leeds v. Townsend, (1899) 89 Ill. App. 646; Pierce v. Jackson, (1810) 6 Mass. 242; Hoxie v. Chaney, (1887) 143 Mass. 592; Tabar-Prang Art Co. v. Durant, (1905) 189 Mass. 173; Hillock v. Grape, (1906) 111 N. Y. App. Div. 720; Wilson v. Black, (1894) 164 Pa. 555; Robinson Bank v. Miller, (1894) 153 Ill. 244; 27 L. R. A. 449, (note). — ⁶ Taft v. Schwamb, (1875) 80 Ill. 289; Blanchard v. Coolidge, (1839) 22 Pick. (Mass.) 151; Howe v. Howe, (1868)

99 Mass. 71; Bowker v. Gleason, (1887) (N. J. Ch.) 7 Atl. 885; Moody v. Rathburn, (1862) 7 Minn. 89; Bartlett v. Jones, (1847) 2 Strob. (S. C.) 471; Stump v. Bauer, (1881) 76 Ind. 157; Taber Prang Art Co. v. Durant, (1905) 189 Mass. 173; Van Voorhis v. Webster, (1895) 85 Hun. (N. Y.) 591; Hart v. Hart, (1903) 117 Wis. 639. — ⁷ Taber Prang Art Co. v. Durant, (1905) 189 Mass. 173; Dunlap v. Byers, (1896) 110 Mich. 109; Person v. Wilson, (1878) 25 Minn. 189; Kelly v. Clancey, (1885) 16 Mo. App. 550; Murphy v. Warren, (1898) 55 Neb. 215; Hillock v. Grape, (1906) 111 N. Y. App. Div. 720; Bailey's Estate, (1898) 187 Pa. 381. — ⁸ Chester v. Dickerson, (1873) 54 N. Y. 1; Dudley v. Littlefield, (1842) 21 Me. 418; Thompson v. Bowman, (1867) 73 U. S. 316; Tyler v. Waddingham, (1889) 58 Conn. 375; Thompson v. Holden, (1893) 117 Mo. 118; Oliver's Estate, (1890) 136 Pa. 43; Boone v. Clark, (1889) 129 Ill. 466; Laffan v. Naglee, (1858) 9 Cal. 662

it is held to be held in trust for the partnership and to be converted to personal property in so far as may be necessary for partnership purposes¹). In Pennsylvania, however, creditors and other third persons are entitled to rely upon the record of title and to treat the persons therein appearing as the real owners. That the record holder possesses a partnership title must appear on the record²). In Louisiana commercial partnership may own only moveable property³). The owners of real estate in Louisiana are considered as joint tenants and not as partners⁴). Real estate, therefore, acquired by a partnership is, in Louisiana, not partnership but joint property and must be conveyed as such⁵); but, as between the partners, it is equitably and practically property of the firm⁶).

There is considerable confusion as to the necessary form and legal effect of a conveyance of real property by or to a firm. This difficulty has helped to promote the legal person idea. The present tendency appears to be to permit conveyances of real property in the firm name and by the same authority, as in the case of personal property. This is manifest by the present tendency to permit actions by or against the firm in the firm name, and the decisions in some States⁷), which hold that the firm name is sufficient to designate the members of the firm as the true owners. There are many decisions, however, which hold that since the firm is not a natural or legal person, and since real property can be conveyed only to a person, a conveyance in the firm name is not sufficient to pass the legal title; but the grantor holds in trust for the partners where the firm name does not contain the name of any partner⁸). This distinction appears to be very narrow, especially since those same jurisdictions hold that a conveyance in the firm name composed of the surnames of one or more of the partners is a sufficient legal conveyance to such persons, when ascertained by parol evidence⁹).

2. *Conversion of Real Property.* — Since, under the general law, real property is considered as converted into personal property to the extent that it is needed for partnership purposes; and, since the partners have a right to receive their respective shares only of the partnership assets remaining after all the partnership affairs are liquidated, the creditors, widow, or heirs of a partner can have rights in partnership land only when he or his estate had a right to receive such share as real property. Where it is not expressly agreed that the land shall be partitioned, the court may order it to be sold for the purpose of winding up the partnership affairs. The decisions are not, however, uniform. The general rule is, that the wife or widow need not join in the conveyance; and that her dower attaches only after the liquidation of partnership affairs¹⁰). Where there is no agreement to the contrary, real property owned by the firm is, as to the widow, heirs, and creditors, generally treated as personal property until it is freed from all the rights of all the other partners¹¹).

d) *Statutory Provisions.* — There are statutory provisions in a few States that where a partnership does business under a firm name which does not disclose the name of the partner of the person conducting the business, all property, stock, and choses in action, acquired or used in such business is liable for the debts of such person¹²).

¹) Hogle v. Lowe, (1877) 12 Nev. 286; Delmonico v. Guillaume, (1845) 2 Sandf. Ch. (N. Y.) 366; Trowbridge v. Cross, (1886) 117 Ill. 109; Southern Cotton Oil Co. v. Henshaw, (1889) 89 Ala. 448; Roberts v. Eldred, (1887) 73 Cal. 394; Beecher v. Stevens, (1876), 43 Conn. 587; Grissom v. Moore, (1885) 106 Ind. 296; Jones v. Beckman, (1900) 47 Atl. 71. — ²) Cundey v. Hall, (1904) 208 Pa. 335. — ³) Saunders' Rev. C. C. of La., (1909) secs. 2825, 2836. — ⁴) Calder v. Their Creditors, (1895) 47 La. Ann. 346. — ⁵) Willey v. Carter, (1849) 4 La. Ann. 56. — ⁶) Mary v. New Orleans & C. R. Co., (1892) 44 La. Ann. 444. — ⁷) Davis v. Davis, (1882) 60 Miss. 615; Sherry v. Gilmore, (1883) 58 Wis. 324; Shaw v. Loud, (1815) 12 Mass. 447; Stroman v. Rottensbury, (1812) 4 Desaus. Eq. (S. C.) 268; Lady Superior, etc., v. McNamara, (1848) 3 Barb. Ch. (N. Y.) 375; Newton v. McKay, (1874) 29 Mich. 1; Hogg v. Odom, Dudley, (Ga.) 185.

— ⁸) Percifull v. Platt, (1880) 36 Ark. 456; Walker v. Miller, (1905) 139 N. C. 448; Woodward v. McAdams, (1894) 101 Cal. 438; Riffel v. Ozark Land Co., (1899) 81 Mo. App. 177; Barber v. Crowell, (1898) 55 Neb. 571; New Vienna Bank v. Johnson, (1889) 47 Oh. St. 306; Riddle v. Whitehill, (1890) 135 U. S. 621. — ⁹) Cole v. Mette, (1898) 65 Ark. 503; McCauley v. Fulton, (1872) 44 Cal. 355; Blanchard v. Floyd, (1890) 93 Ala. 53; Frost v. Wolf, (1890) 77 Tex. 455; Dunlop v. Green, (1894) 60 Fed. 242; Beaman v. Whitney, (1841) 20 Me. 413; Holmes v. Jarrett, (1872) 7 Hask. (Tenn.) 506; Jones v. Neale, (1856) 2 Pat. & H. (Va.) 339; Cunningham v. Ward, (1888) 30 W. Va. 572; Hartnett v. Stillwell, (1904) 121 Ga. 386; Hayes v. Treat, (1896) 178 Pa. 310. — ¹⁰) See, generally, Woodward Holmes Co. v. Nudd, (Minn. 1894) 27 L. R. A. 340, and cases cited in note. — ¹¹) 30 Cyc. 434. — ¹²) Va. Code of 1907, sec. 2877.

But the statute is held not to apply, where the full name of at least two partners are disclosed¹).

II. RELATIONS OF PARTNERS WITH PERSONS DEALING WITH THE PARTNERSHIP. — A. Authority of the Partners to Act for the Firm. — 1. IN GENERAL

— Every partner is an agent of the firm and his copartners for the purpose of the business of the partnership; and the acts of every partner, who does any act, including the execution of deeds of obligation, for carrying on, in the usual way, business of the kind carried on by the firm of which he is a member, bind the firm and his co-partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing has actual knowledge or notice of the fact that he has no authority.

The authority of the partners is based upon the principle of mutual agency among co-principals, where each is a principal as to himself and an agent as to all the other partners²).

The authority of a partner as to third persons is not dependent on, nor controlled by, the contract, except in so far as they have knowledge or notice of the terms of the contract. This authority is one of the legal incidents resulting from the creation of the partnership³).

2. SCOPE OF AUTHORITY. — Where the terms of the contract are unknown to the person dealing with the partnership, the scope of the authority goes to the extent necessary to carry on that particular kind of business. Where the particular business is that of a known class, the authority is the usual authority of the class; and it is sufficient, that the act falls within the class of acts usually done by that class of businesses. But, where the particular business differs from any known business, and the third person reasonably ought to know that it does so differ, he must investigate the authority in the particular business⁴). The scope of the business of the particular partnership may be enlarged by consent of all the partners as manifest either by express contract or by a course of conduct, and the authority of each partner is enlarged accordingly⁵). Most States maintain two classes of partnerships: trading and non-trading partnerships; in some States, this distinction is the result of statute, and in others, of decision. The distinction creates a limitation on the authority of the partners in non-trading firms by denying authority to do those acts which are chiefly commercial, as borrowing money, etc.⁶). This distinction is denied in Pennsylvania but the results attained are practically the same as in the States where the distinction obtains⁷). The codes of the western code States enumerate certain acts which do not fall within the general authority of the partners but may be done only under special authority. Thus, unless his copartners have wholly abandoned the business to him, or are incapable of acting, a partner has no authority: 1. To make an assignment of the partnership property or any portion thereof to a creditor, or to a third person in trust for the benefit of a creditor or of all creditors; 2. To dispose of the good-will of the business; 3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise; 4. To do any act which would make it impossible to carry on the ordinary business of the partnership; 5. To confess a judgment; 6. To submit a partnership claim to arbitration; 7. To do any other act

¹) Bank v. Cringan, 91 Va. 347. — ²) 30 Cyc. 477; Story on Partnership, (7th Ed.) sec. 101, et seq.; 3 Kent Com. (Lacey's Ed.) sec. 40 et seq.; Parsons on Partnership, (4th Ed.) sec. 114, et seq.; Bates on Partnership, sec. 315; Burdick on Partnership, (2 Ed.) 176, et seq. — ³) Winship v. Bank, (1831) 5 Pet. (U. S.) 529; Beecher v. Bush, (1881) 45 Mich. 188; Meehan v. Valentine, (1892) 145 U. S. 611; Midland Bank v. Schoen, (1894) 123 Mo. 650; Rumsey v. Briggs, (1893) 139 N. Y. 323; Hoskinson v. Eliot, (1869) 62 Pa. 393; Crites v. Wilkinson, (1884) 65 Cal. 559; Stillman v. Harvey, (1879) 47 Conn. 26 Jas. Parsons on Partnership (2d Ed.) secs. 45, 137. — ⁴) Collier v. McCall, (1887) 84 Ala. 190; Crane v. Tierney, (1898) 175 Ill. 79; Irwin v. Williar, (1884) 110 U. S. 499; Alsop v. Central Trust Co., (1897) 100 Ky. 375; Pickels v. McPherson, (1881) 59 Miss. 216; Smith v. Collins, (1874) 115 Mass. 388; Rumsey v. Briggs, (1893) 139 N. Y. 323. — ⁵) Boardman v. Adams, (1857) 5 Ia. 224; Walker v. Keyes, (1834) 6 Vt. 257; Irwin v. Williar, (1884) 110 U. S. 499; Folk v. Wilson, (1863) 21 Md. 538; Hoskinson v. Eliot, (1869) 62 Pa. 393; Hamilton v. Phoenix Ins. Co., (1871) 106 Mass. 395. — ⁶) Judge v. Braswell, (1877) 13 Bush. (Ky.) 67; March v. Wheeler, (1905) 77 Conn. 449; Winship v. Bank, (1831) 5 Pet. 529; Adams v. Long, (1904) 114 Ill. App. 277; Dow v. Moore, (1867) 47 N. H. 419; Holt v. Simmons, (1884) 16 Mo. App. 97; Lee v. Bank, (1890) 45 Kan. 8; Vetsch v. Neiss, (1896) 66 Minn. 459; Harris v. Baltimore, (1890) 73 Md. 22; Wooster v. Forbush, (1898) 171 Mass. 423. — ⁷) Hoskinson v. Eliot, (1869) 62 Pa. 393.

not within the class of acts necessary to carry on such business in the ordinary manner¹). But where a partner does dispose of the entire stock under par. 3., supra, it is a sufficient act to pass his interest; and only those partners who do not consent may object²). These same limitations generally exist in the other States under the decisions, because the foregoing acts do not generally fall within the ordinary course of business³).

There has been a movement to enact into the general law the principle that, where the partner acting in the particular matter has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner the firm is not bound by such act⁴). This law has been questioned in England⁵), and appears to be at variance with the present law in this country⁶). In *Sinkler v. Lambert*⁷), Hare, J., said: "The four things necessary to charge two or more persons jointly as partners on a contract made by one of them in his own name are that they were in partnership, that the contract fell within the scope of the business of the firm, that it was actually made on partnership account, and that the plaintiff was ignorant of that fact or of the name of the partnership." This appears to be a correct statement of the law as to cases where a person deals with a partner acting in an undisclosed capacity. It is not the secret restrictions upon his authority which control; but, did the act fall within the business which he was conducting apparently as a sole trader; and, did he actually intend to make a contract for and on behalf of the undisclosed partnership. If both these questions are answered in the affirmative, the contract is binding on the partnership, even though, under the partnership contract, the partner had no authority to act in that particular matter⁸).

3. ACTS WITHOUT THE SCOPE OF PARTNERSHIP BUSINESS. —

Where one partner pledges the credit of the firm for a purpose not connected with the ordinary course of business of the kind carried on by the firm, the firm is not bound, unless he is in fact specially authorized by the other partners, though the partner acting and those consenting thereto will be bound in their separate capacity. It is sufficient that the act falls within the apparent scope of the business. The apparent scope may be that of the general course of business usual in a business of the kind or the known course of business of the particular firm. The general principles of agency here control; and limitations on the authority of a partner are binding only as they would be in the case of a principal and agent. The essential difference between partners and ordinary agents is that the agent derives his authority by contract or holding out, while the authority of a partner arises as a matter of law either from the creation or the holding out of a partnership⁹).

Where the authority is declared, as arising from the custom or course of business of the particular firm, the nature of the custom or course of business and the knowledge and assent of the other partners must be considered. Thus, where checks frequently have been drawn upon the partnership fund for the payment of separate liabilities, a custom or course of business does not arise¹⁰). A custom can enlarge the course of business of the firm only where the circumstances are such as to indicate that the partner to be bound not only knew of the course of dealing but also assented to it as a regular course of dealing with the public¹¹). But, where the evidence of borrowing is regularly entered upon the books of the firm, the knowledge and assent is sufficiently proven¹²). In each case the character of the business and the character

¹) Cal. C. C. sec. 2430. — ²) *Carrie v. Cloverdale*, (1891) 90 Cal. 84. — ³) 30 Cyc. 487, et seq. — ⁴) English Act of 1890, sec. 5. copied in sec. 6 of a draft of an Act to make uniform the Law of Partnership; 30 American Bar Assn. Rep. Pt. 2, p. 443. — ⁵) *Pollock on Partnership*, (7th Ed.) 28. — ⁶) *Baxter v. Clark*, (1843) 4 Ired. (N. C.) 127; *Everitt v. Chapman*, (1827) 6 Conn. 347; *Reynolds v. Cleveland*, (1825) 4 Cow. (N. Y.) 282 (*semble*); *Livingston v. Roosevelt*, (1809) 4 Johns. (N. Y.) 251 (*semble*); *Holmes v. Burton*, (1837) 9 Vt. 255; *Tucker v. Peasle*, (1858) 36 N. H. 167 (*semble*); *Bank v. Hennessey*, (1872) 48 N. Y. 550; *National Bank v. Cringan*, (1895) 91 Va. 347; *Jones v. Hoodley*,

(1906) 115 N. Y. App. Div. 487; *Winship v. Bank*, (1831) 5 Pet. 529; 30 Cyc. 479; *Jas. Parsons on Partnership*, sec. 138. — ⁷) 5 Phila., (1862) (Pa.) 36, 40. — ⁸) *Beecher v. Bush*, (1881) 45 Mich. 188. — ⁹) *Winship v. Bank*, (1831) 5 Pet. 529; *Rice v. Jackson*, (1895) 171 Pa. 89; *Stimson v. Whitney*, (1881) 130 Mass. 591; *Midland Bank v. Schoen*, (1890) 123 Mo. 650; *Crane v. Tierney*, (1898) 175 Ill. 79. — ¹⁰) *Bank v. Smith*, (1901) 114 Ga. 185. — ¹¹) *Herlehy v. Ferguson*, (1900) 47 N. Y. App. Div. 237; *Eady v. Newton Coal Co.*, (1905) 123 Ga. 557. — ¹²) *Burchell v. Voght*, (1900) 35 N. Y. App. Div. 190; affirmed in 164 N. Y. 602.

of the acts and transactions must be closely scrutinized, since it is merely a finding of fact and not an application of a principle of law¹). The question is, what had the public a right to understand were acts falling within the usual course of the business²).

4. **RESTRICTIONS UPON THE AUTHORITY OF A PARTNER.** — If it is agreed among the partners, either in the partnership agreement or by any subsequent agreement, express or implied, that any restrictions shall be placed on the authority of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm or the other partners with respect to persons having actual knowledge or notice that the act is in contravention of the agreement³).

It is believed that the foregoing is a correct statement of the general law. Yet there is a conflict in the authorities. It is to be distinctly noticed, that the foregoing deals only with restrictions by agreement, and not by mere dissent or the act of a minority. The question here narrows itself to the character of notice necessary to affect third persons. The general statement is that it is sufficient that the third person has notice of the agreement⁴). There are decisions in which such statements appear; but generally, in the American cases, notice of the agreement is effective notice only when the agreement is such that it also gives notice on its face that the act is in contravention of the agreement⁵). The authority of a partner is analogous to that of a general agent and not to that of a special agent, for the authority results in law from the existence of the partnership. Third persons may rely upon the partner's statement of the firm's existence and the character of its business; if they do not investigate, they assume the risk that these statements are correct. If, in addition to this, the authority of the particular partner is limited, but the third person has no actual knowledge or notice either personal or from the circumstances, or, if he has notice that the partner does not have authority equal to that of all the other partners, but not that he has no authority to do the particular act, such an act should be binding on the firm and the other partners.

Notice of the limitations may be had from actual knowledge, as where it has been advertised or he has received express notice; or may be implied from the facts. Whether he has knowledge or notice is a question of fact to be found from all the circumstances. Thus where, in the established course of business, notes are always drawn to the order of one partner, the jury may consider this as some evidence of notice of a limitation of authority — a matter creating suspicion but not sufficient in itself to create notice⁶). Information of facts sufficient to have caused a reasonably prudent and cautious man to inquire has been said to be sufficient notice⁷).

5. **AUTHORITY TO DO PARTICULAR ACTS.** — This question falls squarely under the foregoing general principles and is dependent upon whether or not the particular act is necessary to carry on the business in the ordinary course, whether any restriction has been placed upon the authority of the particular partner, and whether the person with whom he is dealing has knowledge or notice of such restriction. Generally the authority is dependent upon the character of the business. Exceptional restrictions may arise from established legal ideas, as in the case of the execution of deeds of obligation or conveyance or of the execution of negotiable instruments. Subject to this general statement specific acts will be noted.

a) *Deeds of Obligation and Conveyance.* — The general rule, as at present existing, is that one partner has no implied authority to bind the firm by deed, bond, mortgage, or other instrument under seal. This rule does not apply to the release of a firm obligation. Such instruments always bind the acting partner personally because of the implied warranty of authority. This rule is due to the common law formality of such instruments rather than to partnership necessity. The modern movement

¹) Boardman v. Adams, (1857) 5 Ia. 224; London Savings Society v. Savings Bank, (1860) 36 Pa. 498. — ²) Banner Tobacco Co. v. Jenison, (1882) 48 Mich. 459. — ³) 30 Cyc. 481; Rice v. Jackson, (1895) 171 Pa. 89; Granby, etc., Co. v. Laverty, (1893) 159 Pa. 287; Straus v. Kohn, (1899) 83 Ill. App. 497; Brent v. Davis, (1856) 9 Md. 217; Winship v. Bank, (1831) 5 Pet. 529; Magovern v. Robertson, (1889) 116 N. Y. 61; Bank v. Hennessey, (1872) 48 N. Y. 545; Bromley v. Elliott, (1859) 38 N. H. 287. Gladstone Bank v. Keating, (1892) 94 Mich. 429. —

⁴) Conyngton on Partnership, 83; Bates on Partnership, secs. 322, 324; Collier on Partnership, sec. 407. — ⁵) Bank of Batavia v. R. R., (1887) 106 N. Y. 195; Bank v. Aymar, (1842) 3 Hill (N. Y.) 262; Mechem on Agency, sec. 279. — ⁶) International Trust Co. v. Wilson, (1894) 161 Mass. 80; Tilford v. Ramsey, (1866) 37 Mo. 563. — ⁷) Bromley v. Elliott, (1859) 38 N. H. 287; Skinner v. Dayton, (1822) 19 Johns. (N. Y.) 513; Gammon v. Huse, (1881) 100 Ill. 234; Gallagher v. Heidenbeiner, (1886) 3 Tex. Civ. Cas. 132.

is away from this rule and towards allowing such acts to fall within the general rule permitting such acts to bind the firm if within the ordinary scope of the business. Thus, it is sufficient that there be previous authorization or subsequent ratification by the copartners, even though it be only by parol and not under seal as generally required¹).

Where the instrument would be binding without the seal, it will be binding though under seal²).

Where a partner makes a contract within his authority which requires the execution of a sealed instrument, equity will decree specific performance³).

b) Bills and Notes. — The authority of a partner to execute negotiable instruments depends upon the character of the business. Where the business is one which, in the usual course, requires the execution of such instruments, that is, in commercial-trading partnerships, each partner possesses the authority; and negotiable paper, issued within the apparent scope of the partnership business, binds all the partners⁴). In non-commercial partnerships prior assent or ratification is necessary⁵). A partner has no authority to execute negotiable paper for accommodation except with express authority or ratification⁶); nor for payment of his separate liability⁷). But where the note comes into the hands of a bona fide purchaser for value it is binding on the firm, if the partner executing has authority to issue such an instrument under any circumstance⁸).

c) Assignments for the Benefit of Creditors. — Assignments for the benefit of creditors may be made by any one or more of the partners only upon previous consent, express or implied, or ratification by all the partners; if the other partners have absconded; are absent and cannot be consulted; or are otherwise incapable of assenting or dissenting⁹). But it is not sufficient that the other partners be temporarily absent, sick, or insane¹⁰). Where an assignment may be made, a preference to particular creditors may also be made, subject to the same rules as in the case of assignment, whenever a statutory provision does not make a preference void as to the other creditors, as under the Federal Bankruptcy Act, sec. 60¹¹).

d) Confession of Judgment. — One partner has no authority to confess a judgment or to give a warrant of attorney to confess a judgment against the firm which will be binding except upon the partner acting in the matter. Prior consent or rati-

¹) McDonald v. Eggleston, (1853) 26 Vt. 154; Russell v. Armable, (1871) 109 Mass. 72; Hull v. Young, (1889) 30 S. C. 121; Day v. Lafferty, (1842) 4 Ark. 450; Fagely v. Bellas, (1851) 17 Pa. 67; Miller v. Royal Flint Glass Co., (1895) 172 Pa. 70; Mackey v. Bloodgood, (1812) 9 Johns. (N. Y.) 285; Smith v. Kerr, (1849) 3 N. Y. 144; Swan v. Steadman, (1842), 45 Mass. 458; Gunter v. Williams, (1867) 40 Ala. 561; Pine v. Weber, (1868) 47 Ill. 41; Gates v. Graham, (1834) 12 Wend. (N. Y.) 53; Person v. Carter, (1819) 7 N. C. 321. — ²) Sterling v. Bock, (1889) 40 Minn. 11; Patten v. Kavanagh, (1883) 11 Daly (N. Y.) 348; Price v. Green, (1850) 2 G. Gr. 427. — ³) Baldwin v. Richardson, (1870) 33 Tex. 16; Rovelsky v. Brown, (1890) 92 Ala. 522; Young v. Wheeler, (1888) 34 Fed. 98; Patton v. Boker, (1883) 62 Ia. 704; Lawrence v. Taylor, (1843) 5 Hill (N. Y.) 107. — ⁴) Redlon v. Churchill, (1882) 73 Me. 146; Mechanic's Insurance Co. v. Richardson, (1881) 33 La. Ann. 1308; Walsh v. Lannon, (1881) 98 Ill. 27; Rumsey v. Briggs, (1893) 139 N. Y. 323; Boyd v. Thompson, (1893) 153 Pa. 78; Voorhess v. Jones, (1861) 29 N. J. L. 270; Citizens Bank v. Platt, (1903) 135 Mich. 267. — ⁵) Bank v. Fultz, (1905) 115 Mo. App. 42; Worcester v. Forbush, (1898) 171 Mass. 423; Linn v. Valz, (1890) 11 Ky. Law Rep. 846; McPherson v. Bristol, (1897) 115 Mich. 258. — ⁶) Talmadge v. Milliken, (1898) 119 Ala. 40;

Hunt v. Allener, (1908) 127 N. Y. App. Div. 572; Beach v. Bank, (1851) 2 Ind. 488. —

⁷) United States Exch. Bank v. Zimmermann, (1908) 113 N. Y. Supp. 33; Meyer v. Hegler, (1898) 121 Cal. 682; McRae v. Campbell, (1897) 101 Ga. 662; Adams v. Long, (1904) 114 Ill. App. 277; Durrell v. Staples, (1897) 169 Mass. 49. — ⁸) Stevens v. McLean, (1899) 120 Mich. 285; Luckner v. Iba, (1900) 54 N. Y. App. Div. 566; Feigenspan v. McDonnell, (1909) 201 Mass. 341; National Bank Exchange v. White, (1887) 30 Fed. 412; National Bank v. Wolf, (1889) 51 Hun (N. Y.) 640. — ⁹) Loeb v. Pierpoint, (1882) 58 Iowa 469; Shattuck v. Chandler, (1889) 40 Kas. 516; Rumsey v. McCulloch, (1882) 54 Wis. 565; Williams v. Frost, (1880) 27 Minn. 255; Hill v. Postley, (1893) 90 Va. 200; Fox v. Curtis, (1896) 176 Pa. 52; Palmer v. Myers, (1865) 43 Barb. (N. Y.) 509; Clafflin v. Evans, (1896) 55 Ohio St. 183; Trumbell v. Trust Co., (1889) 33 Ill. App. 319. — ¹⁰) Stockham v. Wells, (1889) 25 W. N. C. (Pa.) 84; Sheldon v. Smith, 29 Barb. (N. Y.) 593; Stadehman v. Loehr, (1888) 47 Hun. (N. Y.) 327; Forbes v. Scannell, (1859) 13 Cal. 242; Stein v. La Dow, (1868) 13 Minn. 412. — ¹¹) Bowen v. Clark, (1856) 1 Biss. (U. S.) 128; Kirby v. Ingersoll, (1884) 1 Doug. (Mich.) 477; Havens v. Hussey, (1834) 5 Paige (N. Y.) 30; Motley v. Frank, (1891) 87 Va. 432.

fication gives binding effect as to the partners consenting or ratifying¹). But in Pennsylvania, Louisiana, and Virginia, a commercial partner may confess a judgment in behalf of the firm binding on that partner and the firm assets²).

e) *Admissions*. — An admission or representation made by any partner concerning partnership affairs within the scope of his authority is evidence against the firm. The admissions or representations of a partner are not alone sufficient to prove the existence of the firm, or that a transaction is a firm transaction, or to deprive his partners of their interest in the firm property³).

f) *Notice*. — Actual notice to a partner, as such, of any matter relating to partnership affairs and the notice to the partner acting in the particular matter implied from his knowledge acquired as a partner or then present to his mind operate as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner⁴).

g) *Wrongful Act or Omission*. — Where by any wrongful act or omission of any partner acting in the ordinary course of the partnership business or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act⁵). But in Georgia under the Civil Code, sec. 3187, a partner is not responsible for the torts of his copartner⁶).

h) *Breach of Trust*. — In the following cases, namely: 1. Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it⁷); and 2. Where the firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss⁸); but the firm is not responsible where one partner wrongfully employs in the partnership business funds of which he alone is trustee or possessed, unless they have personal knowledge that the fund is a trust fund and that it is being wrongfully used in the business⁹).

6. FIRM ACTS. — a) *In Firm Name*. — Where the partnership has adopted a firm name, every act done in that name within the ordinary course of business binds the firm and the other partners as to persons who have not actual knowledge or notice that the partner acting has, in fact, no authority in the matter; and outside the

¹) Hier v. Kaufman, (1890) 134 Ill. 215; Ellis v. Ellis, (1885) 47 N. J. L. 69; Binney v. La. Gal., (1855) 19 Barb. (N. Y.) 592; Everson v. Gehrman, (1852) 10 How. Prac. (N. Y.) 301. — ²) Wilmut v. The Onachita Belle, (1841) 32 La. Ann. 607; Boyd v. Thompson, (1893) 153 Pa. 78; Franklin v. Morris, (1893) 154 Pa. 152; Adams v. James L. Leeds Co., (1900) 195 Pa. 70; Myers v. Spruckle, (1902) 20 Pa. Super. Ct. 549; Alexander v. Alexander, (1888) 85 Va. 353. — ³) Taft v. Church, (1895) 162 Mass. 527; Gooding v. Underwood, (1891) 89 Mich. 187; Edgell v. Macquean, (1879) 8 Mo. App. 71; Outsalt v. Appleby, (1882) 36 N. J. Eq. 73; Baer v. Leppert, (1878) 12 Hun (N. Y.) 516; Taylor v. Thompson, (1901) 62 N. Y. App. Div. 159; Folk v. Schaeffer, (1897) 180 Pa. 613; Rumsey v. Briggs, (1892) 63 Hun (N. Y.) 11. — ⁴) 30 Cyc. 530; Middleton Bank v. Dubuque, (1866) 19 Ia. 467; Thomas v. Scott, (1842) 3 Rob. (La.) 256; Newall v. Bartlett, (1893) 114 N. Y. 399; Bienenstock v. Ammidown, (1894) 29 N. Y. Supp. 593; Kramer v. Dinsmore, (1893) 152 Pa. 264; Loeb v. Stern, (1902) 198 Ill. 371; Biglow v. Hinniger, (1885) 33 Kas. 362; Hall v. Goodnight, (1896) 138 Mo. 576; Adams v. Ashman, (1902) 203 Pa. 536; Flynn v. Bank (Tex. 1909) 118 S. W. 848. — ⁵) 30 Cyc. 523—527; Mechem on Partnership, secs. 204—205; Williams v. Hendricks, (1897) 115 Ala. 227; Miller v. Phoenix Ins. Co., (1903) 109

Ill. App. 624; Guarantee Trust & Safe Deposit Co. v. E. C. Drew Inv. Co., (1902) 107 La. 521; Lathrop v. Adams, (1882) 133 Mass. 471; Barrett v. McCrummen, (1901) 128 N. C. 81; Bienenstock v. Ammidown, (1898) 155 N. Y. 47, reversing 29 N. Y. Super. 593. — ⁶) Osburn v. Woolworth, (1899) 106 Ga. 459; Hendricks v. U. G. Middlebrooks Co., (1903) 118 Ga. 131. — ⁷) Swafford v. Mills, (1898) 86 Fed. 556; Filter v. Meyer, (1897) 16 Tex. Civ. App. 235; Salt Lake City Co. v. Howke, (1901) 24 Utah, 199; Pettijohn v. Bank, (1903) 101 Va. 111; Galway v. Nordlinger, (1889) 4 N. Y. Supp. 469; Castle v. Bullard, (1859) 23 How. 172; Guillou v. Peterson, (1879) 89 Pa. 163. — ⁸) Todd v. Jackson, (1881) 75 Ind. 272; Clark v. Ball, (1905) 34 Colo. 223; Miller v. Phoenix Ins. Co., (1903) 109 Ill. App. 624; Semlin v. Skutt, (1903) 133 Mich. 208; Nisbet v. Patton, (1833) 4 Rawle (Pa.) 120; Castle v. Bullard, (1859) 63 U. S. 172; Kerr v. Sharp, (1876) 83 Ill. 199; Galway v. Nordlinger, (1889) 51 Hun (N. Y.) 639; Guillou v. Peterson, (1874) 89 Pa. 163; Gilchrist v. Brande, (1883) 58 Wis. 184. — ⁹) Guillou v. Peterson, (1879) 89 Pa. 163; Gilruth v. Decell, (1894) 72 Mass. 232; Englan v. Offutt, (1889) 70 Md. 78; 14 Amer. St. Rep. 332; Shaffer v. Martin, (1898) 25 N. Y. App. Div. 501; Sitter v. Karraker, (1902) 100 Ill. App. 669; German-American Bank v. Scherrer, (1899) 102 Wis. 582.

ordinary course of business, if consent or ratification is proven or an estoppel is raised as to the other partners¹).

b) Obligations. — Where the partners have adopted a firm name, an obligation executed in any other name is not a firm act under the formalities of sealed instruments, unless the use of such name has been consented to or has been ratified by the other partners²); or unless the difference in the two names is immaterial³).

Where the partners have not adopted any firm name, generally the combined names of all the partners is the firm name, but any act, intended by the parties thereto to be a firm act, will bind the firm and the other partners if within the scope of the authority of the partner, except in deeds of obligation or conveyance⁴).

Where the parties have adopted the name of one of the partners as the firm name, acts done in that name are subject to the ordinary rules as between parties having knowledge. But where the partner acting is the partner whose name is used and the intention that it is to be a partnership act does not appear in the contract or instrument, the presumption is that it is a separate act; and the plaintiff must prove that a partnership act was intended by both parties. But where the partner acting in the matter is not engaged in a business of the kind with which such act might be connected, there is a presumption that it is intended to be a firm act⁵); and that the partnership was the undisclosed principal of the acting partner, who intended to create a partnership liability⁶). But where the person, seeking to hold the firm, knowing the existence of the firm and the proper firm name, takes the note or contract of the acting partner, the presumption is that the firm is not bound; and the intention of the parties must be shown to have been to bind the firm principally⁷).

7. AGENTS AND SERVANTS. — The acts of agents and servants are the acts of the partnership according to the general principles of agency and master and servant. The authority of a partner to appoint a servant or agent depends upon the partnership agreements and the character of the business⁸).

III. LIABILITY. — A. Criminal Liability. — Ordinarily a partner cannot be held in a penal or criminal action for the acts of his copartners, though this depends entirely upon the terms of the statute. Thus he may be liable for misuse of the mail⁹). Partners should be indicted as individuals¹⁰).

B. In Tort. — For everything for which the firm, while he is a partner therein, becomes liable because of the wrongful act or omission of any partner, each partner is liable jointly with his copartners and also severally¹¹).

C. On Contract. — For all debts and obligations for which the partnership becomes liable while he is a member therein, each partner is liable at law jointly with his copartners but not severally, except under statutory modifications¹²);

¹ Sweet v. Wood, (1893) 18 R. I. 386; Farmers Ins. Co. v. Malone, (1895) 45 Neb. 302; George v. Tate, (1880) 102 U. S. 564; Hilliken v. Francisco, (1877) 65 Mo. 598; Leckie v. Scott, (1854) 10 La. 412. — ² Tom v. Goodrich, (1807) 2 Johns. (N. Y.) 214; United States v. Astley, (1819) 3 Wash. (U. S. C. C.) 512; North Penna. Coal Co.'s App. (1863) 45 Pa. 181; 84 Am. Dec. 487; Folk v. Wilson, (1863) 21 Md. 538; 83 Am. Dec. 599. — ³ Tilford v. Ramsey, (1866) 37 Mo. 563. — ⁴ Dreyfus v. Bank, (1896) 164 Ill. 83; Smith v. Collins, (1874) 115 Mass. 388; Reed v. Bacon, (1900) 175 Mass. 407; Beckwith v. Mace, (1905) 140 Mich. 157; Austin v. Williams, (1825) 2 Ohio 61; Getchell v. Foster, (1870) 106 Mass. 42; Barcroft v. Haworth, (1870) 29 Ia. 462; Holland v. Long, (1876) 57 Ga. 36. — ⁵ United States Bank v. Ramsey, (1828) Mason (U. S. C. C.) 189; Bank v. Monteith, (1845) 1 Denio (N. Y.) 402, 43 Am. Dec. 681. — ⁶ Tyler v. Waddingham, (1890) 58 Conn. 375; 8 L. R. A. 657; Peterson v. Roach, (1877) 32 Ohio St. 374; 30 Am. Rep. 607; Brown v. Fresno Raisin Co., (1894) 101 Cal. 222; Bank v. Cringan, (1895) 91 Va. 347; Jones v. Hoodley, (1906) 115 N. Y. App. Div. 487; Tucker v. Peaslee, (1858) 36 N. H. 167; Everett v. Chapman, (1827) 6 Conn. 347; Sinkler v. Lambert, (1862) 5 Phila. (Pa.) 36. — ⁷ Marvin v. Buchanan, (1871) 62 Barb. (N. Y.) 468; Smith v. Hoffman, (1826) 2 Cranch (U. S. C. C.) 651; Haefflinger v. Wells, (1879) 47 Wis. 628; Fair v. Citizen's Bank, (1899) 9 Kas. App. 779; Reed v. Bacon, (1900) 175 Mass. 417; Beckwith v. Mace, (1905) 140 Mich. 157. — ⁸ Mead v. Shepard, (1867) 54 Barb. (N. Y.) 474; Sweeney v. Neely, (1884) 53 Mich. 421; Carley v. Jenkins, (1874) 46 Vt. 721. — ⁹ Burton v. U. S., (1906) 142 Fed. 57; Browne v. U. S., (1905) 145 Fed. 1. — ¹⁰ Peterson v. State, (1870) 32 Tex. 477. — ¹¹ 30 Cyc. 535; notes in 41 L. R. A. 650 and 51 L. R. A. 463; Burdick on Partnership, (2d Ed.) 210—227, 266; Mechem on Partnership, sec. 204. — ¹² Mason v. Eldred, (1867) 6 Wall. 231; Sparks v. Fogarty, (1904) 93 N. Y. App. Div. 472; Bowen v. Crow, (1884) 16 Neb. 556.

but in equity all partnership debts are treated as joint and several in substance¹).

D. Statutory Provisions. — By statute, the result reached in equity is generally produced in law also. Some States have enacted that all joint liability shall be both joint and several; but the courts have held that this does not include partnership liability²). Other States have construed such statutes as making partnership liability both joint and several³). In Louisiana the members of an ordinary partnership are liable jointly but not severally⁴); but the members of a commercial partnership are liable in solido and are bound both jointly and severally⁵). Still other States have enacted such procedural reforms as to make partnership liability in substance several⁶).

The foregoing rules apply where the contract is found as a fact to be a partnership obligation, but do not include the cases where one, by holding himself out as a sole trader, has estopped himself from pleading that the contract is a partnership contract⁷); or those where the facts are found to produce a contract binding on the individual members alone or in conjunction with the firm, as expressly declared by the contract⁸); or where the court under the circumstances has so found⁹).

Partnership contracts not to compete with a successor or other person are construed by some courts to be broken by the act of any one partner¹⁰); but in other jurisdictions, only by the joint act of all¹¹).

E. By Estoppel. — 1. IN GENERAL. — When a person by words spoken or written or by conduct represents himself or consents to another representing him as a partner in an existing firm or in a particular business with one or more persons, not actual partners, he is liable jointly with the members of the firm or with the persons represented to be his partners to the same extent and in the same manner as though he were an actual partner of such person or persons, to any person who relies upon the representation. An estoppel is raised where one reads an agreement specifying him as a partner, does not object, and knows of subsequent transactions thereunder¹²); where he holds himself out¹³); or where, upon retirement from a business, continued by a successor in such manner as to represent his continued interest, he does not prevent the representation or reliance by the proper notice of dissolution¹⁴); This rule applies also where he is a sole trader or a member of a partnership; where a partnership takes corporate form; where another, in his presence, represents him as a partner and by his silence he acquiesces¹⁵).

¹) *Camp v. Grant*, (1851) 21 Conn. 41; *Edison Electric Co. v. DeMott*, (1893) 51 N. J. Eq. 16; *Simpson v. Schulte*, (1886) 21 Mo. App. 639; *Silverman v. Chase*, (1878) 90 Ill. 37. But see *McCormick App.*, (1866) 55 Pa. 252. — ²) *Coates v. Preston*, (1883) 105 Ill. 470; *Sandusky v. Sidwell*, (1898) 173 Ill. 493; *Curry v. Harrington*, (1849) 5 Har. (Del.) 147; *Burns v. Mason*, (1848) 11 Mo. 469; *Pope Mfg. Co. v. Charleston, Cycle Co.*, (1899) 55 S. C. 528. — ³) *Dixie Cotton Oil Co. v. Morris*, (1906) 79 Ark. 113; *Ryerson v. Hendrie*, (1867) 22 Ia. 480; *Williams v. Rogers*, (1879) 14 Bush. (Ky.) 776. — ⁴) *Bank of Commerce v. Mayer*, (1890) 42 La. Ann. 1031. — ⁵) *McClellan Dry Dock Co. v. Farmers Alliance Steamboat Co.*, (1891) 43 La. Ann. 258; *Liverpool, etc., Nav. Co. v. Agar*, (1882) 14 Fed. 615. — ⁶) Cal. Code of Civ. Pro. secs. 989—994; 2 Idaho Rev. Codes, secs. 4860—4865; N. Y. Code Pro., secs. 1932—1947; 2 S. Dak. Comp. Laws, p. 405, secs. 466—471; *Cobbey's Comp. Stat. of Neb.*, sec. 1084; 1 N. C. Rev. Laws, (1905) secs. 455—459. — ⁷) *Crosby v. Jeroboman*, (1871) 37 Ind. 264. — ⁸) *Forst v. Leonard*, (1895) 112 Ala. 296; *In re Gray*, (1888) 111 N. Y. 404; *McIntyre v. Housman*, (1901) 98 Ill. App. 76; *Stark v. Noble*, (1868) 24 Ia. 71; *Pittsburg Valve, etc., Co. v. Klingel-hoffer*, (1904) 210 Pa. 513; *Penn. v. Folger*, (1899) 182 Ill. 76. — ⁹) *Theus v. Armistead*, (1906) 116 La. 795; *Trenton Potteries Co. v. Oliphant*, (1899) 56 N. J. Eq. 680; 58 N. J.

Eq. 507; 46 L. R. A. 255, 78 Am. St. Rep. 612; *Amend v. Becker*, (1902) 75 N. Y. Supp. 1095. — ¹⁰) *Love v. Stedham*, (1901) 18 App. D. C. 306; 53 L. R. A. 397; *U. S. Cordage Co. v. Walls Sons Co.*, (1895) 90 Hun (N. Y.) 429; *Welsh v. Morris*, (1891) 81 Tex. 159, 36 Am. St. Rep. 801; *Trenton Potteries Co. v. Oliphant*, (1899) 58 N. J. Eq. 507. — ¹¹) *Streichen v. Fehleisen*, (1900) 112 Iowa, 612, 51 L. R. A. 412. — ¹²) *Tyler v. Omeirs*, (1899) 76 Minn. 537. — ¹³) *Williams v. Rogers*, (1879) 77 Ky. 776; *In re Grant*, (1901) 106 Fed. 496; *Dooley v. Vance*, (1901) 97 Ill. App. 42; *Hartford Fire Ins. Co. v. McLain*, (1905) 27 Ky. Law Rep. 461; *Schultze v. Steels*, (1897) 69 Mo. App. 614; *Marks v. Samuels*, (1900) 54 N. Y. App. Div. 249. — ¹⁴) *Evans & Howard, etc., Co. v. Hadfield*, (1896) 93 Wis. 665; *Henry C. Warner Co. v. Cahoun*, (1904) 55 W. Va. 246; *Reed v. J. H. Kreling's Sons*, (1899) 125 Cal. 117; *Davenport Gas & Elec. Co. v. Reiners*, (Iowa, 1903) 96 N. W. 1084; See 38 Cent. Dig. Partnership, sec. 50. — ¹⁵) *Kritzer v. Sweet*, (1885) 57 Mich. 617; *Armstrong v. Potter*, (1894) 103 Mich. 409; *Slade v. Paschal*, (1881) 67 Ga. 541; *Craig v. Alverson*, (1831) 6 J. J. Mar. (Ky.) 609; *Seabury v. Bolles*, (1888) 51 N. J. L. 103; affirmed in 52 N. J. L. 413; 11 L. R. A. 136; *Adams v. Albert*, (1895) 87 Hun (N. Y.) 471; reserved on other grounds in 155 N. Y. 356; *Smith v. Hill*, (1872) 45 Vt. 90; *Powers v. Large*, (1891) 75 Wis. 494, 17 Am. St. Rep. 195.

There are cases which go to the extent of declaring that, if one holds out as his partner another, who, knowing this fact, does not prevent the holding out, that other suffers it and is liable. This is correct where he has authorized the first holding out or where he has previously been a partner or held himself out, as upon retiring from a partnership, but should not be carried to the extent to which it appears to be carried by those authorities¹). This view is denied by the better cases²).

It is not necessary that the person held out should have knowledge that he is being held out to the particular person relying, but it is sufficient if the person seeking to hold him liable has had knowledge of the representation and could reasonably rely upon it. Holding out to the world is not sufficient; it must be to the particular person³).

The person who has been held out so as to become liable can avoid future liability only by preventing future "holding out," or by preventing further future reliance. Inasmuch as he need not necessarily know the persons who may be entitled to rely, he must at least give notice as required on the dissolution of a partnership in fact⁴), though there is authority that a request to discontinue is sufficient⁵). Though Lord Lindley⁶) is great authority in our own courts, it is hardly possible that an application for an injunction to restrain another from holding one out will be necessary in any State, because the statutory basis for such requirement does not exist in our law.

2. OPERATION AND EFFECT OF HOLDING OUT. — This is controlled by the general law of estoppel and must be considered as to third persons and as to the persons estopped.

a) As to Third Persons. — Where a person has represented himself, or has consented to another representing him as a partner in an existing partnership or with one or more persons not actual partners, he is an agent of the person or persons, consenting to the representation that he is their partner, to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation⁷).

Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but, in all other cases, it is merely the joint act or obligation of the persons acting and the persons consenting to the representation of the partnership. This results under the general rules of agency, *supra*, and because of the principle of *delectus personarum*. Where all the partners consent to the representation of partnership, the results are the same as where a partner in fact contracts against all right or interest in the partnership property or profits, but not against a share in the losses. Under this differentiation between the cases of an existing partnership and individual traders, the confused questions, as to the rights of person seeking to enforce such liability in the property of the business, are made certain. Thus, where there is a partnership in fact such creditor possesses the rights of a firm creditor as against the partners and their separate creditors, being *pari passu* with all the firm creditors and prior to the partners and the separate creditors⁸). Where no partnership in fact exists, then he has only the rights arising out of joint liability and the partners, but not their separate creditors, are estopped from denying that the property employed in the business is joint property subject

¹) *Janner v. Hall*, (1888) 86 Ala. 305; *Rittenhouse v. Leigh*, (1880) 57 Miss. 667; *Speer v. Bishop*, (1874) 24 Ohio St. 598; *Williams v. Rogers*, (1879) 77 Ky. 976. — ²) *Gainesville, etc., Bank v. Cody*, (1894) 93 Ga. 127; *Munthou v. Rutherford*, (1899) 121 Mich. 418; *Crook v. Davis*, (1859) 28 Mo. 94; *Morgan v. Farrell*, (1890) 58 Conn. 413; *Bishop v. Georgeson*, (1871) 60 Ill. 484; *Thompson v. Bank*, (1883) 111 U. S. 529; *Fisher v. McDonald*, (1899) 85 Ill. App. 653; *Ihmsen v. Lathrop*, (1883) 104 Pa. 365. — ³) 30 Cyc. 394; *Burdick on Partnership*, (2d Ed.) 67 et seq.; *Herman Kahn Co. v. A. T. Bowden Co.* (1906) 80 Ark. 23; *Fisher v. A. Y. McDonald Co.*, (1899) 85 Ill. App. 653; *Marschall v. Aiken*, (1897) 170 Mass. 3; *Ludowig v. Talcott*, (1905) 93 N. Y. Supp. 621; *Thompson*

v. Bank, (1884) 111 U. S. 529; *Marble v. Lykes*, (1886) 82 Ala. 322; *Dodd v. Bishop*, (1878) 30 La. Ann. 1178; *Lancaster Bank v. Boffenmayer*, (1894) 162 Pa. 559. — ⁴) *Benjamin v. Covert*, (1879) 47 Wis. 375; *Reybold v. Dodd*, (1832, Del.) 1 Har. 401. — ⁵) *Rittenhouse v. Leigh*, (1880) 57 Miss. 697. — ⁶) *Lindley on Partnership*, (7th Ed.) 72. — ⁷) *Barnett Line of Steamers v. Blackman*, (1874) 53 Ga. 98; *Gumbel v. Abrams*, (1868) 20 La. Ann. 568, 96 Am. Dec. 426; *Van Kleeck v. McCake*, (1891) 87 Mich. 599; 24 Am. St. Rep. 182; *Demuth v. Sternheimer*, 182 City Ct. Rep. (N.Y.) 443; *Shafer v. Randolph*, (1882) 99 Pa. 250; *Beall v. Lowndes*, (1873) 4 S. C. 285; *Thompson v. Bank*, (1884) 111 U. S. 529. — ⁸) *Broadway Bank v. Wood*, (1896) 165 Mass. 312.

to the liability¹). It is, however, held in a few jurisdictions that the persons who deal with parties representing themselves as partners in a business, and rely upon the representation, are entitled to have the property used in that business applied to the payment of their debts in preference to the payment of the individual debts of those representing themselves as partners²). This view does not have the general support of authority³).

Under this rule the difficulty resulting under the reasoning of *Scarfe v. Jardine*⁴) is avoided. That case may have a sound legal basis, but expediency demands that the creditor should be permitted to join all the parties. This appears to have the support of authority in America⁵). It is to be noticed that all the actual partners must consent to the representation. Where one partner retires and a new firm or other person continues the business in such form as to represent his continued membership, whether composed of only members of the old firm or a new member is also added, the representation is a representation in law requiring no act on his part and his actual consent is not necessary; for proper notice of dissolution is required to terminate the representation. Under such circumstances, the consent of the actual partners is immaterial, because the result is one of law and they should be held to consent to the legal consequences of their acts.

The liability of partners by estoppel can arise only in contract and not in mere tort or crime because of the necessity for the reliance which does not exist in such cases⁶); but where the tort is grounded on a contract which binds the partners by estoppel, it appears there is and should be a liability for the tort⁷).

b) *Rights of Partners by Estoppel, inter se.* — The authorities appear to hold that the estoppel is merely a personal one; that the ostensible partner cannot be included in insolvency proceedings; cannot interfere in the management of the business; cannot obtain an injunction or the appointment of a receiver; and that he has no partner's lien on the partnership assets⁸). Notwithstanding all this, it is equally true that, because the liability is joint, he does possess the right to contribution from his co-debtors and that for the purpose of terminating all future liability he must, at least, give the ordinary notice of dissolution; and to this end may also take the necessary equitable actions. Where he lends his name or credit to a firm and all the actual partners consent, so as to create a firm agreement, there is strong reason for believing that the firm as such becomes his debtor upon his payment of the liability; and this is inevitable under the legal person theory. The usual agreement is that he shall be saved harmless either by the partners or the firm. This would make him an ordinary creditor of the firm, but postponed as to those with respect to whom he also was liable; and would enable him to work out his rights through the partners' equities. Where there is in fact, no firm, the ordinary rights and liabilities of joint debtors obtain.

It should be noted that the continuation of the partnership business in the old firm name, with or without the consent of the representatives of a deceased partner, does not of itself make the estate or effects of the deceased partner or his executor or administrator liable under the doctrine of estoppel, because of the legal effect of death as to the deceased partner and his estate, and because the executor or administrator has made or consented to no representations. The executor or administrator may make himself liable, as in other cases, by his own conduct, either personally or as executor; and so much of the deceased partner's estate as continues in the business is subject to the rights of the firm creditors⁹). In *Adams v. Albert* this rule has also been extended to the property of a retired partner left in the business for

¹) *Kelly v. Scott*, (1872) 42 N. Y. App. 595; *Scully's Appeal*, (1886) 116 Pa. 141; *Bixler v. Kresge*, (1895) 169 Pa. 405; *Hillman v. Moore*, (1877) 3 Tenn. 454; *Johnson v. Williams*, (Virginia, 1910) 68 S. E. 410. — ²) *Van Kleek v. McCabe*, (1891) 87 Mich. 599; *Thayer v. Humphrey*, (1895) 91 Wis. 276; 30 L. R. A. 549, 51 Am. St. Rep. 887. — ³) 30 Cyc. 395; *Burdick on Partnership* (2d Ed.) 77, 292; *Bates on Partnership*, sec. 105. — ⁴) (1882) 7 App. Cas. (Eng.) 345. — ⁵) *Reed v. Kramer*, (1886) 111 Pa. 482; *Speer v. Bi-*

shop, (1874) 24 Ohio St. 598; *Evans v. Hadfield*, (Wisconsin, 1896) 68 N. W. 468; *Buckley v. Dingman*, (1851) 11 Barb. (N. Y.) 289. — ⁶) *Hundley v. Chadick*, (1895) 109 Ala. 575; *Burdick on Partnerships*, (2d Ed.) 75. — ⁷) *Sherrod v. Langdon*, (1886) 21 Ia. 518; *Maxwell v. Gibbs*, (1871) 32 Ia. 32. — ⁸) *Broadway Bank v. Wood*, (1895) 165 Mass. 312, and cases cited in 30 Cyc. 396. — ⁹) *Burwell v. Mundirille's Ex.* (1884) 2 How. 560; *Hoyt v. Sprague*, (1880) 103 U. S. 613; *Willis v. Sharp*, (1889) 113 N. Y. 591.

continued use¹). This decision has been criticized²) and is opposed to *Brower v. His Creditors*³). *Adams v. Albert* will no doubt be confined to its exact facts of representations that the interest was at the risk of the business, especially since the amount due appeared to be considered as a debt. But quære as to whether where the retiring partner does not withdraw his interest and retains his rights to an account or to an injunction, the property invested is not at the risk of the business, since the continuing partners must account for the profits thereon and the retiring partner can exert, in equity, a positive control over the use of that property⁴).

F. Liability of Incoming Partner. — Under the present law a new partner may be admitted into the business with the consent of all the partners, but the business is thereafter carried on by a new firm. In common speech it is said that he enters the firm; but in law he associates to form a new firm. From this it results that he becomes liable by operation of law only for liabilities arising thereafter and for the pre-existing liabilities only by contract, express or implied⁵). Business expediency, however, appears to be demanding that the admission of a new partner should not necessarily cause a dissolution or a break in the partnership affairs by operation of law only. As a result, the courts are inclined to find upon very slight evidence that the all partners associating to form the new firm have so contracted to assume the liabilities of the pre-existing firm, and thus give pre-existing creditors full rights with the other creditors against the new firm property and the new partners⁶). The tendency of the law is to conform to the expediency of business where no partner ceases to be associated and a new partner is admitted; and to hold that no dissolution is thereby produced and that the partnership property, including that contributed by the incoming partner, continues to be liable for the pre-existing liabilities.

G. Exoneration from Future Liability. — 1. IN GENERAL. — This right is the subject of much confusion in the cases. The question must be considered as to particular future contracts and transactions and as to all future contracts and transactions.

2. AS TO ALL FUTURE CONTRACTS. — It is contrary to the law and public policy to permit one to derive the benefits of a partner and yet, at the same time, to escape the liabilities. The law, therefore, prohibits a partner from exonerating himself generally from all future liability, except by terminating his rights to the benefits of a partner. Where the partnership is at will only, any partner may at any time terminate all future liability by dissolution and proper notice thereof. But, where the partnership, under the agreements, is to continue for a particular term or undertaking, it is a mooted question as to whether any one partner can terminate all his future liability without the consent of all the partners even by a dissolution and proper notice. Since the contract of partnership is such a personal one that it cannot be enforced in equity and concerns only the partners, except where third persons have knowledge or notice, the better reason and expediency appears to be to permit any partner to exonerate himself from liability. The more general law may be stated as follows: a partner may exonerate himself from all liability to third persons and to his copartners on account of all future contracts or transactions by giving proper notice to third persons and to his copartners that he dissolves the partnership⁷). The

¹) *Adams v. Albert*, (1898) 155 N. Y. 356.

— ²) *Burdick on Partnership*, (2d Ed.) 293. —

³) (1856) 11 La. Ann. 117. — ⁴) *New York Com. Co. v. Francis*, (1900) 101 Fed. 16; *Moore v. Rowson*, (1900) 185 Mass. 264; *Hotchell v. Chew*, (1900) 22 Ky. Law Rep. 738; *Reddington v. Franey*, (1905) 124 Wis. 500. —

⁵) *Humus v. Higman*, (1906) 145 Ala. 215; *Satler v. Edward Hines Lumber Co.*, (1898) 77 Ill. App. 97; *Ash v. Werner*, (1899) 12 Pa. Super. Ct. 39; *Ball v. Washburn*, (1899) 110 Ga. 225; *In re Hoagland's Est.*, (1903) 9 N. Y. App. Div. 56. — ⁶) *Shedd & Co., v. Bank of Battleboro*, (1860) 32 Vt. 707; *Gross v. Burlington Bank*, (1876) 17 Kas. 336; *Pyser v. Myers*, (1892) 135 N. Y. 599; *Flour*

City Nat. Bank v. Widener, (1900) 163 N. Y. 276; *Karraker v. Eddleman*, (1901) 100 Ill. App. 664. — ⁷) *Cal. Civ. Code*, sec. 2417; *S. Dak. Civ. Code*, sec. 1736; *Okla. C. C. § 4850*; *N. Dak. C. C. § 5848*; *Mont. C. C. § 5262*, *Ga. C. C. sec. 2633*; *Skinner v. Dayton*, (1822) 19 Johns. (N. Y.) 513, 537; *Mason v. Connell*, (1836) 1 Whart. (Pa.) 381, 388; *Monroe v. Connor*, (1838) 15 Me. 178; *Cape Sable's Case*, (1840) 3 Bland's Ch. 606, 674; *Slemmer's Appeal*, (1868) 58 Pa. 168, 176; *Solomon v. Kirkwood*, (1884) 55 Mich. 256; *Carr v. Hertz*, (1895) 54 N. J. Eq. 127; *Moore v. Price*, (1896) 116 Ala. 247; *Karrick v. Hannaman*, (1897) 168 U. S. 328; *Lapenta v. Littieri*, (1899) 72 Conn. 377.

English view that no such right exists in any partner has support in some States¹). The tendency appears to be towards the recognition of the right.

3. AS TO PARTICULAR FUTURE CONTRACTS OR TRANSACTIONS. — As to the right of a partner to exonerate himself from liability for any particular contract or transaction, this right is recognized in all jurisdictions when the firm is composed of only two partners. But where there are more than two members, the law is in confusion. The acts necessary to prevent liability are actual and explicit notice to the third person before the liability is incurred and the absence of any ratification, by the receipt therefrom of profits or otherwise; mere dissent is not sufficient even if brought to the knowledge of the third person. This notice may generally be given and be effective even against the express will of the copartners. When the other partners do not acquiesce, they retain the rights under the partnership contract against the dissenting partner for damages if the contract or transaction is properly within the scope of the business. These rights are adjudicated, when an account is had on final dissolution. A right to dissolution by decree of court may also accrue to the other partners²). There are cases denying such rights where there are more than two partners³). The better reasoning and expediency appear to favor the first position.

4. OF PARTNER BY ESTOPPEL. — One liable as a partner by estoppel may exonerate himself from any or all future liability in the same manner and to the same extent as a partner in fact. But the notice need not be as explicit as to any particular person for it is sufficient that he is put on suspicion or prevented from relying on the representation.

5. DAMAGES TO COPARTNERS. — In all the foregoing three cases, the partner or person exonerating himself from future liability may become liable under his contract to his copartners or the persons represented as his copartners for any damages caused to them by reason of any contract.

H. Application of Assets to Liabilities. — 1. MARSHALLING FIRM AND INDIVIDUAL ASSETS. — Generally speaking, the firm creditors have no rights in the application of partnership property; and the partners may dispose of the partnership property to third persons or to some or all of the partners, for the benefit of the separate creditors or for the benefit of the firm creditors, and may use it to prefer either one creditor or one set of creditors over the other, in the absence of statute. But when such act produces a fraud upon creditors, is an act of bankruptcy, or is done after insolvency or dissolution, then in many States the firm creditors acquire rights under the law relating to transfers in fraud of creditors. Thus in every State, when there is insolvency, or where there has been an act of bankruptcy within three months under the Federal Bankruptcy Act, or when the funds, separate or joint, are in the possession of a court of equity for distribution the firm creditors have prior rights as to firm assets and the separate creditors as to the separate assets. While there is a general principle that firm property must be applied to firm indebtedness before it can be applied to the debts of the individual members of the firm, this rule does not apply to cases where the partnership continues to conduct its ordinary business but only to cases where equitable principles become applicable in the distribution of partnership property among the creditors by the court⁴).

The general rule that firm creditors have priority on firm assets and separate creditors on separate assets is adopted without exception in a number of States⁵). In other States an exception is made permitting firm creditors to prove against the

¹) *Pierpont v. Graham*, (1818) 4 Wash. (U. S.) 234 overruled by *Karrick v. Hannaman*, (1897) 168 U. S. 328; *Hannaman v. Karrick*, (1893) 9 Utah, 236; reversed in 168 U. S. 328; *Cole v. Moxley*, (1878) 12 W. Va. 730; *Blake v. Dargan*, (1848) 1 Greene (Ia.) 537; *Reboul v. Chalker*, (1858) 27 Conn. 114; *Dobbins v. Tatem*, (N. J. Ch., 1892) 25 Atl. 544. — ²) *Leavett v. Peck*, (1819) 3 Conn. 124; *Feigley v. Sponeberger*, (1843) 5 W. & S. (Pa.) 564; *Matthews v. Dare*, (1863) 20 Md. 248; *Knox v. Buffington*, (1879) 50 Ia. 320; *Carr v. Hertz*, (1895) 54 N. J. Eq. 127. — ³) *McMahon v. McLearnan*, (1877) 10 W. Va. 419; *Cole v. Moxley*, (1878) 12 W.

Va. 747; *Harvey v. Howell*, (1843) 5 Ark. 270; *Campbell v. Bower*, (1873) 49 Ga. 417; *Johnston v. Dutton*, (1885) 27 Ala. 245. — ⁴) *Schaeffer v. Fithian* (1861) 117 Ind. 463; *Schmidlapp v. Currie*, (1878) 55 Miss. 597; *Mitnight v. Smith*, (1865) 17 N. J. Eq. 259; *Appeal of Gallagher*, (1886) 114 Pa. 353. — ⁵) *Wilder v. Keeler*, (1832) 3 Paige (N. Y.) 167; *Hewett v. Northrup*, (1878) 75 N. Y. 506; *Irby v. Graham*, (1872) 46 Miss. 425; *Bower v. Billings*, (1882) 13 Neb. 439; *Miller v. Clark*, 37 Ia. 325; *Ives v. Mahoney*, (Minnesota, 1898) 73 N. W. 720; *Fawlkes v. Bower's Heirs*, (1893) 11 Lea (Tenn.) 144.

separate assets where there is no joint estate¹). This exception is rejected in other States²). In Kentucky and Georgia the joint creditor has rights in the joint estate and proves *pari passu* with separate creditors as to both estates; otherwise the separate creditor receives from the separate estate as large a dividend as the firm creditor receives from the firm estate and thereafter firm and separate creditors are paid *pro rata* from the separate estate³). The general rule has been rejected in three States⁴); and is in doubt in Kansas⁵). Under the Federal Bankruptcy Act of 1898⁶), the general rule is recognized and also, in effect, the exception. There is, however, considerable conflict in the various Circuit Courts as to the interpretation of the Act⁷). In other States, the firm creditors, after having exhausted the firm assets, are entitled to prove *pari passu* with the separate creditors as to the separate estates⁸).

2. PARTNERS SURETY FOR FIRM DEBT. — Where a firm creditor has a security of separate assets for the payment of a firm debt, the separate creditors may compel him first to exhaust the firm assets; but he need not surrender the security in order to prove his entire claim⁹).

3. FIRM AS AN OSTENSIBLE SOLE TRADER. — The foregoing rules as to marshalling of assets do not apply where the firm is an ostensible sole trader but all creditors prove *pari passu* as to both the apparent firm assets and the other assets of the sole trader¹⁰).

4. RIGHTS OF CREDITORS IN FIRM ASSETS. — Firm creditors have no legal lien on the firm assets, except such as are acquired by express contract or due legal proceedings¹¹).

5. RIGHTS OF PARTNERS AS TO FIRM ASSETS. — The partners have in equity a lien on all partnership property, because of the relation, for the purpose of having it applied to the satisfaction of all firm debts¹²).

6. RIGHTS OF FIRM CREDITORS THROUGH PARTNERS. — In most States, firm creditors are able to secure the application of the firm assets to the payment of their claims unless the partners have waived or destroyed their lien¹³). In other States the partnership is treated as a legal person and, as such, is subject to the laws concerning insolvent debtors and fraudulent transfers, under which it is recognized that firm creditors must work out their rights through the partner's equity but the partner is not permitted to terminate his equity irrespective of the firm creditors. This is true where the firm and the partners are insolvent or on the eve of insolvency

¹) *Smith v. Mallory's Exr.*, (1854) 24 Ala. 628; *Evans v. Winston*, (1883) 74 Ala. 349; *Bell v. Newman*, (1819) 5 S. & R. (Pa.) 78; *Black's App.*, (1863) 44 Pa. 503; *Davis v. Howell*, (1880) 33 N. J. Eq. 72 (affirmed in 34 N. J. Eq. 292); *Rogers v. Meranda*, (1856) 7 Ohio St. 179; *Young v. Clapp*, (1892) 147 Ill. 176; *Hundley v. Farris*, (1890) 103 Mo. 78; *McCulloch v. Dashiehl*, (1872) 1 Md. 96; *Colwell v. Bank*, (1888) 16 R. I. 288; *Thayer v. Humphrey*, (1895) 91 Wis. 276; *Harris v. Peabody*, (1885) 73 Me. 262; *Keese v. Coleman*, (1884) 72 Ga. 658 (*semble*). — ²) *Warren v. Farmer*, (1884) 100 Ind. 593; *Potters Works v. Minot*, (1852) 10 Cush. 592; *Weaver v. Weaver*, (1865) 46 N. H. 188. — ³) *Bank v. Keizer*, (1865) 2 Duv. (Ky.) 169; *Fayette Bank v. Kenney*, (1880) 79 Ky. 133; *Johnson v. Gordon*, (1897) 102 Ga. 350. — ⁴) *Bardwell v. Perry*, (1847) 19 Vt. 292; *Camp v. Grant*, (1851) 21 Conn. 41; *Pettyjohn v. Woodruff*, (1890) 86 Va. 478. — ⁵) *Fullman v. Abrahams*, (1883) 29 Kas. 725. — ⁶) Chap. III sec. 5. — ⁷) *In re Forbes*, (1904) 11 Am. Bkcy. 787; 128 Fed. 137; *In re Wilcox*, (1899) 2 Am. Bkcy. 117, 84 Fed. 84; *In re Bertenshaw*, (1907) 157 Fed. 363; *West v. Lea*, (1890) 174 U. S. 590; *Sargent v. Blake*, (1908) 160 Fed. 57. — ⁸) *Blair v. Black*, (1899) 31 S. C. 346; *Gulringer v. His Creditors*, (1881) 33 La. Ann. 1279; *Rice v. Barnard*, (1848) 20 Vt. 479; *Pettyjohn v. Woodruff*, (1890) 86 Va. 478. — ⁹) *Bell v. Hepworth*, (1892) 134 N. Y. 442; *Gotzian v. Shakman*, (1894) 89 Wis. 52; *Lawson v. Dunn*, (1904) 66 N. J. Eq. 90. — ¹⁰) *Cammack v. Johnson*, (1863) 2 N. J. Eq. 163. — ¹¹) *Reese v. Bradford*, (1848) 13 Ala. 837; *Sickman v. Abernathy*, (1890) 14 Colo. 174; *Frank v. Peters*, (1857) 9 Ind. 343; *Thorpe v. Pennock, Mercantile Co.*, (1906) 99 Minn. 22; *Greenwood v. Broadhead*, (1850) 8 Barb. (N. Y.) 593; *Clement v. Foster*, (1844) 38 N. C. 213; *Fairbanks Co. v. Welsham*, (1898) 55 Neb. 362; *Crippen v. Hudson*, (1855) 73 N. Y. 161. — ¹²) *Leedom v. Ham*, (1897) 48 Pac. (Cal.) 222; 116 Cal. XVI; *Nelson v. Haymer*, (1873) 66 Ill. 487; *Crooker v. Crocker*, (1858) 46 Me. 250; *Hamilton v. Harris*, (1888) 72 Mich. 56; *Arnold v. Hagerman*, (1889) 45 N. J. Eq. 197; *Bulger v. Rosa*, (1890) 119 N. Y. 465; *Case v. Bureaugard*, (1878) 99 U. S. 119; *Donner v. Stauffer*, (1829) 1 P. & W. (Pa.) 198. — ¹³) *John Spry Lumber Co. v. Chappell*, (1900) 184 Ill. 539; *Johnson v. McClary*, (1892) 131 Ind. 105; *Thorpe v. Pennock*, (1906) 99 Minn. 22; *Hundley v. Farris*, (1890) 103 Mo. 78; *Milhiser v. McKinley*, (1900) 98 Va. 207; *Tillinghast v. Champlin*, (1856) 4 R. I. 173; *Boardwell v. Perry*, (1847) 19 Vt. 292; *In re Stewart*, (1899) 193 Pa. 347.

and one partner conveys all his right to the others¹). This view is denied, even on the insolvency of the partners, in some jurisdictions. It is difficult to reconcile the cases²). It may possibly be stated as the present tendency of the law to treat a partnership as though it were a legal person and to confer upon the firm creditor the same rights against the firm as a separate creditor has against a separate partner³); by protecting him against a fraudulent or collusive waiver of the partner's lien or its destruction by a fraudulent or voluntary conveyance.

7. RIGHTS OF CREDITORS OF INDIVIDUAL PARTNERS. — The rights of separate creditors are restricted to the partner's interest in the firm, which is his share of the profits and of the surplus remaining after all the firm debts are paid and his partner's equities have been satisfied. All jurisdictions are in agreement as to these rights⁴); but considerable confusion exists as to the method of subjecting the partner's share to the separate creditors' rights. This difference is due to a considerable extent to the different conceptions of the nature of the partners' ownership of partnership property. The courts tend to hold to the more modern view that a sale, on levy and execution, of a partner's interest does not affect the partners' equities or the resulting firm creditors' rights; and that the purchaser secures only the right to receive the profits as declared and his judgment debtor's share after dissolution and liquidation⁵). While there are cases holding that the partner's interest can be subject to his separate debts only in equity, others hold that execution may be had at law; in some cases, by the sheriff seizing the partnership property, but selling only the share; in others, by garnishee proceedings⁶). Many States have statutory provisions on the matter⁷); and the tendency is towards the adoption of the English proceedings⁸) though no such comprehensive statute exists at present.

8. TRANSACTIONS OF PARTNERS AFFECTING CREDITORS. — Firm creditors may be affected:

a) By any one or more of the partners conveying their interest so as to destroy their equity. When such conveyance is to a bona fide purchaser for a sufficient consideration, the firm creditors can assert no right except through the remaining partners. When the transfer is fraudulent, it may be set aside; and when the purchaser assumes the obligations of the firm, the firm creditors are entitled to relief on the contract without first exhausting their remedies against the partners⁹).

b) By a distribution of the assets among the partners. The courts seek to protect the creditors and so the transfer must be complete and be made in good faith. Fraud is presumed when the conveyance is to one of the partners and insolvency results¹⁰). But where the transfer is to separate creditor of a partner in satisfaction of a separate debt, the law is in confusion. Some jurisdictions hold that if it is done in good faith as to intention, it cannot be attacked¹¹); but the majority require that it shall

¹) *Darby v. Gilligan*, (1889) 33 W. Va. 121; *Pritchett v. Pollock*, (1896) 82 Ala. 169; *Bartlett v. Meyer-Schmidt Co.*, (1889) 65 Ark. 290; *Meyer v. Hegler*, (1898) 121 Cal. 682; *Ellison v. Lucas*, (1891) 87 Ga. 223; *Spry Lumber Co. v. Chappell*, (1900) 184 Ill. 539; *Clark v. Patterson*, (1893) 158 Mass. 388; *Freedman v. Holberg*, (1901) 89 Mo. App. 340; *Bulger v. Rosa*, (1890) 119 N. Y. 459; *Coffin's App.*, (1884) 106 Pa. 280. — ²) *Case v. Bureau-gard*, (1878) 99 U. S. 116; *Woodmansie v. Holcomb*, (1885) 34 Kas. 35; *Reynolds v. Johnson*, (1891) 54 Ark. 449; *Allen v. Center, Valley Co.*, (1851) 21 Conn. 130; *Veal v. Keeley Co.*, (1890) 86 Ga. 130; *Farwell v. Huston*, (1894) 151 Ill. 239; *Johnson v. Robuck*, (1898) 104 Iowa, 523; *Bank v. Hickman*, (1897) 148 Ind. 490; *Wiggins v. Blackshear*, (1894) 86 Tex. 665. — ³) *Teague v. Lindsay*, (1894) 106 Ala. 266; *Johnson v. Shirley*, (1899) 152 Ind. 453; *Franklin Sugar Co. v. Henderson*, (1897) 86 Md. 452; *Bailey v. Hornthal*, (1898) 154 N. Y. 648; *Bedford v. McDonald*, (1899) 102 Tenn. 358. — ⁴) 30 Cyc. 542. — ⁵) *Phillips v. Cook*, (1840) 24 Wend. (N. Y.) 389; *Tappan*

v. Blaisdell, (1830) 5 N. H. 190; *Hubbard v. Curtis*, (1859) 8 Ia. 1; *Harney v. First National Bank*, (1894) 52 N. J. Eq. 697; *Nixon v. Nash*, (1861) 12 Ohio St. 647; *Menagh v. Whitwell*, (1873) 52 N. Y. 146; *Donner v. Stauffer*, (1829) 1 P. & W. (Pa.) 198; *Vandike's App.*, (1868) 57 Pa. 9; *Stump v. Bauer*, (1881) 76 Ind. 157; *Kuntz v. Cox*, (1897) 113 Mich. 546; *Carraway's Adms. v. Staley*, (1897) 44 W. Va. 163. — ⁶) See *Freeman on Executions* (3d Ed.) sec. 125. — ⁷) See *Statutes, infra*. — ⁸) *Partnership Act of 1890*, sec. 23. — ⁹) *Beecher v. Stevens*, (1876) 43 Conn. 587; *Selz Schwab Co. v. Meyer*, (1898) 151 Ind. 422; *Olsen v. Morrison*, (1874) 29 Mich. 395; *Thorpe v. Pennock Mercantile Co.*, (1906) 99 Minn. 22; *Reddington v. Franey*, (1905) 124 Wis. 590; *Menagh v. Whitwell*, (1873) 52 N. Y. 146. — ¹⁰) *In re Terens*, (1910) 175 Fed. 495, and cases cited. — ¹¹) *Simmons Hardware Co. v. Thomas*, (1897) 147 Ind. 313; *Canfield v. Curry*, (1886) 63 Mich. 594; *Victor v. Glover*, (1897) 17 Wash. 37; 40 L. R. A. 297; *Hundley v. Farris*, (1890) 103 Mo. 78; 12 L. R. A. 254.

be an honest transfer and not be made during or in contemplation of insolvency¹). It would appear that every transfer should be made in good faith and during solvency; and, after insolvency, only upon consideration; and that firm creditors may be preferred in the absence of statute; but that separate creditors should not be preferred except on a valuable consideration to the firm as such. This is the present tendency²), whether the transfer be to a partner or to a separate creditor, to a new firm, or to a third person. Mortgages and other securities are governed to a limited extent, by the same rules, and depend upon the conditions at their creation.

J. Actions by or against Firms. — 1. IN GENERAL. — At common law the right of action and the liability were joint and so all actions were by or against all the partners jointly. The common law rule continues to apply in the absence of statute. Statutes are now becoming general which allow suits in the firm name; prevent the partners entering a plea in abatement; enable judgment to be taken against the partners named; and permit subsequent proceedings against the partners not bound by the prior judgment³). It has, however, been held that these statutes are not effective in the Federal courts to prevent jurisdiction on the ground of diversity of citizenship⁴), that they do apply to proceedings in a court of equity⁵); that they apply only to partnerships doing business or holding property in the State⁶); and that the right is merely in addition to the common law right⁷). Where the action is in the firm name only and none of the partners are joined or become parties to the action, the judgment has effect only as to the partnership property⁸). In order to bind the separate property of the partners, they must be joined and be served or appear; and the judgment affects the separate estate only of such as are served or appear⁹). Where the judgment binds the partnership property but not the separate property of all the partners, proceedings may generally be had against those not bound either by an action in the nature of a *scire facias* or by an entirely new action. The right of action against those not joined is not merged into the judgment¹⁰).

2. FIRM AS PLAINTIFF. — While the statutory provisions for suits against firms are quite general, actions by the firm must still, in many of those jurisdictions, be brought in the names of all the partners¹¹).

3. FIRMS WITH COMMON PARTNERS. — The common law rule that one firm cannot sue another in which a member of the first firm is a partner, exists in some States¹²); but the statutes in many States at present permit such actions¹³).

4. DORMANT PARTNERS. — Generally, a dormant partner is not a necessary party in actions by or against the partnership¹⁴), but there are cases holding that he is a necessary party, as in an action against one of two secret partners¹⁵). He may, however, always be made a party to the action¹⁶).

¹) *Keith v. Fink*, (1868) 47 Ill. 272; *Walker v. Mariul Bank*, (1888) 98 Pa. 574; *Steifel v. Berlin*, (1898) 28 N. Y. App. Div. 103; *Riddle v. McLister-Van Hoose Co.*, (1905) 145 Ala. 307; *Kidder v. Page*, (1869) 48 N. H. 380; *George v. Derby Lumber Co.*, (1902) 81 Miss. 725. — ²) *Burdick on Partnerships* (2d Ed.) 113 et seq.; 30 Cyc. 543. — ³) See statutes *infra*. — ⁴) *Bruett & Co. v. Austin Co.*, (1909) 174 Fed. 668. — ⁵) *Levystein v. Gerson*, (1906) 147 Ala. 251. — ⁶) *Abernathy v. Latimore*, (1850) 19 Ohio, 286. — ⁷) *Davidson v. Knox*, (1885) 67 Cal. 143; *Sawyer v. Armstrong*, (1896) 23 Colo. 287; *Markham v. Buckingham*, (1866) 21 Ia. 494. — ⁸) *Mc Kissick v. Witz*, (1899) 120 Ala. 412; *Winters v. Means*, (1897) 50 Neb. 209. — ⁹) *Ogle v. Miller & Sasche*, (1905) 128 Ia. 474; *Sawyer v. Armstrong*, (1896) 23 Colo. 287; *First National Bank v. Grieg*, (1901) 43 Fla. 412. *Willock v. Wilson*, (1901) 178 Mass. 68; *Pope Mfg. Co. v. Nelsh*, (1899) 55 S. C. 528; *Ferguson v. Millendor*, (1889) 32 W. Va. 30. — ¹⁰) *Gormley v. Hartray*, (1900) 92 Ill. App. 175; (1903) 105 Ill. App. 625; *Davis*

v. Sanderlin, (1896) 119 N. C. 84; and see statutes *infra*. — ¹¹) *Coleman v. Fisher*, (1899) 67 Ark. 27; *Bumpus v. Turgeon*, (1904) 98 Me. 550; *Grimes v. Bowerman*, (1892) 92 Mich. 258; *Heaton v. Wilson*, (1898) 123 N. C. 398. — ¹²) *Thompson v. Young*, (1899) 90 Md. 72; *Taylor v. Thompson*, (1903) 176 N. Y. 168; *sed contra* as to assignee *Mangels v. Shaen*, (1897) 21 N. Y. App. Div. 507; *Green v. Chapman*, (1855) 27 Vt. 236; *Banks v. Mitchell*, (1835) 8 Yerg. (Tenn.) 111. — ¹³) See statutes *infra*; *Alexander v. Jones*, (1889) 90 Ala. 474; *Schnaier v. Schmidt*, (1891) 13 N. Y. Supp. 725; affirmed in 128 N. Y. 683; *Pennock v. Swayne*, (1843) 6 W. & S. (Pa.) 239. — ¹⁴) *Tomlinson v. Spencer*, (1855) 5 Cal. 291; *Hopkins v. Kent*, (1861) 17 Md. 72; *Howe v. Sarosy*, (1872) 51 N. Y. 631; but see *contra*, *Alexander v. McGinn*, (1834) 5 Watts. (Pa.) 320. — ¹⁵) *Ela v. Rand*, (1828) 4 N. H. 307. — ¹⁶) *Wood v. Cullen*, (1868) 13 Minn. 394; *Farwell v. Davis*, (1867) 66 Barb. (N. Y.) 73; *Jackson v. Alexander*, (1852) 8 Tex. 109.

5. **EFFECT OF DEATH OR DISSOLUTION.** — Where the right of action has accrued or the action is pending, neither the death of a partner nor the dissolution of the firm affect, in substance, the right or the action. In the case of death all right survives to the other partners¹); and in cases of dissolution the relation is held not to terminate before all firm affairs are wound up and liquidated²).

6. **SERVICE OF PROCESS.** — At common law, service on each partner was necessary to a judgment against the firm; equity permitted a decree where there was service on all within the jurisdiction who could be found³). But this has been generally modified so that service on any partner or authorized agent is sufficient for a judgment binding on firm property and the separate property of the partners who are served or have appeared⁴).

IV. RELATIONS OF PARTNERS TO ONE ANOTHER. — A. In General. — The partnership, resulting from contract and being a personal relation, is not controlled by any formalities of the law, as between the partners, which cannot be controlled by the agreements of the members thereof. Because of the personal relation and the unlimited liability, "good faith" is the one legal requirement which is required in all matters. The good faith required is generally the same as that required of a trustee, though the analogy is not perfect in many respects⁵). The western code States apply to partners those parts of their codes which apply to trustees⁶).

B. Relations Varied by General Consent. — The mutual rights and duties of partners, whether ascertained by agreement or defined by law, may be varied at any time by the consent of all the partners, and such consent may be either express or inferred from a course of dealing⁷).

C. Construction of Partnership Articles. — The construction of partnership articles is generally governed by the ordinary rules of construction as applied to written agreements. But, as to any matter not clearly covered by the articles, the rights, duties, obligations, and interests implied by law control. Where the interpretation is doubtful, the construction adopted by the partners in their partnership transactions controls. This may be true even though certain express stipulations are thereby modified or cancelled⁸).

D. Rules Determining Rights and Duties of Partners. — While expediency requires that the articles of partnership should be signed by all the parties and be made to cover the essential rights and duties of the partners, this is not necessary to the regulation of the rights and duties. Where there is no agreement, either in the form of articles or in any other express or implied agreement, the intent of the partners in the partnership and their rights and duties in respect to one another are determined by the following rules:

1. Each partner is entitled to repayment of his contribution, whether by way of capital or advances, to the partnership property and to share equally in the profits and surplus remaining after all liabilities are satisfied; and generally must contribute towards the losses, whether of capital or otherwise, sustained by the firm, according to his share in the profits.

¹) *Roberts v. Stegelman*, (1875) 78 Ill. 120; *Newman v. Gates*, (1903) 108 Ky. 389; *Brown v. Kellog*, (1902) 182 Mass. 297; *Van Kleeck v. McCabe*, (1891) 87 Mich. 509; *Preston v. Fitch*, (1893) 37 N. Y. 41. — ²) *W. F. Market & Co. v. Jefferson*, (1905) 128 Ga. 471; *Blum v. Mayer*, (1906) 186 N. Y. 542; affirmed in (1907) 189 N. Y. 153; *Robinson Bank v. Miller*, (1891) 47 Ill. App. 310. — ³) *Pennock v. Swayne*, (1843) 6 W. & S. (Pa.) 239; *People's Bank v. Hall*, (1904) 76 Vt. 280; *Atkins v. Preston*, (1839) 10 N. H. 120; *Le Blanc v. Marandet*, (1873) 25 La. Ann. 464. — ⁴) See statutes *infra*; U. S. v. Amer. Tel. Co. (Ohio), (1886) 29 Fed. 17; *In re Grossmayer*, (1900) 177 U. S. 48; *Rolya Market Co. v. Armour & Co.*, (Iowa, 1900) 102 Fed. 530; *Booth v. Gamble-Robinson Com. Co.*, (1903) 139 Cal. 175; *Hanna v. Emerson*, (1895) 45 Neb. 708; *Grady v. Gasoline*, (1891) 48 Ohio St. 665; *Feldman v. Siegel*, (1904)

87 N. Y. Supp. 538. — ⁵) *Story on Partnerships*, (7th. Ed.) secs. 169 et seq.; *Wiggins v. Markham*, (1906) 131 Ia. 102; *Chittendon v. Witbeck*, (1883) 50 Mich. 401; *McKinley v. Lynch*, (1905) 58 W. Va. 44; *Bloom v. Lofgren*, (1896) 64 Minn. 1; *Mitchell v. Reed*, (1874) 61 N. Y. 123; *Tenant v. Dunlop*, (1899) 97 Va. 234. — ⁶) Cal. Civ. Code, sec. 2410, *infra*; — ⁷) *Parsons on Partnerships* (4th Ed.) 205; *Mechem on Partnership*, secs. 75, 76; *Winchester v. Glazier*, (1890) 152 Mass. 316; *Chicago v. Sheldon*, (1864) 9 Wall. (U. S.) 50; *Story on Partnership*, secs. 191, 192. — ⁸) *Boyd v. Mynatt*, (1842) 4 Ala. 79; *Ratburn v. McConnell*, (1889) 27 Neb. 239; *Snyder v. Seaman*, (1896) 2 N. Y. App. Div. 258; *Appeal of Southmayd*, (Pennsylvania, 1887) 8 Atl. 72; *Spears v. Willis*, (1897) 151 N. Y. 443; *Funck v. Haskell*, (1882) 132 Mass. 580; *Ingraham v. Mariner*, (1902) 194 Ill. 269.

Whether property has been contributed so as to become partnership property, or whether only the use of the property has been contributed, is frequently a disputed question of fact. Partners should avoid the difficulty by means of a definite transfer or agreement¹). Where a partner has agreed to make a certain contribution by way of capital or advance, but fails to contribute according to its terms, he is a debtor to the partnership for the agreed amount and liable for interest only from the date payment should have been made²). An advance is differentiated from a contribution to the capital stock in that it does not in any manner affect the terms of the previous agreement as where profits and losses are to be shared according to the stock contributed, and, in that interest is due thereon from the date the advancement is made. When repayment is to be made before the dissolution and liquidation, the advancement is by way of loan, but where no term is agreed the right to repayment arises only on final liquidation and account. This does not include advances made in the ordinary course of business and without agreement among the partners, in which case the party making the advancement is entitled to repayment forthwith³).

While the general rule for the sharing of losses is, as stated, according to the sharing of profits⁴), this rule is not universal⁵). The better authority and reason appears to support the general rule stated⁶). The cases appear to be confused because of the methods of accounting, and because of the equities arising out of the circumstances of particular cases rather than out of the principles of equity. One class of cases arises from the difficulty of ascertaining the exact nature of the contribution, as where the partners contribute capital stock unequally or where one contributes all the capital and the other only skill and labor. Some courts have held, perhaps incorrectly, that each contributed merely the use and so the first must bear all the loss of capital⁷). This result does not obtain generally⁸). This last result might be reached in Pennsylvania⁹). The difficulty in these cases arises from the failure to consider capital and advances as liabilities of the partners collectively. Where the loss is due to fraud, culpable negligence, or bad faith, it is charged to the guilty partner and not to the partners collectively¹⁰).

2. The firm must indemnify every partner in respect of payments made an personal liabilities incurred by him: a) In the ordinary and proper conduct of the business of the firm; or b) In or about anything necessarily done for the preservation of the business or property of the firm.

As to the first of these rules, all the States are in accord¹¹); as to the second, the American cases do not appear to have raised the exact question but the English law would no doubt be followed¹²).

3. A partner, making for the purpose of the partnership any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the legal rate per annum from the date of the payment or advance¹³). Some States refuse to recognize any definite rule but hold that interest should not be allowed on partnership accounts before there has been an accounting or settlement of the same, unless, under the peculiar facts and circumstances surrounding the case, the equities demand that interest be charged¹⁴).

¹) *Mallett v. Kellar*, (1904) 86 N. Y. Supp. 917; affirmed (1905) 181 N. Y. 543; *Delp v. Edlis*, (1899) 190 Pa. 25; *Frederick v. Cooper*, (1856) 3 Ia. 171. — ²) *Delp v. Edlis*, (1899) 190 Pa. 25; *Freligh v. Miller*, (1862) 16 La. Ann. 418; *Rule v. McGregor*, (1902) 117 Ia. 419. — ³) 30 Cyc. 440, 441, *Burdick on Partnership*, (2d Ed.) 360. — ⁴) 30 Cyc. 452. — ⁵) *Bates on Partnership*, sec. 812 et seq.; *Mechem on Partnership*, §§ 306—308. — ⁶) *Whitecomb v. Converse*, (1875) 119 Mass. 38; *Hasbruck v. Childs*, (1858) 16 N. Y. Super. Ct. (3 Bosw.) 105. — ⁷) *Knapp v. Edwards*, (1883) 57 Wis. 191; *Cameron v. Watson*, (1858) 10 Rich. Eq. (S. C.) 64; *Yohe v. Barnet*, (1841) 3 W. & S. (Pa.) 81; *Everly v. Durbarrow*, (1871) 8 Phila. 93. — ⁸) *Whitecombe v. Converse*, (1875) 119 Mass. 38; *Hasbruck v. Childs*, (1858) 16 N. Y.

Super. Ct. (3 Bosw.) 105; *Savery v. Thurston*, (1879) 4 Ill. App. 55; *Richards v. Grinnell*, (1884) 63 Ia. 44; *Gill v. Geyer*, (1864) 15 Ohio St. 399. — ⁹) *Emerick v. Moir*, (1899) 124 Pa. 498. — ¹⁰) *Hall v. Sannoner*, (1884) 44 Ark. 34; *Chalmers v. Chalmers*, (1889) 81 Cal. 81; *Morrison v. Smith*, (1876) 81 Ill. 221; *Lyons v. Lyons*, (1903) 207 Pa. 7; *Caldwell v. Leiber*, (1839) 7 Paige (N. Y.) 483. — ¹¹) 30 Cyc. 450; *Bates on Partnership*, sec. 766. — ¹²) *Lindley on Partnership*, (7th Ed.) 404. — ¹³) 30 Cyc. 699; *McAlister v. Payne*, (1899) 108 Ga. 517; *Jordan v. Wilson*, (1895) 64 Ill. App. 665; *Rogers v. Clement*, (1900) 162 N. Y. 422. — ¹⁴) *Goodwill v. Heine*, (1905) 212 Pa. 595; *Seibert's Assignee v. Ragsdale*, (1898) 103 Ky. 206.

4. A partner is not entitled to interest on his share of the capital except from the date repayment should be made¹).

5. All the partners have equal rights in the management and conduct of the partnership business. This right exists in limitation of the right of majority action²).

6. No partner is entitled to remuneration for acting in the partnership business³).

7. No person may be introduced as a partner in the business without the consent of all the existing partners⁴).

8. Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement may be done without the consent of all the partners⁵). This rule does not, however, extend to matters of a fundamental nature, but only to matters within the ordinary course of business⁶). This rule has, of course, no effect as to third persons. Whether the minority can prevent the action of the majority by notice to third persons is uncertain as has been indicated, *supra*. Mere knowledge of the dissent of one or more of the partners is not effective to prevent liability on the part of the partners dissenting to the third persons who have such knowledge.

9. The partnership books must be kept at the place of business of the partnership (or the principal place if there is more than one) and every partner can have access to and may inspect and copy any of them⁷).

Whether the agent or representative of a partner has a right, in law or equity, to have access to the books is in doubt. It would appear that such right does not exist, at least where the copartners have reasonable grounds for objection to such inspection⁸).

E. Use of Partnership Property. — 1. IN GENERAL. — All partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement⁹).

2. DUTY TO RENDER ACCOUNTS. — Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representative, when required by the partnership agreement or by law. This duty exists, in the absence of any agreement, as to every contract and transaction, to the extent of keeping full and accurate accounts thereof in the proper books¹⁰). Since the partners have equal and free access to the books, in the absence of agreement, the entries are deemed accurate and presumed to be known to each of the partners; this presumption may be overthrown by other evidence¹¹). Where one partner assumes the duty of keeping the books of account, the entries will generally be

¹) 30 Cyc. 698; *Lesserman v. Bernheimer*, (1887) 10 N. Y. 47; *Harris v. Carter*, (1888) 147 Mass. 313; *O'Brien v. Brumback*, (1889) 71 Ky. Law Rep. 405; *Rogers v. Clement*, (1900) 162 N. Y. 422; *Lamb v. Rowan*, (1903) 83 Miss. 45. — ²) 30 Cyc. 446; *Harris v. Harris*, (1902) 132 Ala. 208; *Groth v. Payment*, (1890) 79 Mich. 290; *Wilcox v. Pratt*, (1890) 125 N. Y. 688; *Story on Partnership*, (7th Ed.) sec. 123. — ³) *Nevilles v. More Mining Co.*, (1902) 125 Cal. 561; *McAlister v. Payne*, (1905) 108 Ga. 517; *McDowell v. North*, (1899) 24 Ind. App. 435; *Hoag v. Alderman*, (1903) 184 Mass. 217; *Evans v. Warner*, (1897) 47 N. Y. Supp. 16; *Delp v. Edlis*, (1899) 190 Pa. 25; 30 Cyc. 448. — ⁴) *Burdick on Partnership*, (2d Ed.) 8, 344; *Marlett v. Jackman*, (1861) 3 Allen (Mass.) 257; *Story on Partnership*, (7th Ed.) sec. 5; *Bates on Partnership*, secs. 158, et seq. — ⁵) 30 Cyc. 446; *Bates on Partnership*, secs. 431 et seq. *Burdick on Partnership*, (2d Ed.) 230 et seq. *Markle v. Wilbur*, (1901) 200 Pa. 457; *Livingston v. Linch*, (1820) 4 Johns. Ch. (N. Y.) 592; *Johnston v. Dutton*, (1855) 27 Ala. 245; *Staples v. Sprague*, (1883) 75 Me. 458. — ⁶) *Gansvoort v. Kennedy*, (1859) 30 Barb. (N. Y.) 279; *Zabriskie v. Railroad*, (1867) 18 N. J. Eq. 178; *Abbott v. Johnson*, (1855)

32 N. H. 9; *Moore v. Knott*, (1885) 12 Ore. 260. — ⁷) *Bates on Partnership*, sec. 314; *Goodfrey v. White*, (1880) 43 Mich. 171; *Chandler v. Sherman*, (1876) 16 Fla. 99; *Fulmer's App.*, (1879) 90 Pa. 143; *Saunders v. Duvall*, (1857) 19 Tex. 467. — ⁸) *Trego v. Hunt*, (1896) A. C. (Eng.) 47; *Beavan v. Webb*, (1901) 2 Ch. (Eng.) 59. — ⁹) *Hanna v. McLaughlin*, (1902) 158 Ind. 292; *Stevens v. McLachlan*, (1899) 120 Mich. 285; *Stevens v. Coney*, (1874) 49 Miss. 761; *Boozar v. Webb*, (1886) 25 S. C. 82; *Bingham v. Keller*, (1901) 25 Wash. 156; *Maubray v. Maubray*, 3 N. Y. App. D. 227, (1899) 157 N. Y. 712; *Browning v. Coover*, (1885) 108 Pa. 595; *Gray v. Portland Bank*, (1807) 3 Mass. 364; *Rafferty v. Todd*, (1881) 34 N. J. Eq. 552. — ¹⁰) *Chandler v. Sherman*, (1876) 16 Fla. 99; *Knapp v. Edwards*, (1883) 57 Wis. 191; *Goodfrey v. White*, (1880) 43 Mich. 171; *Webb v. Fordyce*, (1880) 55 Ia. 11; *Pomeroy v. Benton*, (1882) 77 Mo. 64; *Hall v. Claggett*, (1877) 48 Md. 223; *Pierce v. Scott*, (1881) 37 Ark. 308; *Kelly v. Greenleaf*, (1843) 3 Story (U. S.) 105. — ¹¹) *Allen v. Coit*, (1844) 6 Hill (N. Y.) 318; *Shoemaker v. Shoemaker*, (1906) 29 Ky. Law Rep. 134; *Richard v. Manton*, (1903) 109 La. 465; *Garretson v. Brown*, (1898) 185 Pa. 447; *Ryman v. Ryman's Exr's*, (1901) 100 Va. 20.

treated as conclusive as against him¹). The duty to render the periodic account depends on the agreement; and the final account upon dissolution. The right to an account by decree of court may arise because of particular circumstances; as the wrongful use of partnership property; improperly engaging in a rival business; the failure of a partner, upon whom is the duty, to account in accordance with the agreement; or the absence of proper book accounts²).

3. PARTNER ACCOUNTABLE AS A FIDUCIARY. — Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction connected with the formation, conduct, or liquidation of the partnership, or from any use by him of the partnership property, name, or business connection. The representatives of a deceased partner engaged in the liquidation of the affairs of the partnership must account to the same extent and in the same manner as a partner³).

4. PARTNER ACCOUNTABLE FOR PROFITS FROM A RIVAL BUSINESS. — If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm, all profits made by him in that business⁴). In order to prevent a partner from engaging in another business which is not competing or within the scope of the business of the firm or to compel an account of the profits therefrom, a contract right must exist⁵).

F. Nature of Partner's Interest in Partnership Property. — Under the present confusion in the law on this subject, it is difficult to state any recognized or established definition of the nature of a partner's interest. Most authorities agree that it is not that of tenants in common or joint tenants as defined by the common law⁶). The decisions have worked out a result inconsistent with the incidents of such tenure; and the statutes in the western code States have created a new kind of tenure called a partnership interest and defined as "one owned by several persons, in partnership, for partnership purposes" (Cal. Civ. Code, sec. 684) in which "the interest of each member of the partnership extends to every portion of its property" (Cal. Civ. Code, sec. 2402⁷).

The incidents of this tenure as evolved by the decisions and declared by statute appear to be that:

1. The partners are co-owners of partnership property.
2. A partner has no right to possess partnership property, without the consent of his copartners, except for a partnership purpose.
3. A partner's right, as co-owner, in specific partnership property is not assignable for any other than a partnership purpose except with the consent of all the partners.
4. A partner's right as co-owner of specific partnership property is not subject to attachment or execution except on a claim against the firm.
5. A partner's right as co-owner in partnership property is personal estate as between his heirs and executor or administrator, in the absence of an express provision or agreement to the contrary.

¹ Caswell v. Hazard, (1892) 19 N. Y. Supp. 721; Stidger v. Reynolds, (1841) 10 Ohio, 351; Rohr v. Pearson, (1888) 16 Oreg. 325; Lewis v. Laper, (1893) 54 Fed. 237. — ² Bates on Partnership, secs. 313, 314, Sanger v. French, (1898) 157 N. Y. 213 Maloney v. Crow, (1898) 11 Colo. App. 518; Miller v. Freeman, (1900) 111 Ga. 654; Hogan v. Walsh, (1905) 122 Ga. 283; Lord v. Hull, (1904) 178 N. Y. 9. — ³ Williamson v. Monroe, (1900) 101 Fed. 322; Mattern v. Canavan, (1906) 3 Cal. App. 493; Deane v. O'Hara, (1906) 36 Colo. 476; Coleman v. Coleman, (1881) 78 Ind. 344; David Belasco Co. v. Klaw, (1905) 97 N. Y. Supp. 712; Gates v. Paul, (1903) 117 Wis. 170; Jones v. Dexter, (1881) 130 Mass. 380; Wescott v. Tyson, (1861) 38 Pa. 389; Raison's Adm. v. Williams, (1897) 19 Ky. Law Rep. 1142; Gaskill v. Spence, (1900) 83 Mo. App. 380; Marlatt v. Scantland, (1858) 19 Ark. 443. — ⁴ Van Deusen v. Crispell, (1906) 114

N. Y. App. Div. 361; Marshall v. Johnson, (1863) 33 Ga. 509; Lockwood v. Beckwith, (1858) 6 Mich. 168; Norwood v. Norwood, (1815) 4 H. & J. (Md.) 112; Amer. Bank Note Co. v. Edson, (1870) 50 Barb. (N. Y.) 84. — ⁵ Starr v. Case, (1882) 59 Ia. 491; Drew v. Beard, (1871) 107 Mass. 67; Kelley v. Shay, (1903) 203 Pa. 215; Tichenor v. Newman, (1900) 186 Ill. 264; Latta v. Kilbourn, (1893) 150 U. S. 524; Levine v. Michel, 35 La. Ann. 1121. — ⁶ Burdick on Partnership, (2d Ed.) 101; Jas. Parsons on Partnership, secs. 97 et seq.; Beale's Parsons on Partnership, (4th Ed.) sec. 78, Bates on Partnership, secs. 80 et seq. Collier on Partnership, sec. 108; Story on Partnership, secs. 89 et seq. — ⁷ Secs. in accord; Okla. C. C., sec. 4841; Ga. Code, (1911) secs. 3155, 3169; Rev. Codes of N. Dak., (1905), secs. 4720, 5822; Rev. Codes of Mont., (1907) secs. 4439, 5469; S. Dak. Comp. L., (1908) sec. 1727.

6. A partner may assign or transfer or his creditors may seize by legal process, without the consent of the other partners, the whole or a part of his interest as co-owner but the assignee, transferee, or execution purchaser secures only the right to receive any profits to which the partner may be entitled, and the partner's share of what remains on liquidation and settlement of partnership affairs and equities after dissolution¹).

Cases, which have worked out these results by means of a separate entity, exist in States which in other respects reject the entity theory²). The opposite view that the title remains in the partners, is maintained in other cases³).

G. Partner's Share. — The nature of a partner's interest is entirely distinct from the nature of his share. While there is some doubt in the law as to what is the nature a partner's interest, the same is not true as to his share. All the States agree that a partner's share in the partnership is his interest in the profits and in the surplus of of the partnership assets after all the partnership debts and obligations and the equities of the partners have been satisfied⁴).

It is this share or right which is the subject of assignment by a partner without the consent of his copartners, and is liable to seizure by means of legal process by the separate creditors of the partner. It is this right which is the subject of co-ownership by subpartners. In each case, the rights of the parties claiming through the partner are the rights which the partner has as against his copartners other than such as are entirely personal. Thus, persons claiming rights merely through the rights of one of the partners, cannot take any part in the business; cannot inspect the books; cannot demand an account except on dissolution; cannot take possession of any of the partnership property; nor in any other way interfere with the conduct of the business. All these rights are personal as between the partners, and a third person cannot secure any rights or privileges therein except with the consent of all the partners⁵).

Unless the contrary intention is manifest, each partner's share is personal property as between his heirs and personal representatives. There are, however, some cases which appear to hold that where the partnership is engaged in transactions in real estate, there is no conversion as between his heirs and personal representatives as to this real property. The same is true where there is real property and an agreement for the partition of the real property on dissolution of the firm. Each of these cases depends, more or less, on the nature of the contract and the particular facts and is not subject to any hard and fast rule of law. Where, however, a portion of a partner's share is or will be composed of real property, the wife or widow possesses no rights of dower or exemption in such property before all partnership obligations have been satisfied and the real property comes into the separate estate of the partner; the same is true as to the judgment-liens of the separate creditors of a partner⁶).

H. Assignment of a Partner's Share. — An assignment by a partner of his share in the partnership does not of itself dissolve the firm, nor, as against the other

¹) 30 Cyc. 444; *Kiennewig v. Schilansky*, (1898) 45 W. Va. 521; *Pratt v. McGuinness*, (1899) 173 Mass. 170; *Lambert v. Griffith*, (1883) 50 Mich. 286; *Ewart v. Mercantile Co.*, (1895) 130 Mo. 112; *Filley v. Philips*, (1847) 18 Conn. 294; *Claiborne v. His Creditors*, (1841) 18 La. 501; *Arnold v. Wainwright*, (1861) 6 Minn. 358, 369; *Crooker v. Crooker*, (1861) 46 Me. 250; *Nixon v. Nash*, (1861) 12 Ohio St. 647. — ²) *Tarrant v. Swain*, (1875) 15 Kas. 145; *Wiggins v. Blackshear*, (1890, Tex. Civ. App.) 24 S. W. 918; reversed in (1894) 86 Tex. 665; *Teague v. Lindsay*, (1894) 106 Ala. 278; *Arnold v. Hagerman*, (1889) 45 N. J. Eq. 197; *Bulger v. Rosa*, (1890) 119 N. Y. 465; *Pratt v. McGuinness*, (1899) 173 Mass. 170. — ³) *Molineaux v. Reynolds*, (1896) 54 N. J. Eq. 559; *Hallowell v. Blackstone*, (1891) 154 Mass. 359; *Bank v. Thompson*, (1890) 121 N. Y. 280; *Bedford v. McDonald*, (1899) 102 Tenn. 364; *Darby v. Gilligan*, (1889) 33 W. Va. 246; *Bartlett v. Meyer-Schmidt*, (1898) 65 Ark.

290; *Sergeant v. Blake*, (1908) 160 Fed. 57; *Case v. Bureau*, (1878) 99 U. S. 119; *Wanamaker v. Buchanan*, (1907) 33 Pa. Super. Ct. 138. — ⁴) 30 Cyc. 444, 689; *Burdick on Partnership*, (2d Ed.) 120; *Shearer v. Shearer*, (1867) 98 Mass. 107; *Lambert v. Griffith*, (1883) 50 Mich. 286; *State v. Bristow*, (1878) 73 N. Y. 264; *Trowbridge v. Cross*, (1886) 117 Ill. 109; *Nixon v. Nash*, (1861) 12 Ohio St. 647; *Bates on Partnership*, secs. 180—191. — ⁵) 30 Cyc. 458, 541, 548, 551; *Robbins v. Cooper*, (1822) 6 Johns. Ch. (N. Y.) 186; *In re Hallock*, (1905) 95 N. Y. Supp. 105; *In re Stewart's App.*, (1899) 193 Pa. 347; *McMillan v. Hadley*, (1881) 78 Ind. 590; *Holmes v. Miller*, (3333) 19 Ky. Law Rep. 660; *Mathewson v. Clarke*, (1848) 6 How. 122; *Stokes v. Stokes*, (1891) 59 Hun (N. Y.) 431; *Nixon v. Nash*, (1861) 12 Ohio St. 647. — ⁶) See *Robinson v. Miller*, (Ill. 1894) 27 L. R. A. 449, and cases cited in the note; also notes in 28 L. R. A. 86.

partners, in the absence of an agreement, entitle the assignee, during, the continuation of the firm, to interfere in the management or administration of the partnership business or affairs, or to require an account of the partnership transactions, or to inspect the partnership books; but merely entitles the assignee to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of the profits agreed to by all the partners¹).

But, in case of a dissolution of the partnership, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and, for the purpose ascertaining that share, to an account as from the date of the dissolution. This right results under the preceding paragraphs.

J. Rights of individual creditors against partner's share. — The share of a partner in the partnership is in all States subject to process of one kind or another by the individual creditors of the partner so as to subject the partner's share to such creditor's debt or obligation. The process differs in the various States and depends almost entirely on statute. In most States, it is now provided that the property of the firm cannot be seized on execution, and thus taken out of the possession and control of the firm; but must be made subject to the debt by means of an attachment process or by an equitable proceeding. Where the interest is subject to levy and the property is seized, the sale passes only the interest of the partner therein and does not pass any title to any of the corpus of the property. The present confusion, resulting from the modes used, will no doubt in time be eliminated by the adoption of some such proceedings as that employed in England, that is by a proceeding in the nature of the present equitable charging order. At present, the laws of each State must be considered in order to ascertain the proper proceeding to be employed²).

V. DISSOLUTION OF PARTNERSHIPS. — A. In General. — There appears to be considerable confusion in the cases as to the nature of a dissolution and how it is brought about. The results are on the whole fairly certain. Where difficulties are encountered, they are usually due to the peculiar facts. Thus, it will be found in the cases, that a dissolution occurs by operation of law; that a dissolution does not necessarily occur upon the admission of a new partner, whether an existing member of the firm retires or not; that a dissolution does not necessarily occur whenever one partner retires. It is, however, believed that these statements are merely misleading and that the results are produced by peculiar facts which have counteracted the dissolution or its effects. Much of the confusion of the cases is due to the use of the term dissolution to designate both the breaking up of the personal relation and the final liquidation and settlement of all the partnership affairs. If the term "dissolution" be confined to the designation of the breaking up of the personal relation and "termination" of the partnership to the final settlement of all the partnership affairs, the cases will simplify themselves to a considerable extent. While the personal relation may be terminated and the partnership may have attempted to bring to a close all its affairs, yet, so long as there are any outstanding debts or obligations, it is amenable to suit; and so long as proper and sufficient notice has not been given to persons who are entitled to rely on the continued existence of the firm, any one partner can bind the others as to persons who have no knowledge of the termination of the personal relation. Because of these results great care must be taken in the termination of the relation. The general law is well illustrated by the codes of Georgia and California, *infra*.

B. Definition. — The dissolution of the partnership is the termination of the personal relation caused by the consent of all the partners or by the retirement of any one or more of the partners. To this definition must be added the fact that it is also said to result where a new member is admitted into the firm when none of the existing members retires. Whether this can, in all cases, be brought under a dissolution by consent or not, is in doubt. This question arises when creditors, who became such

¹) 30 Cyc. 605; Beale's Parsons on Partnership, (4th Ed.) secs. 106, 305, 306; Story on Partnership, secs. 272, 307, 308; Bates on Partnership, secs. 158—168, 931—933. —

²) Nixon v. Nash, (1861) 12 Ohio St. 647; Claggett v. Kilbourne, (1861) 1 Black, 346; Phillips v. Cook, (1840) 24 Wend. (N. Y.) 389; Fogg v. Laury, 68 Me. 78; Hoaglin v.

Henderson, (1903) 119 Ia. 720; Hutchinson v. Brassfield, (1900) 86 Mo. App. 40; Hawes v. Waltham, (1836) 35 Mass. 451; Horne v. Petty, (1899) 192 Pa. 32; Raley v. Smith, (Texas, 1903) 73 S. W. 54; 38 Cent. Dig. Partnership, sec. 389; 15 Dec. Dig. Partnership, sec. 208; 30 Cyc. 572—579.

before the admission of the new member, seek to subject the property of the new firm to the satisfaction of their claims, after the admission of the new member. The courts usually say that this cannot be done because a new firm has come into existence upon the admission of the new member. In all such cases it must be found that the new firm has agreed to assume the debts and obligations of the old firm. The movement of business men, however, is away from this position; and the law will doubtless compel the new firm to continue liable for the pre-existing liabilities. Business expediency often demands that there shall not be any break in the affairs of a firm by reason of the admission of a new member; and there is no resulting condition which demands such effect.

C. Continuance beyond Fixed Term. — Where a partnership, entered into for a fixed term or a particular undertaking, is continued after the term has expired or the undertaking has been completed and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will. A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership. It has been said that a new firm results¹); but the law is as stated²).

But where there is no fixed term, and the partnership is only at will, as to third persons and the partners inter se, there is the ordinary presumption of fact that it still continues unless there has been notice, either express or from the circumstances, that one or more of the partners has dissolved the relation³).

D. Power of Partners to Dissolve. — There is considerable confusion as to the power of any one or more, but not all, of the partners to cause a dissolution of the firm, where it is entered into for a particular term or undertaking. There are a number of jurisdictions which deny the right except with the consent of all the partners⁴). The prevailing view, however, in this country is contrary to these cases. Most jurisdictions hold that any one partner may dissolve the firm, being responsible only to his partners for damages under the contract⁵).

In the western code States, there exists what is called a partial dissolution whereby the partnership is dissolved as to the retiring partner only. There do not appear to be any cases construing these statutes in their practical application⁶). It is a probable deduction that these statutes will be construed to have the same effect as is produced by the prevailing law.

E. Methods of Effecting Dissolution. — There are no formal requisites for the causing of a dissolution. It is sufficient that notice be given to the other partners and to such third persons as are entitled to rely on the continued existence of the partnership. The character of this notice is considered, *infra*.

1. BY ACT OF THE PARTNERS. — A dissolution by one or more of the partners may be rightfully brought about under the terms of the contract or wrongfully in contravention of the terms of the contract, in which case the other partners are entitled to damages on final accounting. A dissolution is had rightfully under the terms of the contract:

a) By the manifest intention of any or all of the partners at the termination of the particular term or undertaking specified in the agreement.

b) By the express will of any or all of the partners when no definite term or particular undertaking is specified.

¹) George on Partnership, 395. — ²) Jurgens v. Ittman, (1895) 47 La. Ann. 367; Riddle v. Whitehill, (1889) 135 U. S. 621; Reybold v. Dodd's Adm., (1834) 1 Harr. (Del.) 401; Cooper v. Dedrick, (1856) 22 Barb. (N. Y.) 516; Potter v. Moses, (1850) 1 R. I. 430. — ³) Watters v. McGreavy, (1900) 111 Ia. 538; Moline Wagon Co. v. Rummell, (1880) 12 Fed. 658; Tudor v. White, (1864) 27 Tex. 584; Thurston v. Perkins, (1841) 7 Mo. 29. — ⁴) McMahon v. McLearnan, (1877) 10 W. Va. 419; Cole v. Moxley, (1878) 12 W. Va. 747; Harvey v. Howell, (1843) 5 Ark. 270; Campbell v. Bowser, (1873) 49 Ga. 417; Johnston v. Dutton, (1855) 27 Ala. 245; Ferrero v. Buhlmeier,

(1867) 34 How. Pr. (N. Y.) 33; Hannaman v. Karriek, (1893) 9 Utah 236; von Tagen v. Roberts, (1871) 4 Leg. Op. (Pa.) 610. — ⁵) 3 Kent Com. sec. 54; Skinner v. Dayton, (1822) 19 Johns. (N. Y.) 513, 537; Monroe v. Connor, (1838) 15 Me. 178; Slemmer's App. (1868) 58 Pa. 168; Solomon v. Kirkwood, (1864) 55 Mich. 256; Carr v. Hertz, (1895) 54 N. J. Eq. 127; Moore v. Price, (1896) 116 Ala. 247; Karriek v. Hannaman, (1897) 168 U. S. 328; Lapenta v. Lettieri, (1899) 72 Conn. 377. — ⁶) Cal. C. C., sec. 2418; S. Dak. Code, sec. 1736; Okla. C. C., sec. 4850; N. Dak. C. C., sec. 5848; Mont. C. C., sec. 3262; Ga. C. C., sec. 2633.

c) By the express will of all the partners who have not suffered their interests to be charged for their separate debts.

d) By the expulsion of any partner from the business bona fide in accordance with such power conferred by the partnership agreement.

All of these methods of dissolution exist throughout the different States¹⁾.

2. WRONGFULLY UNDER THE CONTRACT. — A partnership is wrongfully dissolved under the terms of the contract, where the circumstances are not such as to permit a dissolution by decree of court, by the express will of any one or more but not all of the partners before the termination of the definite term or particular undertaking specified in the contract. This is illustrated by the cases cited under power to dissolve, *supra*.

3. BY OPERATION OF LAW. — This classification should be confined to the cases where the dissolution is caused by decree of court or by the happening of an event which makes it unlawful for the business of the firm to be carried on or for the members to carry it on in partnership²⁾. The present legal terminology, however, also includes the cases where the dissolution is produced by:

- a) The death of a partner;
- b) By a partner or the firm being declared bankrupt or insolvent;
- c) By the marriage of a female member of a firm, under the common law;
- d) By decree of court.

4. BY DECREE OF COURT. — On the application by a partner the court may decree a dissolution of the partnership in any of the following cases:

a) When a partner has been found lunatic by inquisition or is shown to the satisfaction of the court to be of unsound mind, in either of which cases the application may be made either on behalf of that partner by his committee or next friend or person having title to intervene or by any other partner.

b) When a partner, other than the partner suing, becomes in any other way incapable of performing his part of the partnership agreement.

c) When a partner, other than the partner suing, has been guilty of such conduct as in the opinion of the court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business of the partnership.

d) When the partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practical for the other partner or partners to carry on the business in partnership with him.

e) When the business of the partnership can be carried on only at a loss.

f) Whenever circumstances have arisen, which, in the opinion of the court, render it just and equitable that the partnership be dissolved³⁾. It is said in some of the cases that the assignment of one partner of his interest to a third person dissolves the partnership; but it is to be noted that these cases are usually limited to transfers by one partner to one of his copartners, in which cases the dissolution results rather by consent, and that the partner assigning manifests an intention that he does not intend to continue to perform his part of the contract⁴⁾. There is considerable doubt whether, where a partner assigns all his interest in the partnership property but intends to perform all the duties imposed upon him by the relation, the other partners or third persons would be entitled to treat the partnership as dissolved or whether the court would without more decree a dissolution. If the partnership could be so treated, such a right could be evaded by the partner retaining but a small part of his interest and transferring the remaining part to a subpartner. The essential elements of the association are the personal relation and the continued credit of the partners. So long as these are maintained, there does not appear to be any valid reason for holding that the partnership has been dissolved; and the courts would hardly carry the law to the extent stated by those authorities. Where the assigning partner does not intend or refuses to perform his duties and obligations, or has impaired his credit so that his partners can continue the relation with him only at a

¹⁾ See 38 Cent. Dig. Partnerships, sec. 605 et seq.; 30 Cyc. 651 et seq. — ²⁾ 30 Cyc. 653, 655. — ³⁾ 30 Cyc. 656; 38 Cent. Dig. Partnerships, secs. 611 et seq. — ⁴⁾ *Rowe v. Simmons*, (1896) 113 Cal. 688; *Lendholm v. Bailey*, (1901) 16 Colo. App. 190; *Phelps v. State*, (1899) 109

Ga. 115; *Lesure v. Norris*, (1853) 65 Mass. 328; *Emerson v. Parsons*, (1870) 46 N. Y. 560; *Swoope v. Wakefield*, (1899) 10 Pa. Super. Ct. 342; *Conrad v. Buck*, (1883) 21 W. Va. 396.

risk to the business, a dissolution may be had by decree of the court under the rules stated above.

F. When Effective. — 1. IN GENERAL. — A dissolution becomes effective as to the other partners only when they have notice of the intention of a partner to dissolve the partnership. This notice may arise from express notice of the intention or may arise from notice of facts which can reasonably be held to give them notice of the fact that one of the partners intends to dissolve the firm. Thus where one of the partners has become bankrupt or has brought such proceedings or actions as to make the fact of dissolution known to them, there is sufficient notice. The same is true where a partner has been declared to be insolvent. It is also said that each partner must take notice of the death of any one of the partners. The law as to agency is being changed by statute so that actual knowledge of the death must be found so as to cause a termination of the agency. This rule should apply also to partnership agency.

2. AS TO THIRD PERSONS. — After dissolution of the partnership third persons by dealing with any partner, not bankrupt, may bind the other partners in the same manner and to the same extent as if the partnership had not been dissolved, except:

a) That no liability shall attach to the estate of a partner who has died, or who has become bankrupt, or who has retired from the firm having been a secret and inactive partner. This is the general statement of the law, but it would appear that a more accurate statement would be that the liability of a deceased, bankrupt, or retired secret and inactive partner should be merely limited to his interest in the existing partnership property. In this manner any confusion would be avoided as to such creditors' right to subject the partnership property remaining in the business to their claims.

b) Where the dissolution has been caused by an event which made it unlawful for the business of the firm to be carried on, or for the members to carry it on in partnership.

c) When such third person, having had business relations with the firm prior to the dissolution by which a credit was extended on the faith of the partnership, has had actual knowledge or notice of the dissolution.

d) When such third person has not had dealings with the firm prior to the dissolution by which a credit was extended on the faith of the existence of the partnership and the fact of dissolution has been advertised in a daily newspaper of general circulation of the place or of each place if more than one, in which at the time of the dissolution, the business of the firm was regularly or notoriously carried on; or the fact of the dissolution is notorious in the community in which such third person is engaged in business.

G. Character of the Notice. — 1. IN GENERAL. — Notice exists as to third persons where such notice has been actually delivered to the person to be charged with notice; so, also, where such third person has knowledge of facts which would put a reasonable man on inquiry. Thus, notice may be implied from the change in the name of the firm or in the conduct of the firm business¹).

Where the dissolution is by operation of law, that is by the death or bankruptcy of any one of the partners, by decree of court, by war or any event which makes it unlawful for the business to be carried on or for the members to carry it on in partnership, the notice results in law without more²). To this broad rule there may exist considerable objection, but the cases at present support such a rule.

In the case of the death of a partner, there is a valid reason why the estate of the deceased partner should not be made liable for the subsequent transactions of the firm; but there does not exist the same reason for denying liability as to the other partners not deceased; and this is especially true where the partner acting in the particular matter does so in good faith and in ignorance of the death of any one partner. Death is not such a notorious event as is necessarily or even possibly known to all persons as has been held in some cases³). This rule has been modified by

¹ Edward v. Wheeler's Est., (1902) 130 Mich. 219; Watkinson v. Bank of Penn., (1839) 4 Whart. (Pa.) 482; Prentiss v. Sinclair, (1831) 5 Vt. 149; Graves v. Merry, (1827) 6 Cow. (N. Y.) 701; Ketcham v. Clark, (1810) 6 Johns.

(N. Y.) 144; Cogswell v. Davis, (1886) 65 Wis. 191; Polk v. Oliver, (1879) 56 Miss. 566; Cent. Nat. Bank v. Frye, (1889) 148 Mass. 498. — ²) 30 Cyc. 671. — ³) Marlett v. Jackman, (1861) 3 Allen (Mass.) 257, 550.

statute and decision as to agency and should be also modified as to partners. The same objections are applicable to the other events causing dissolution by operation of law, except where the dissolution is by reason of the fact that it is unlawful to carry on the business. The only safe plan is for partners in every case of dissolution to give notice to those persons who have had prior dealings with the partnership, and public advertisement of the fact so as to avoid liability as to persons who have not had any prior dealings with the firm. The courts in some jurisdictions will refuse to adhere to any hard and fast rule; but decide each case upon its own facts. This question deserves serious consideration because by means of the notice the agency of the other partners to act for the partner is terminated and because the liability of any one partner for such acts can only thus be safely terminated.

2. PERSONS ENTITLED TO NOTICE. — There is some confusion as to the persons entitled to personal notice. Some authorities hold that actual notice need be given only to such persons as have had prior dealings with the firm by reason of which a credit has been extended to the firm; while others hold that such notice must be given to all persons who have had dealings with the firm whether a credit was extended or not. On reason, this last rule appears to be the proper one; but in expediency the former appears to be the better rule especially where the firm is considered as one doing an extensive business; but this gives a protection to the few large businesses to the detriment of third persons who may have had dealings with the firm which have created a holding out of the partners as having the authority to do acts involving credit; and the persons, relying on such prior holding out, may subsequently enter into a transaction with one of the partners involving credit and be prevented from holding the other partners, simply because of the fortuitous fact that no credit was extended in the prior transactions. It is believed that this is a departure from the general law of agency which is not justified merely as being for the protection of the firms which do an extensive business¹).

3. BANKRUPT PARTNERS. — In the case of a dissolution caused by the bankruptcy of any one partner, the bankrupt is incapable of making any binding contract either personally or by his agent, and so he or his estate could not be bound, but *quaere* whether the other partners and their estates should not be bound by the acts of any other partner who has not become bankrupt. The same objections exist as to this case, as to the foregoing. There should be at least a reasonable possibility that the persons, whether the partner acting or the third person seeking to hold the other partners, might have knowledge of the bankruptcy of the partner.

4. DORMANT PARTNERS. — Where a dormant partner has retired, one of the underlying reasons for the notice does not exist. For third persons did not know of his relation, did not trust to him, and did not deal with a known agent of his. There is a conflict, however, between the application of the rules to such partner and to an undisclosed principal. The rule is, however, well established that the dormant partner need not give any notice except to such persons as have actual knowledge of his association in the business. It need not be known to the dormant partner that such third person has knowledge of his membership in the partnership. He must assume the risk that no person has knowledge of his relation with the firm or that such person may not have any dealings with the firm after his retirement. In the absence of the ordinary notice, as in other cases, any person who may happen to have knowledge of his association in the firm, can hold such dormant partner, if he contracts with one of the partners relying on the dormant partner's continued membership in the firm. The only safe practice is for all partners, whether dormant or not, to give the required notice. This is true, also, where one of the partners has died or become bankrupt and the others do not desire to be bound by the acts of the other partners. The cases cited for the rule that no such notice need be given in the cases of death or bankruptcy have to do generally with the estate of the deceased or bankrupt partner and not with the liability of the other partners.

H. Right of Partners to Notify Dissolution. — On the dissolution of a partnership, any one of the partners may publicly notify the same and may require the other partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

¹ 30 Cyc. 671; Parsons on Partnership 38 Cent. Dig. Partnerships 1550; 15 Dec. Dig. (4th Ed.) 408; Bates on Partnerships, secs. Partnerships 1286.
613—615; Mechem on Partnership, sec. 261;

1. Discharge of Partner from Liability on Dissolution. — 1. IN GENERAL. —

The dissolution of the partnership does not of itself discharge the existing liability of any partner. This result follows from the fact that the right of action has become vested and that the partners cannot affect the rights of the creditor without his consent. The right of the creditor continues as it was before the dissolution, that is he has the right to join all parties whom he could have joined had the dissolution not taken place. This right exists though one or more of the partners have agreed to continue the business and to assume all the liabilities of the dissolved firm. This liability will attach as to contracts made after the dissolution of the partnership in favor of persons who have had dealings with the firm after the dissolution of the firm in reliance on the continued existence of the partnership. There may be some doubt where one or more of the partners retire and one or more new partners enter into the new partnership and the retired partners become liable for transactions after their retirement because of failure to give proper notice, whether the retired partners can be joined in the action with the incoming partners; or whether the person seeking to enforce the liability must elect whether he will hold the members of the old firm or the members of the new firm only. There are a few decisions which appear to hold that he may join both in the same suit, though the exact question has not arisen in any of the cases discovered. As pointed out before, it is believed that he should be permitted to join the retired and the incoming partners, for the incoming partners are liable because they are partners in fact and the retired partners because the law says that they have been held out and so they must be held to have permitted the holding out by the members of the new firm and the members of the new firm must be responsible for the effects, in law, of their acts of holding out.

2. DISCHARGE FROM LIABILITY BY AGREEMENT. — A partner is discharged from any existing liability upon the dissolution of the partnership by an agreement to that effect between himself, the existing partnership creditors, and the persons or partnership continuing the business, and this agreement may be either express or inferred from the course of dealing between the creditors, having notice or knowledge of the dissolution, and the person or partnership continuing the business. This results under the law concerning novations¹). This agreement will not be proven by the mere assent of the existing firm creditors unless such assent is such as to produce a binding contract²).

In some States, the firm creditors are not permitted to enforce the contract of the continuing person or partnership to assume all the liabilities directly against the assignee³). But in other States it is held that the creditor has a right to bring his action directly against the assignee⁴).

3. RETIRED PARTNERS SURETIES. — Where the person or partnership continuing the business agrees to assume all the existing liabilities of the dissolved firm, the partners, who are not engaged in continuing the business, with whom the agreement is made are merely sureties for the payment of such liabilities as to all persons who have actual notice or knowledge of the agreement. Under this rule the liability of the partners who retire continues to the extent of the liability as it existed at the time of retirement; but any subsequent action by the creditor with the continuing person or partnership, whereby the time of payment is extended or the nature of the liability is in any other manner changed, is held to discharge the retired partner in the same manner as a surety is discharged. This rule is not universal; but it is believed that the results are, in most cases, the same under the opposing rule; for the continuing person or partnership has no authority to do any act for or on behalf of the retired partner or partners, except for the purpose of winding up and liquidating the affairs of the dissolved firm⁵).

¹) 30 Cyc. 615; Beale's Parsons on Partnership, (4th Ed.) sec. 325 et seq. — ²) Chase v. Vaughn, (1849) 30 Me. 412; Frenstress v. Markle, (1850) 2 G. Gr. 553; First Nat. Bank v. Cheney, (1897) 114 Ala. 536; Fowler v. Coker, (1899) 107 Ga. 817; Wiley v. Temple, (1899) 85 Ill. App. 69; Nickerson v. Russell, (1899) 172 Mass. 584; Motley v. Wickhoff, (1897) 113 Mich. 231; Bronx Metal Co. v. Wallerstein, (1903) 84 N. Y. Supp. 294. —

³) Hicks v. Wyatt, (1861) 23 Ark. 55; Darling v. Rutherford, (1900) 125 Mich. 70, Bronx Metal Co. v. Wallerstein, (1903) 84 N. Y. Supp. 924. — ⁴) Beesemer Savings Bank v. Rosenbaum Grocery Co., (1903) 137 Ala. 530; McGibbon v. Walsh, (1901) 109 Wis. 670; Allen v. Cooley, (1898) 53 S. C. 77; Lowe v. Thompson, (1882) 86 Ind. 503. — ⁵) 15 Dec. Dig. Partnerships, sec. 239 (5); 30 Cyc. 618.

J. Authority of Partners after Dissolution. — 1. **IN GENERAL.** — The dissolution of the partnership terminates all authority in any one or more of the partners to act for the firm or the partners, except so far as may be necessary to wind up or liquidate the partnership affairs or to complete transactions begun but unfinished at the time of dissolution. The dissolution becomes effective, as to any given person, only when he receives notice as required by law and stated *supra*¹). The effect of this rule can, of course, be destroyed by the consent of all the partners or by ratification, either express or implied from the facts.

2. **AUTHORITY OF BANKRUPT PARTNER.** — The firm is in no case bound by the acts of a partner who has become bankrupt or insolvent, because of the fact that, in law such person is incapable of making a contract which is binding. This does not affect the liability of a person who has after the bankruptcy represented himself or enabled the bankrupt or any other to represent him as a partner of the bankrupt under the doctrine of estoppel.

3. **SURVIVING PARTNERS.** — Under the rules just stated, all power and authority to wind up and liquidate the partnership affairs vests in the surviving partners upon the death of one or more of the partners. The surviving partner, while compelled to act in the highest good faith towards the estate of the deceased partner is not held to be a trustee of the partnership property for the benefit of the estate of the deceased partner and the creditors of the firm. He is liable to the estate of the deceased partner only for what remains in his hands after all the debts and obligations of the partnership have been satisfied. The representatives of the deceased partner possess no right to take possession of the property or assets of the firm, or to do any acts towards the winding up of the affairs of the firm, except by decree of court for the purpose of protecting the rights of the estate in the assets, or where, by the terms of the partnership agreement, such a right has been created. The duty of collecting the partnership assets and of settling all partnership liabilities is in the surviving partners. For the purpose of satisfying all these liabilities and extinguishing all the partners' equities, the title to all the partnership property vests in the surviving partners. Where all the partners have become deceased, the duties, rights, and liabilities which existed in the last surviving partner, pass to his executor, who stands in the shoes of the deceased partner. This duty can be avoided by the assistance of the court by securing the appointment of a receiver²). These rights and duties are generally the subject of statutory regulation and the statutes of the various States should be consulted.

K. Rights of Partners to Take Part in Liquidation. — Where the partnership agreement does not provide otherwise, a dissolution gives to each partner, not bankrupt, the right to wind up or liquidate the partnership affairs. It is not certain under the decisions whether a partner who dissolves the partnership in contravention of the terms of the agreement may assert any right to wind up or liquidate the partnership affairs or not; but it is believed that he possesses only the right to give notice that he dissolves the firm and to withdraw his interest in the partnership property or to recover the value thereof. It is, however, possible that he may be compelled to permit his interest to remain in the possession and control of the other partners and subject to the liabilities of the firm arising after the time when he gives notice of his withdrawal from the firm and before the termination of the agreed term or particular undertaking. This may well be doubted, however, because of the policy of the law not to compel a forfeiture of the property or of rights in property. There is, also, an uncertainty as to the rights of a partner who has been expelled from the partnership *bona fide* under the terms of the partnership agreement. If his expulsion from the firm produces a dissolution of the firm, as it is believed it does, then the right to liquidate or wind up the partnership affairs should exist; but this would destroy all benefit of the power of expulsion. It must, therefore, have been the contemplation of the parties to the agreement that the affairs of the partnership should not be wound up; but that the new firm should take over all rights and title to the business and to its continuance; and that the expelled partner should possess only the right to receive the value of his interest in the partnership property. It is, of course, possible for the partners to provide in the contract just what should be the effect of

¹) 30 Cyc. 659 Beale's Parsons on Partnership, (4th Ed.) secs. 287 et seq.; Bates on Partnership, secs. 679 et seq. — ²) 15 Dec.

Dig. Partnership, secs. 275, et seq., 30 Cyc. 620, et seq.; Bates on Partnership, secs. 712, et seq.

an expulsion; and by the terms of the contract, it may be agreed that the expelled partners shall forfeit all right and interest in the partnership property. Such a contract will however be construed strictly by the court and its terms must be carried out in good faith¹).

L. Rights of Partners in the Application of Partnership Property. — Where the partnership is rightfully dissolved in accordance with the terms of the partnership agreement, every partner is entitled, as against the other partners and all persons claiming through them in respect of their interests as partners, to have the partnership property applied in payment of the debts and liabilities of the partnership, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the partnership, and for that purpose any partner or his representatives may apply to the court to wind up and liquidate the business and affairs of the partnership. Where, however, one of the partners is expelled from the partnership in accordance with the terms of the partnership agreement, such expelled partner possesses only the rights specified by the terms of the agreement, and, in the absence of any provision in the agreement, it would appear that the expelled partner would possess the ordinary rights of a partner to compel the application of the partnership property to the liabilities of the partnership, unless he is discharged from all existing partnership liabilities either by payment thereof or by agreement to that effect among the continuing partners, the existing partnership creditors, and the expelled partner. These rights are the result of the so called partners' lien which exists during the conduct of the ordinary business of the partnership and becomes effective as above on the dissolution of the partnership. This lien is said to be the right of any or all partners to have the partnership property applied to the payment of all the partnership liabilities. These liabilities include any amounts which may be due to any one of the partners with respect to any transactions between the partners relating to partnership affairs, and such liabilities as all the partners agree shall become partnership liabilities. But it does not include transactions with respect to matters not connected with the ordinary conduct of the partnership business nor brought within the scope of partnership business by the agreement of all the partners. Nor does it include any transaction connected with the formation of the partnership which has to do only with the contribution of a partner's share of the capital; nor any other matter of agreement among the partners which is not expressly brought within the partnership affairs or related to the ordinary course of business. Any claims which any one of the partners may have against the partnership by reason of loans or advances or dealings with the partnership, as such, are partnership liabilities and subject to the foregoing. Any thing which may be due to the firm by reason of the failure of any one of the partners to contribute his entire share of the capital stock, or any transaction which he may have had with the partnership in its ordinary course of business or by reason of any withdrawal of funds or property of the partnership, not as profits nor in absolute right with the consent of all the partners, is an asset of the partnership and must be realized or accounted for as other assets are²).

Where the dissolution of the partnership is caused by the act of one or more, but not all, of the partners in contravention of the partnership agreement, there can be no certain rule laid down as to the results as evolved by the discovered cases. It is, however, believed that, if the other partners refuse to allow an ordinary dissolution, and desire to continue the partnership business, the following is the probable result which would be reached:

a) Every partner is entitled to receive what is due him in respect of his interest in the partnership, subject to any agreement to the contrary, and for that purpose may apply to the court;

b) The partners who have not wrongfully under the terms of the agreement caused the dissolution are entitled, as against the partner or partners retiring from the business, to continue the business under the firm name with all the rights in any good-will and existing partnership contracts at the same place or places during the agreed term or particular undertaking; and as against the partners wrongfully causing

¹ *Patterson v. Stillman*, (1857) 28 Pa. 304; *Bates on Partnership*, secs. 241, 242, 667; *Beale's Parsons on Partnership*, sec. 169. —
² 30 Cyc. 453, 700, 15 Dec. Dig. Partnerships,

secs. 297 et seq., 38 Cent Dig. Partnerships, secs. 679 et seq. *Bates on Partnership*, secs. 757 et seq.

the dissolution, to damages for the breach of the partnership agreement and to a forfeiture of all the interest of all such partners in all the future rights of the partnership. The cases discovered which deal with the question are few, and do not clearly define the rights of the partners under such circumstances¹).

M. Right to Profits Accruing after Dissolution. — Where any person upon the dissolution of the partnership has ceased to be associated in the business, continued by one or more of his partners alone or with other persons with the capital or assets of the dissolved partnership without any settlement of the accounts as between him or his estate and the person or partnership continuing the business, in the absence of any agreement to the contrary, he is entitled, at the option of himself or his legal representatives, after all the other creditors of the partnership, if any, continuing the business have been paid, to the amount of his interest in the assets of the dissolved partnership, and such share of the profits made since the dissolution of the partnership as the court may find attributable to the use of his share of the assets of the dissolved partnership; or as an ordinary creditor, to the amount of his interest in the assets of the dissolved partnership with interest at the legal rate per annum. Where, however, by the partnership agreement an option is given to the surviving or continuing partners to purchase the interest of the deceased or retired partner and that option is duly exercised, the estate of the deceased partner or the retired partner or his estate, as the case may be, is not entitled to any further or other share of the profits; but if any partner assuming to act in the exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing rule²).

N. Rights on Dissolution for Fraud or Misrepresentation. — Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:

1. To a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of the share in the partnership and for any capital contributed by him; and
2. To stand in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and
3. To be indemnified by the person guilty of the fraud or making the misrepresentation against the debts and liabilities of the partnership³).

VI. LIQUIDATION. — A. Rules for Liquidation. — In the settlement of accounts between the partners after a dissolution of the partnership, the following rules are observed, subject to any agreement; but such agreement cannot affect the rights of persons other than parties and privies thereto:

1. The assets of the partnership are:
 - a) The profits of the business;
 - b) The partnership property;
 - c) The contributions of the partners necessary for the payment of all the partnership liabilities.
2. The liabilities of the partnership are and rank in order of payment as follows:
 - a) That due to creditors other than partners;
 - b) That due the partners other than for advances, capital, and profits;
 - c) That due the partners in respect of advances;
 - d) That due the partners in respect of capital;
 - e) That due the partners in respect of profits.

¹ Bagely v. Smith, (1853) 10 N. Y. 489; Ambler v. Whipple, (1874) 20 Wall. 546; Pearce v. Ham, (1884) 113 U. S. 585; Karrick v. Hannaman, (1897) 168 U. S. 328; Burgess v. Badger, (1888) 124 Ill. 288; Kinloch v. Allen, (1834) 2 Hill (S. C.) 19; Slemmer's Appeal, (1868) 58 Pa. 168; Karrick v. Hannaman, (1894) 9 Utah, 236; Holmes v. Gilman, (1893) 138 N. Y. 377; Riddle v. Whitehill, (1889) 135 U. S. 621; Beller v. Murphy, (1909) 139 Mo. App. 663; Westwood v. Cole, (1910) 120 N. Y. Supp. 884. —

² Huggins v. Huggins, (1903) 117 Ga. 151; Young v. Scoville, (1896) 99 Ia. 177; Egan v. Wirth, (1904) 26 R. I. 363; Robinson v. Simmons, (1888) 146 Mass. 167; Skidmore v. Collier, (1876) 8 Hun (N. Y.) 50; Moore v. Rawson, (1904) 185 Mass. 264; Appeal of Brown, (1879) 58 Pa. 139. — ³ Bates on Partnership, sec. 595; Beale's Parsons on Partnership (4th Ed.) sec. 10, George on Partnership, 18; Crockett v. Burleson, (W. Va., 1906) 6 L. R. A. (N. S.) 263, and note.

3. The assets of the partnership should be applied to the satisfaction of the liabilities in the order of their declaration, *supra*.

B. The Assets. — The assets of the partnership include under the designation of partnership property all right, title, and interest in property of whatsoever kind which may be in the partners by reason of their association in partnership. Thus all claims of the partnership, as such, against all third persons and the partners are assets of the firm which must be collected or liquidated in so far as possible by the partners engaged in winding up or liquidating the partnership affairs. The same is true where the representative of a deceased partner is engaged in winding up or liquidating the partnership affairs. Where the claim is against one of the partners it may be settled in the account by means of a set-off. But if its payment is necessary for the satisfaction of the liabilities to the other partners or to third persons, the partner who is indebted must pay the amount before he has any rights as against the other partners. The right to continue the business or the good will of the partnership, where the firm has established such a business reputation as to make it of value, is a partnership asset; and, in the absence of agreement, this right must be taken by one or more of the partners or their assignees at a value agreed on or the value thereof must be realized by means of sale. The right to use the firm name depends upon the character of the name. Where the firm name is the name of one or more of the partners, the mere fact that they have retired from the firm does not prevent those persons, whose name it is, from engaging in the same business under that name. But where such partners also represent themselves as the dissolved partnership, the members of the dissolved partnership or the assignees thereof may restrain such action as unfair trade competition¹).

C. Conversion. — Where there is no agreement and the partners are unable to agree as to the division of the assets after the payment of all the liabilities to third persons, upon application to the court, all the property will be reduced to cash value and so distributed. Where one or more of the partners, either as survivors or as liquidating partners, are engaged in the settlement of the partnership affairs, a sale of all the property of the partnership is a proper method of making the distribution. Where any partner believes that the partner liquidating the partnership affairs is not acting in good faith and for the purpose of winding up and liquidating all the partnership affairs, he may apply to the court to have the affairs of the partnership wound up and liquidated by a receiver under the direction of the court. Because of these rights it results that there can be no right in any specific property, whether real or personal, in any of the partners before all the affairs of the partnership have been finally wound up and liquidated and the share of the partner has come into his possession freed from all the equities of the other partners. The partners may of course agree that the real property of the partnership shall not be sold but shall be partitioned among the partners. Such an agreement would be binding on the partners, so long as the property does not come into the possession of the court or become subject to the liabilities of the firm creditors. The creditors possess the right to subject the property to the payment of the partnership debts on the dissolution before the partners are entitled to possess the partnership property for any other purpose than the payment of such liabilities. This is because of the fact that the partnership is held not to be terminated before all the liabilities of the firm have been satisfied²).

D. Premiums. — It is to be noted that in America there is no disposition on the part of the courts to follow the English rule and compel the return of premiums paid by one partner to another for the right to be admitted into the business. Where, however, there has been fraud on the part of the partner receiving the premium, the courts will compel repayment³).

E. Contributions. — There is some doubt as to whether the contributions of the partners, necessary for the payment of all the liabilities of the partnership, are assets of the firm or not. This is especially true in the different jurisdictions of the United States District and Circuit Courts in their interpretation of the Federal Bankruptcy

¹ Iowa Seed Co. v. Door, (1886) 70 Ia. 481; Holbrook v. Nesbitt, (1895) 163 Mass. 120; Sheppard v. Boggs, (1879) 9 Neb. 257; Dayton v. Wilkes, (1859) 17 How. Pr. (N. Y.) 510; Morgan v. Schuyler, (1890) 79 N. Y. 490; Snyder Mfg. Co., v. Snyder, (1896) 54 Ohio

St. 86; Musselman's App., (1869) 62 Pa. 81. — ² Bates on Partnership, secs. 810 et seq.; 30 Cyc. 434, 684; 38 Cent. Dig. Partnerships, sec. 698, 704; 15 Dec. Dig. Partnerships, sec. 301. — ³ 30 Cyc. 686; Bates on Partnership, secs. 802 et seq.

Act¹). There is not, however, any doubt as to the duty of the partners to make contribution to the payment of all the partnership liabilities. Whether this duty is to the firm creditors or only to the other partners is the point in doubt. Of course, the duty to make contribution to the other partners for any liability which they may have incurred because of the failure of one or more of the partners to pay their share of the liabilities to firm creditors, or, because of the fact that a creditor has enforced the whole partnership liability against the separate estate of one of the partners, exists as to every partner under the principles applicable to the ordinary joint liability. It is also certain under the principles of joint liability that the right to enforce a contribution as against the other partners does not accrue to any partner until he has made payment of the liability to the joint creditor; and, where the affairs of the partnership are in process of liquidation, before he has paid a sum greater than the amount which he should contribute. These matters are settled by means of an account; except that, where the partnership has become bankrupt; or where some of the partners have paid all the liabilities and the other partner has been found to be indebted to the partnership, the action may be at law since there is no necessity for an account. These claims for a contribution towards the payment of the partnership liabilities are usually postponed to the payment of all the separate liabilities of the partner.

This right to contribution is, in some jurisdictions, based on the general principles of joint liability and results in law, in others, it is said to result from an agreement implied in law; the results in both cases being the same. There is a further question which arises in cases of insolvency or absence of some of the partners from the jurisdiction, when a receiver or assignee of the partnership is seeking to enforce the separate liabilities of the partners to contribute to the satisfaction of all the firm liabilities. Some jurisdictions hold that, as to the liabilities to the partners with respect to capital or advances, contribution can be enforced only for the amount which would be due from each were all the partners solvent and within the jurisdiction of the court. Others hold that the partners who are solvent and within the jurisdiction of the court are liable for the payment of the full amount necessary for the payment of all the liabilities whether owing to partners or to third persons. This last view appears to be the more correct and to be the prevailing one. As to third persons, all the States agree that the assignee or trustee for the creditors of the partnership, who are not partners, should enforce the whole amount against such partners as are solvent and within the jurisdiction. In some of these jurisdictions it is not necessary to join the partners who are insolvent or without the jurisdiction²).

F. Liabilities. — The order of the payment of the liabilities is due, in the first place, to the fact that a person is not permitted by the law to compete with his own creditors as to the same fund out of which the rights and liabilities arose. It is for this reason that the partners are postponed to the other creditors of the firm and are not permitted to bring actions at law for the payment of any amount which may be due from the firm to them. There is, of course, the further reason that the equities of the partners cannot satisfactorily be worked out in an action at law. Partners are paid that which is due them from the firm other than for advances, capital, and profits because of the dual relation and of the fact that these claims arising out of transactions of the same character as those of third persons would have been paid *pari passu* with those claims but for the fact that the partner is not permitted by the law to compete with respect to a debt which he himself owes out of the assets out of which he is claiming a share.

Advances partake more of the nature of a loan than of capital. Where there is a deficiency of assets necessary to repay the capital and the advances, repayment of the advances should be made before the repayment of the capital, because of the fact that the capital is contributed for the payment of all the liabilities of the business and of the fact that the advance is one of the liabilities payable out of the capital.

¹) In *re Bertenshaw*, (1907) 157 Fed. 363; In *re Forbes*, (1904) 128 Fed. 137; *Barry v. Foyles*, (1828) 1 Pet. 311; *West v. Lea*, (1899) 174 U. S. 590; *Vaccaro v. Bank*, (1900) 103 Fed. 463; In *re Mercur*, (1903) 122 Fed. 384. —
²) 30 Cyc. 692; *Scott v. Porter*, (1887) 96 N. C. 289; *Henry v. Jackson*, (1865) 37 Vt. 431; *Whitman v. Porter*, (1871) 107 Mass. 522;

Whitcomb v. Converse, (1875) 119 Mass. 37; *Bates on Partnership*, secs. 759, 760; *Beale's Parsons on Partnership*, (4th Ed.) sec. 173; *Burdick on Partnership*, (2th Ed.) 329—331, 365; *Mechem on Partnership*, secs. 125—127; 38 Cent. Dig., *Partnership*, sec. 341; 15 Dec. Dig., *Partnership*, sec. 188.

Where all the partners are within the jurisdiction and solvent, this question creates no trouble because all of the liabilities will then be paid; but where one or more are insolvent or without the jurisdiction and the shares of the capital are unequal, it is of considerable importance, that the advance should be repaid before the repayment of any of the capital.

G. Capital. — There is some confusion in the cases as to the exact nature of capital and the right to contribution from the other partners for the repayment of the capital. Some courts hold that the agreement is that the capital is at the risk of the business and that the other partners cannot be compelled to contribute to the repayment of it. This is especially true where one or more of the partners contribute all the capital and one or more only the use of their names or their services. Other courts hold that the repayment of the capital invested by a partner is one of the liabilities of the partnership for the repayment of which all the partners are liable in the agreed or legal shares. These courts permit the enforcement of the right to contribution even against the partners who have not contributed any capital; and for the full amount against those of the partners who are solvent and subject to process. This last rule appears to have the support of the better reason as a matter of law and aside from the terms of the agreement¹).

Where, however, the loss is due to a partner's breach of the partnership contract or to his gross negligence, it must be borne entirely by that partner²).

H. Profits. — The profits are all which remain after the payment of all liabilities to third persons and to the partners in respect of all transactions, including the payment of the advances and the capital. This amount is divided among the partners equally where there is no agreement on the subject; otherwise, according to the agreement. There are a few States, however, which make the division according to the amount of capital stock contributed by each partner. Still other States make distribution according to the facts of the particular case, raising an implied contract from the facts and circumstances.

I. Final Settlement by Agreement. — The affairs of the partnership may be wound up and liquidated either with the assistance of the court of equity or by agreement among the partners. Where this is done by agreement, all the partners must be parties to the agreement. In order that the agreement may operate as a complete settlement of all the partnership affairs, it must include all the transactions and cause a satisfaction of all the liabilities or a novation with respect to them. In order that the court may not be compelled to pass upon the matter and to make a new accounting, it must be definite and clearly expressed; must be free from all fraud or mistake, especially to be guarded against where the partners are not all equal with respect to knowledge of the partnership affairs; and must include all partnership affairs and transactions up to the time of the final settlement of affairs. It will not be conclusive as to partners who are not parties to it nor as to matters not included in its terms. It may become conclusive by reason of the partner accepting it as complete when he has ample opportunity to rectify and delays so as to raise an estoppel or by his making such a disposition of what has been received that the parties cannot be placed in statu quo. Where a partner seeks to set aside a private settlement, he must support his reasons therefor by clear and cogent proof³).

J. Settlement without Satisfaction of Liabilities. — The affairs of the partnership may be settled as between the partners without the satisfaction of the partnership liabilities as to third persons by one or more of the partners assuming the payment of such liabilities and agreeing to indemnify the other partners against any liability therefor. Where this is done without the agreement of the firm creditors, that is by a novation, the partners continue liable to the partnership creditors; but, generally, merely as sureties. Where the partner or partners assuming to pay the liabilities take over the assets of the partnership and promise to pay the liabilities therewith, a trust is attached to such assets which may be enforced by the indemnified partner against the assuming partner or his transferee who has notice of the trust. In other

¹) 30 Cyc. 690, 691; 15 Dec. Dig., Partnership, secs. 84, 303, 304, 305; Hellebrush v. Coughlin, (1889) 37 Fed. 294; Taylor v. Coffing, (1857) 18 Ill. 422; Brandt v. Edwards, (1900) 91 Minn. 505; Juillard v. Orem's Ex., (1889) 70 Md. 465; Hasbruck v. Childs, (1858) 16 N. Y. Super. Ct. (3 Bosw.) 105;

Jones v. Butler, (1882) 87 N. Y. 613; Emerick v. Moir, (1889) 124 Pa. 498; Mallett v. Hellar, (1904) 91 N. Y. App. Div. 505; Woeful v. Thompson, (1899) 73 Mass. 301. — ²) 30 Cyc. 691. — ³) 30 Cyc. 701 et seq.; 38 Cent. Dig. Partnership, secs. 718 et seq.

cases the indemnified partner is an ordinary creditor of the assuming partner and must recover on his bond as an ordinary creditor¹).

ARBITRATION AND AWARD. — Because of the uncertainty as to the result of a settlement by decree of court and the time when such settlement can be had, partnership agreements frequently provide for settlement by means of an arbitration and award. The same means is frequently agreed upon by the partners when the dissolution is had and an agreement cannot be reached by the partners as to the proper division of the assets which should be made. Such an agreement does not, however, oust the jurisdiction of the court of equity to grant an injunction or to appoint a receiver, though the courts will not exercise this jurisdiction except for special cause. Such agreements are construed strictly by the courts; and the terms thereof must be strictly adhered to by the parties and the arbitrators. Where the arbitration fails through no fault of the parties but because of the failure of the arbitrators to agree, or for any similar cause, the court will decree settlement and account. Where the arbitrators have made an award which is definite and certain in its terms and capable of enforcement by a court of equity, the parties may secure its enforcement or plead it as a defense. The parties are bound to present to the arbitrators evidence necessary for a decision on the matters submitted to them; but the arbitrators have no authority as to matters not submitted to them, nor will an award, as to such matters, be binding upon the parties²).

K. Actions for Dissolution and Account. — **1. JURISDICTION.** — The jurisdiction over dissolution and account is generally in the court of equity, but in Pennsylvania partnership matters may be settled at law by the action of account render. The right of action is in each partner or the personal representatives of a deceased or bankrupt partner. Generally the court will not permit the action unless a dissolution is sought; but under peculiar circumstances a partial account may be had. The relation must be found to have actually existed. When the action is brought, it is evidence that a dissolution is desired by the party taking the action from the date of the action³).

2. CONDITIONS PRECEDENT TO RIGHT. — It is sufficient that the partnership has been dissolved and that no private accounting and settlement has taken place to entitle any partner to maintain a bill for an accounting under the direction of the court. Where a creditor of a partner seeks to maintain a bill, he must first, as a rule, secure a judgment and a lien on the partner's interest in the partnership. No previous demand for an account is necessary to enable a partner to maintain his bill or action. It is not necessary to offer to put the parties in statu quo where there has been fraud on the part of the partners other than the partner bringing the bill or action. Nor does the fact that an account is in process of being rendered prevent the maintaining of the bill or action. But where the partner seeking to maintain a bill or action has assumed the duty of winding up and liquidating the partnership affairs, he must render an account of his actions before he may maintain his bill or action⁴).

3. SET-OFF AND COUNTER CLAIM. — In the accounting, personal claims against one of the partners may be set-off against the amount finally found to be due to such partner, if the rights of creditors do not intervene and the account to be set-off is not wholly distinct from the relation. But where the partner, against whom the set-off is sought to be made, is bankrupt, such set-off may be made against him or his assignee even if it is entirely disassociated from the partnership transactions. All sums or amounts due from any partner to the partnership are proper matters to be set-off or to be pleaded as a counter claim⁵).

4. LIMITATIONS AND LACHES. — The time when the statute of limitations begins to run is uncertain under the decisions of the various States; but it may be generally said that it begins to run from the time the right of action matured. This time is never before the dissolution has taken place. Some jurisdictions hold that the statute begins to run immediately upon the dissolution because any partner then

1) 30 Cyc. 707; 38 Cent. Dig. Partnerships, secs. 724, 725. — 2) 30 Cyc. 708 et seq.; Bates on Partnership, secs. 233, 234, 336; 38 Cent. Dig. Partnership, secs. 726 et seq.; 15 Dec. Dig., Partnerships, sec. 312. — 3) 30 Cyc. 710; 15 Dec. Dig. Partnerships, secs. 313 et seq.; 38 Cent. Dig., Partnerships,

sec. 729. — 4) Brew v. Cochran, (1905) 141 Fed. 459; Richards v. Frazer, (1898) 122 Cal. 456; Oliver v. House, (1906) 125 Ga. 637; Merideth v. Ewing, (1882) 85 Ind. 410; Hanna v. McLaughlin Co., (1902) 158 Ind. 292; 30 Cyc. 713. — 5) 38 Cent Dig. Partnerships, sec. 734; 30 Cyc. 714.

obtains the right to bring his action for an account. Others hold that each case must depend upon its own circumstances. Others that an adverse holding or claim by one of the partners is necessary. Others raise a trust relation and require that there must first be a demand or repudiation of the trust. The better rule appears to be that the right does not accrue or the statute begin to run before the affairs of the partnership have been settled and a balance found. It would appear that the right to an account should run from the date of the dissolution and that the amount due with respect to any partner's share should be a debt accruing as to any matter covered by the account at the date the account is stated; and as to any matter not covered by the account, at the date of notice of liquidation of such matter¹).

Laches are treated in this action as they are generally treated by a court of equity and no definite rule can be given as to their effect. The ordinary maxims of equity will be effective.

VII. LIMITED PARTNERSHIPS. — A. In General. — Limited partnerships are properly classed as partnerships because of the fact that the members thereof possess all the rights and privileges of general partners, excepting where, by the statute under which they are formed, the special or limited partners are restricted in these rights and privileges. The fundamental difference is in the extent of the liability. All other differences are the result of this alteration from the rights and liabilities of general partners. The adoption of this form of business association was made from the French law, and is said to have been the first law adopted from any country other than England. Of course, such association had already been copied from the French law into the law of Louisiana, which bases its law on the French law generally, where it was then, and still is, called a partnership in *commenda*, after the French terminology. New York was the first State to adopt the limited partnership into its law, in 1822; Connecticut followed two years later and Pennsylvania in 1863. Both these latter States copied the law of New York; this has been done also by most of the other States. At present, limited partnerships exist in every State in the Union, all closely resembling that of New York. While the statutes closely resemble one another, the courts are not so unanimous in their construction of these statutes²).

1. PURPOSE AND CONSTRUCTION. — This form of partnership was adopted for the purpose of enabling the joining of labor and capital in such a manner that the person who invested the capital would not be compelled to risk an amount greater than the amount put at the risk of the business. In this manner, capital was brought into trade and placed at the disposal of those who possessed time and ability but no capital. Business was to this extent facilitated³).

Though limited partnerships were adopted from the continental law, the courts refused to adopt the rules of construction obtaining on the continent⁴). The rules of common law construction, which were in use at the time of the adoption, were applied to the construction of these statutes. Where these rules were such as to subvert the purpose of the acts of the legislatures, the courts proceeded to mould those rules so as to permit the purpose of the legislatures to be carried out⁵). There is, however, a contrary view in some of the States which may be said to adhere to a strict construction of these statutes. Under the construction of the statutes in these States, persons who desire to obtain the advantages of the statutes must comply strictly with the terms of the act or become liable as general partners. The construction of the statutes in these States has made the use of such associations of uncertain value. Because of this fact other forms of associations have been developed. Thus there has arisen the partnership associations, which are similar to the companies of England and the joint stock companies of other States⁶); partnerships re-

¹) 30 Cyc. 718; Beale's Parsons on Partnership, sec. 228; Bates on Partnership, secs. 942—952; Collier on Partnership, 456 et seq. — ²) Ames v. Downing, (1850) 1 Bradf. Sur. (N. Y.) 321; Bates on Limited Partnerships, sec. 3; 3 Kent Com. 36; Troubat on Limited Partnerships, sec. 35. — ³) Clapp v. Lacey, (1868) 35 Conn. 463; Singer v. Kelly, (1863) 44 Pa. 145; Riper v. Poppenhausen, (1870) 43 N. Y. 68. — ⁴) Pierce v. Bryant, (1862) 5 Allen, 91. — ⁵) Jacquin v. Buisson, (1855) 11 How. Pr. (N. Y.) 385; Clapp v.

Lacey, (1868) 35 Conn. 463; Riper v. Poppenhausen, (1870) 43 N. Y. 68; Singer v. Kelly, (1863) 44 Pa. 145; Lachaise v. Marks, (1855) 4 E. D. Smith (N. Y.) 610. — ⁶) Pennsylvania, Act of June 2, 1874, Brightly's Purdon (12th ed.) 1086; Virginia, Act of March 2, 1875; Code of 1877, secs. 2878—2886; Michigan, Act of May 22, 1877, 1 Howell's Stats, secs. 2365—2375; New Jersey, Act of March of 12, 1880; 2 Gen. Stats. sec. 2440; Ohio, Act of April 20, 1881, Codes of 1910, secs. 8059—8079.

gistered have also been adopted so as to avoid the constructions of the limited partnership statutes¹). These last classes of so-called partnerships are not true partnerships because of the fact that the rights and incidents are not at all like unto those of partnerships²). The strict construction has been applied in the following cases³).

B. Formation. — 1. **PURPOSES.** — Limited partnerships may in general be formed for the "transaction of any agricultural, mercantile, mining, transportation of any coal, or manufacturing business." Other States add "for any other lawful business." From these are generally excepted banking and making insurance⁴).

2. **MEMBERSHIP.** — A limited partnership may be formed by such persons as are qualified to form a general partnership, though some of the statutes specifically except infants from the class of persons qualified⁵).

3. **CLASSIFICATION AND LIABILITY.** — A limited partnership is composed of two classes of partners, one or more general partners, and one or more persons called special or limited partners. The general partners possess all the rights and are subject to all the liabilities of partners in an ordinary partnership as declared under the discussion of Partnerships, *supra*. The limited or special partners are subject to the terms of the statute. Under the terms of all the statutes, the liability of the limited or special partner is limited to the amount contributed to the capital of the partnership. By the terms of the statutes, the limited or special partners must contribute, generally in actual cash payments, a specified sum as capital to the common stock, which must be placed absolutely at the risk of the business. In Pennsylvania, Arkansas and a few other States, goods and merchandise or other property may be contributed by the special or limited partner as his contribution to the common stock of the partnership. But such property must be described and appraised under oath. Such a contribution will be closely scrutinized by the court. Any false statement or error which is not purely formal will cause the partnership to become a general partnership, and cause all the partners to become liable as general partners. Where it is required that the contribution shall be in cash, a payment by means of a check or note or by means of a transfer of property will not be a compliance with the statute so as to confer limited liability⁶).

Under the interpretation of the statutes, it is required that the partnership must have received the property or cash before the limited partnership can come into existence. This results from the fact that an affidavit must be made that the cash or property has been so received. This affidavit must be made by all the general partners. Any false statement in such affidavit is held, whether the false statement is knowingly made or not, to prevent the creation of the limited partnership. If the partnership holds itself out as a limited partnership and incurs any liability, all the partners are liable therefor as general partners.

4. **THE CERTIFICATE.** — Generally under the statutes, the persons desirous of forming such a partnership must make and severally sign a certificate which shall contain:

1. The name or firm under which such partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.
4. The amount of capital which each partner shall have contributed to the common stock.
5. The period at which such partnership is to commence and the period at which it will terminate.

In some States, the place of business must be designated; in others, an attorney in fact may sign if his power is recorded; in others the authority of the general

¹) See Statutes, *infra*. — ²) *Pierce v. Bryant*, (1862) 5 Allen, 91. — ³) *Maloney v. Bruce*, (1880) 94 Pa. 249; *Richardson v. Hogg*, (1861) 38 Pa. 153; *Bank v. Whitaker*, (1895)) 170 Pa. 297; *Argall v. Smith* (1846) 3 Denio, 435; *Holliday v. Union Bag and Paper Co.*, (1877) 3 Colo. 342. — ⁴) *Bates on Limited Partnership*, sec. 19; and see statutes *infra*.

— ⁵) See Statutes of N. Y., *infra*. — ⁶) *Bates on Limited Partnership*, sec. 20; *Burdick on Partnership*, 393 et seq.; *McGinnis v. Farrelly*, (1886) 27 Fed. 33; *Hennessey v. Farrelly*, (1886) 13 Daly (N. Y.) 468; *Wilson v. Bean*, (1889) 33 Ill. App. 529; *Lineweaver v. Slagle*, (1886) 64 Md. 465; *Bank v. Creveling*, (1896) 177 Pa. 270.

partners to do certain acts may be limited by entering such limitation in the certificate of formation.

5. **FORMALITIES.** — The statutes of all the States require certain definite formalities to be performed before the members of any partnership are permitted to enjoy the immunities of the statutes. If these formalities are not complied with to the extent that the performance depends upon their action, though the partnership may transact business as a limited partnership and the persons dealing with it may deal with it, believing that one or more of the partners are enjoying the immunities of the statute and are liable only to the extent of the capital invested; yet such persons may later hold all the partners on such transactions as general partners with unlimited liability. The formalities required are: that the certificate mentioned above shall be filed with the designated officer; that it shall be signed and properly acknowledged by all the members of the partnership; that the general partners shall make an affidavit that the amount specified in the certificate to be contributed by the limited or special partners has been paid in in cash, or an affidavit that such property has been contributed and that the inventory and appraisal filed with the certificate is a bona fide appraisal and inventory, where property other than cash may be contributed by the special or limited partners. The publication of the certificate or the substance of the certificate is usually a condition precedent to the valid formation of the partnership and the vesting of the right to enjoy limited liability on the part of any of the partners. Where the substance of the certificate is published, all the partners, both general and special, are bound to see that the material facts of the certificate appear in the published notice. A bona fide mistake as to the amount contributed by the special or limited partner, indicating a larger amount than is in fact to be contributed, is fatal to the existence of limited liability. But the misspelling or duplication of a name, or a mistake in the date when the partnership is to begin business, will not be fatal¹). The specific amount to be contributed by each partner must appear, a statement of the aggregate sum is not sufficient²).

The fact that the amount paid in by the special partner is, under the terms of an agreement, to be paid out on existing debts has been held not to vitiate the formation³). But where the certificate and affidavit declare that the amount has been paid in on a given day and it is not paid in until thereafter, the formation is not valid⁴); so also where the payment has been by check⁵).

There are other cases which hold that a check, contributed by a special or limited partner and paid as soon as presented for payment in the ordinary course of business, is to be treated as a cash payment because by the general course of business checks pass as cash⁶).

In most of the States when there is a false statement in the affidavit or in the certificate, all the partners are held to be general partners, whether they had knowledge of the false statement or not. All are held to insure the truth of the averments made. This has been found to be a harsh rule, and some of the States have modified it so that where any one partner has unintentionally made a false statement or permitted it to be made, he is liable as a general partner only to any creditor who has been actually misled to his prejudice⁷).

6. **FIRM-NAME AND SIGN.** — It is required of every limited or special partnership that a firm name or sign be adopted and that the same shall be set forth in the certificate. The usual requirement is that the firm name shall contain only the names of the general partners. All States require that the name of a limited or special partner shall not appear in the firm name. The use of "and Company" or "& Co." is permitted in some States, if there are two or more general partners so that the general term may represent one or more general partners. In a few States, any general term or name may be used if the term "Limited" be added as

¹) *Smith v. Argall*, (1844) 6 Hill, 479; (1846) 3 Denio, 435; *Bowen v. Argall*, (1840) 24 Wend. 496; *Carter, etc., Co. v. Jackson*, (Tex. Civ. App., 1898) 45 S. W. 615; *Madison Bank v. Gould*, (1843) 5 Hill (N. Y.) 309; *Manhattan Co. v. Phillips*, (1888) 109 N. Y. 383. — ²) *Spencer Optical Co. v. Johnson*, (1898) 53 S. C. 533. — ³) *Anderson v. Stone*, (1887) 24 Ill. App. 342. — ⁴) *Myers v. Edison*

General Electric Co., (1896) 59 N. J. L. 153. — ⁵) *Durant v. Abendroth*, (1876) 41 N. Y. Super. Ct. 53; *Chambers v. Webster*, (1902) 75 N. Y. Supp. 31. — ⁶) *Hogg v. Orgill*, (1859) 34 Pa. 344; *Rothchild v. Hoge*, (1890) 43 Fed. 97; *Metropolitan Nat. Bank v. Palmer*, (1890) 9 N. Y. Supp. 239; *Chick v. Robinson*, (Mich. 1899) 95 Fed. 619; 52 L. R. A. 833. — ⁷) *Cal. C. C. sec. 2502*.

the last word of the firm name or sign. Where however the name of a limited or special partner is also the name of one of the general partners or where the limited partnership succeeds to the name of a prior firm whose name contained the name of one who is a limited partner in the new firm, such name may be continued in use when by statute a succeeding firm is permitted to succeed to the name of the preceding firm¹).

In a few States, it is required that the partnership shall fix and maintain on the front of the building, in which its principal place of business is located, a sign in the English language disclosing who are limited or special partners and who are general partners. Under the New York statute, a failure so to disclose the names of the members does not cause the partnership to become a general partnership; but simply prevents a plea of abatement on the ground that all the partners have not been properly named²). Where the sign is properly displayed, it has been held that such sign may cure an otherwise defective firm name³).

C. Duration. — The filing of the certificate is constructive notice of all the matters required to be contained therein. This applies to the period of the duration of the partnership as well as the other matters contained therein. The time of the accruing of the rights granted by the statute is controlled by the completion of the formalities required. This is true even though the certificate may state otherwise. But where the certificate states a definite time for the beginning of the partnership and the business of the firm is begun on that date, and the formalities are not completed until after such date, the partnership is a general partnership as to all matters transacted before the completion of the formalities; and the partners are all liable as general partners, as to all such matters⁴). Where transactions are had after the termination of the period specified in the certificate, and no new certificate of renewal is filed as required by the statute, the partnership is a general partnership as to such transactions and all the partners are liable as general partners as to such transactions⁵).

D. Continuance or Renewal. — The statutes generally permit that the partnership may be continued or renewed after the termination of the original term; but this may be done only on compliance with the same formalities as are required on formation. Where these formalities are not complied with, the partnership becomes a general partnership as to matters done after the term of the original certificate and all the partners are liable as general partners as to such matters⁶). Where the limited partnership has terminated by reason of the expiration of the period or has been dissolved for any other cause, a renewal thereafter is not effective so as to prevent the partnership having become a general partnership⁷). Thus the admission of a new partner prevents a renewal; so also where one of the partners has died⁸). But where, between the time of the expiration of the partnership and the time of the renewal, no business has been done and the period is short, a valid renewal has been found⁹).

There is a conflict among the decisions as to whether a valid renewal can be made where the capital contributed by the special partner has been impaired. It would appear that where it is clearly stated that the contribution of the special partner is merely the contribution which he originally made to the firm, such a specification should be a sufficient averment; but the decisions of each State must be investigated. He is held to be a general partner when his contribution has been impaired, in a number of States unless the then condition of the contribution is specifically declared¹⁰). But this is rejected in other States¹¹). There is nothing to prevent the partners, under circumstances where a renewal cannot be had, creating a new limited partnership.

¹) Groves v. Wilson, (1897) 168 Mass. 370; Buck v. Alley, (1895) 145 N. Y. 488; Metropolitan Nat. Bank v. Gruber, (1883) 14 W. N. C. (Pa.) 12. — ²) Carter-Battle Grocer Co. v. Jackson, (1898) 18 Tex. Civ. App. 353. — ³) Vilas Bank v. Bullock, (1875) 10 Phila. (Pa.) 309. — ⁴) Gray v. Gibson, (1859) 6 Mich. 300; Robinson v. McIntosh, (1854) 3 E. D. Smith (N. Y.) 221. — ⁵) Sarmiento v. The Catherine Co. (1896) 110 Mich. 120; Haggerty v. Taylor, (1843) 10 Paige (N. Y.) 261. — ⁶) Strang v. Thomas,

(1902) 114 Wis. 599. — ⁷) Columbia Bank v. Berolzheimer, (1898) 53 N. Y. Supp. 417. — ⁸) Andrews v. Schott, (1848) 10 Pa. 47; Hardt v. Levy, (1893) 72 Hun (N. Y.) 225. — ⁹) Hirsch v. Vanuxem, (1885) 15 W. N. C. (Pa.) 467. — ¹⁰) Durgin v. Colburn, (1900) 176 Mass. 110; Fourth St. Nat. Bank v. Whitaker, (1895) 170 Pa. 297. — ¹¹) Fifth Ave. Bank v. Colgate, (1890) 120 N. Y. 381, 8 L. R. A. 712; Hogan v. Hadzsits, (1897) 113 Mich. 568.

E. Mutual Rights, Duties, and Liabilities of Partners. — As to the general partners the mutual rights, duties, and liabilities are the same as they are in case of general partnerships¹). The special partner is governed by the terms of the statute. These statutes generally prohibit such partner from taking any active part in the business other than investigating the books and accounts and giving advice. The special partner has no right under the statutes to transact any business for the partnership either as a partner or as an agent for the partnership. Such action is generally held to cause him to become a general partner. He is, however, permitted to deal with the partnership in the same manner and to the same extent in other respects as are strangers. Generally he may become a creditor of the firm as to any matter except as to his contribution. The essential consideration in most of these cases is, that he has not in any way impaired his contribution to the capital stock of the partnership. Where he has done this, his liability is either for the amount which he has impaired his contribution or as a general partner, according to the terms of the statute. Where the general partners, by their misconduct, have imperilled the business of the partnership, the special partner can maintain a suit for a dissolution of the partnership and the appointment of a receiver to wind up and liquidate the partnership affairs as in the case of general partnerships. Where the dispute is merely as to a matter of judgment or the discretion of the general partners, the courts will not interfere. Except in these cases, all right of control and disposition of the partnership property is in the general partners, the special partner possessing merely the right to receive his share of the profits as they accrue and to receive so much of the capital stock on the dissolution as may be due him by reason of the contract or his share in the capital of the partnership. In ordinary circumstances, all right of winding up and liquidating the partnership affairs is in the general partners. The general partners are liable to account to the special partner on dissolution as in the case of a general partnership. Where the special partner has bound himself to bear a share of the losses in addition to the amount of the capital which he has invested in the business, the general partners may enforce this contract as in ordinary contracts, but where he has withdrawn part of the amount or capital which he has contributed with their consent, they cannot maintain an action to recover such amount, for there is no trust fund to support such action. The rights of third persons are not affected, however, by this inability of the general partners²).

F. Rights and Liabilities as to Third Persons. — In order to obtain any rights or immunities as to third persons which general partners do not possess, the partners in a limited partnership must comply strictly with the terms of the statute under which the partnership is formed³). All the partners are liable as general partners as to third persons when the business is such as is not permitted by the statute; when the formalities required on the formation have not been strictly or substantially, as the case may be, complied with; when a false statement as to material matter has been made in the certificate or affidavit; when the special partners have withdrawn any part or all of their contributions, either as such or as profits, or in any other manner diminished such contribution; when the special partners have taken such an activity in the conduct or management of the partnership affairs as is prohibited by the statute; when by any other means the special partners have estopped themselves generally from setting up the fact that the partnership is a limited or special partnership. When this general liability has once attached or the partnership has been terminated, such character can be re-assumed thereafter only by the same process as on the original formation. This broad statement is of course subject to the modification of those statutes which declare that when the special partner has unintentionally done an act which would impose unlimited liability on him, he shall be so liable only to such persons as have been damaged thereby and not generally to all the world, as is the general rule. This results from the fact that under those statutes, it is held that the partnership, as such, does not

¹) *Emery v. Kalamazoo Cons. Co.*, (1903) 132 Mich. 560; *Van Dolsen v. Abendroth*, (1882) 1 City Ct. Rep. (N. Y.) 469; *Pope Mfg. Co. v. Charleston Cycle Co.*, (1899) 55 S. C. 528. — ²) See 30 Cyc. 759; 38 Cent. Dig., Limited Partnership, sec. 839, et seq. — ³) *Lancaster v. Choate*, (1863) 87 Mass. 530; *Hartford Nat.*

Bank v. Beinecke, (1903) 80 N. Y. Supp. 803; *Spencer Optical Co. v. Johnson*, (1898) 53 S. C. 533; *Strang v. Thomas*, (1902) 114 Wis. 599; *Richardson v. Hogg*, (1861) 38 Pa. 153; *Manhattan Brass Co. v. Allin*, (1890) 35 Ill. App. 336 *Guillou v. Peterson*, (1879) 89 Pa. 163.

forfeit all its rights and immunities under the statute and cease to exist as a limited partnership.

1. **ALTERATION IN BUSINESS OR MEMBERSHIP.** — Because of the fact that the certificate may be relied upon as to all matters contained therein and must contain a true statement of the facts, any alteration in the business or in the membership of the partnership is held to destroy the limited character of the partnership. This occurs when one of the partners ceases to be associated as a general partner by reason of death or for any other reason, unless the statute declares otherwise, which is not generally the case; when the place of business is changed; when a new member is admitted into the partnership without the formality of a new certificate, whether as a general or a special partner; or when the character of the business has been changed. When, however, the general partners without the consent of the special partners attempt to do any of these things, such acts are ineffective to produce the results intended, because of the fact that the general partners have no such authority either in an ordinary partnership or under the statutes concerning limited partnerships. Such acts are without the ordinary scope of the partnership business and are not done for the purpose of carrying on the business for which the partnership has been formed. The consent of all the partners, both general and limited, must be had in order to make such acts effective either to accomplish the end intended or to destroy the limited character of the partnership. The partners acting or attempting to act would of course be liable for such acts as to persons damaged thereby, under the doctrine of estoppel¹).

2. **WITHDRAWAL OF CONTRIBUTION.** — There is here a distinction between the withdrawal of profits or amounts from the partnership by the special partner which unintentionally reduce or entirely withdraw the contribution of such partner and those acts which either directly or indirectly are intended to produce a withdrawal of the whole or a part of the amount contributed by the special partner. In the first case, the special partner is generally liable only to restore the amount so withdrawn, and the creditors of the partnership may enforce a liability against such special partner to the extent of the amount so withdrawn, after failure to secure satisfaction of their claims out of the partnership assets. But when the withdrawal is intentional, either directly or indirectly, it may be said to be an alteration of the capital of the partnership and such an act as entirely destroys the limited character of the partnership. The withdrawal must, in every case, be made during the existence of the partnership; and when the special partner withdraws the whole or a part of his contribution after the termination of the term, for which the partnership was formed, he is not liable as a general partner but merely to restore so much of the amount withdrawn as is necessary to satisfy all the claims of the creditors of the partnership, other than partners. This is true, also, when a special partner ceases to be such on the termination of the term for which the partnership was formed, but permits his contribution to remain in the business of the partnership continued either as a new limited partnership or as a general partnership. Under such circumstances, the special partner may later withdraw such amount without incurring any liability as to persons who became creditors of the new partnership after the time of the termination of the former partnership²).

3. **ESTOPPEL.** — When the partners have done some, but not all, of the acts necessary to secure the immunities of the statute, the partners are subject to the doctrine of estoppel as to the other partners, and an estoppel may be raised as to third persons under some of the decisions. When a third person has dealt with the partnership as a limited partnership and has given it credit as such, it has been held that such third person cannot hold the members as general partners³). This

¹) First Nat. Bank v. Clark, (1892) 143 Ill. 83; Lachaise v. Marks, (1855) 4 E. D. Smith (N. Y.) 610; Metropolitan Nat. Bank v. Palmer, (1890) 9 N. Y. Supp. 239; Singer v. Macalester, (1861) 4 Phila. (Pa.) 312; Singer v. Kelly, (1863) 44 Pa. 145; 30 Cyc. 761. — ²) Hampden Bank v. Morgan, (1840) 11 Fed. Cas. No. 6008; La Chomette v. Thomas, (1846) 1 La. Ann. 120; Beers v. Reynolds, (1851) 12 Barb. (N. Y.) 288; Lachaise v. Marks, (1855) 4 E. D. Smith (N. Y.) 610; Bell v. Merrifield,

(1882) 28 Hun (N. Y.) 219; George v. Carpenter, (1893) 73 Hun (N. Y.) 221; Hogg v. Orgill, (1859) 34 Pa. 344; Appeal of Coffin, (1884) 106 Pa. 280; Hogan v. Hadzsits, (1897) 113 Mich. 568; Bailey v. Hornthal (1898) 154 N. Y. 648. — ³) Tracy v. Tuffly, (1889) 134 U. S. 206; Hardt v. Levy (1893) 72 Hun. (N. Y.) 225; Staver Mfg. Co. v. Blake, (1896) 111 Mich. 282; 38 L. R. A. 798; Carhart v. Killough, (1881) 1 Tex. Civ. Cas. 112.

view is, however, denied by other cases, which appear to be the more correct¹). But in all cases, the creditors of the partnership may contract not to enforce a general liability or, by their conduct, may prevent themselves from setting up a general liability²). When partners have certified that there is a limited partnership and that one of the partners is a special partner, the other partners may not set up a denial of the record³).

4. ACTIVITIES OF SPECIAL PARTNER IN THE BUSINESS. — The statutes generally provide that a special partner may, from time to time, examine into the state and progress of the business of the partnership and may advise as to its management; but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise; and if he shall interfere contrary to these provisions, he shall be deemed to be a general partner.

The purpose of this provision is to give full effect to the restrictions and limitations placed upon the special or limited partner. The aim of the statutes is to give to the public generally, and those dealing with the partnership, an accurate knowledge of its status. To this end, a permanent record of the fact that the partnership is a limited or special partnership, of the names of the persons who are the special partners and the amount of capital contributed by each is required; these facts must be accompanied by a solemn oath and be duly published. In addition to this it is required that the name of the special partner shall be concealed as much as possible except that it may be employed in such manner as will distinctly point out the fact that he is a special partner. In furtherance of this purpose of the statutes, the provision above stated is required. For when a special partner is permitted to take an active part in the business or affairs of the partnership, he is in a position to assume more control than is justified by the nature of his liability. He would then be able to assume control of the business in such a manner that the fact of such act could be discovered only with great difficulty, if at all. Furthermore, his activities in the business and affairs of the firm would tend to deceive such persons as might deal with the partnership without any actual knowledge of the facts set forth in the certificate, or of the fact that one or more of the partners were special partners or that the partnership was a special partnership. Even when this fact was disclosed, the person dealing with the partnership might not so readily perceive the distinction resulting from the fact that the partner is a special partner. Since the person who deals with the partnership is bound by the record and the matters recorded, whether he has knowledge thereof or not, it is essential that no conduct on the part of the partners or the partnership should be permitted which would in any manner detract from the effect of the record or cast any doubt upon it. If, by the conduct of the partners, such third persons were deceived, they could not plead such a fact, unless it were such conduct as to raise an estoppel. When the special partner is permitted to take any part in the conduct or management of the business of affairs of the partnership, it would be difficult to establish any rule by which a line of demarcation could be drawn between such conduct as raised an estoppel and such as did not raise an estoppel. The public trusts to the partnership on the belief that the conduct and management of its business and affairs is in the general partners only. This reason may be another for prohibiting the special partner from taking, any part in the conduct or management of the business. For such third persons may not have the same reliance in the special partners nor be willing that such partners should conduct or manage the business upon the successful conduct or management of which the payment of their claims may depend. They have trusted to the contribution of the special partner, to the ability of the general partners, and to the unlimited liability of the general partners. None of these should be subject to any alteration, effective as to third persons, in any manner by the partners, without the consent of the creditors of the partnership⁴).

¹) *Manhattan Brass Co. v. Allin*, (1890) 35 Ill. App. 336; *Sheble v. Strong*, (1889) 128 Pa. 315. — ²) *Allegheny Nat. Bank v. Bailey*, (1891) 147 Pa. 111; *Imperial Shale Brick Co. v. Jewett*, (1901) 169 N. Y. 143; *Hess v. Werts*, (1818) 4 Serg. & R. (Pa.) 356. — ³) *Sturgeon v. Apollo Oil Co.*, (1902) 203 Pa. 369; *Casola v. Kugelman*, (1898) 54 N. Y. Supp. 89; (1900) 164 N. Y. 608. — ⁴) 30 Cyc.

762; *Bates on Limited Partnership*, secs. 104, et seq.; *Madison Bank v. Gould*, (1843) 5 Hill (N. Y.) 309; *Continental Bank v. Strauss*, (1893) 132 N. Y. 148; *Outcalt v. Burnet*, (1855) 1 Handy (Ohio) 404; *Richardson v. Hogg*, (1861) 38 Pa. 153; *Fourth St. Nat. Bank v. Whitaker*, (1895) 170 Pa. 297; *Farnsworth v. Boardman*, (1881) 131 Mass. 115.

Where, however, the acts of the special partner do not in any manner affect the contribution made or the free conduct and management of the business, there is no objection to such action. Thus the special partner cannot in any manner affect any one of these incidents by merely giving advice, thereby leaving the general partners free to act as they deem best; or by inspection of the books. So, also, the special partner cannot in any manner represent himself as a general partner; affect the general authority of the general partners; or diminish his contribution to the capital, by dealing with the partnership in the same manner and to the same extent as third persons. These transactions are subject only to the restrictions that they shall not be such acts as can be done only in the capacity of a partner and that they shall not be fraudulent as to the other creditors. Of course, if the transactions are, in truth, merely means for the diminution or return of the contribution, the courts will so construe them and impose unlimited liability or a liability to repay the amount received, as the case may be¹).

There is the further restriction that the special partner shall not act for the partnership as agent, attorney, or otherwise. This restriction as to attorney does not fall within the reasons given, *supra*. Some of the States do not impose such restriction as to an attorney. The agency is not that of an occasional act but such as are general or of such character as to give the agent such control of the business as the statute seeks to prohibit. These statutes, as construed in some States, have become almost devoid of use, other courts have tended to increase their efficiency of late years²).

When the statute causes the partnership to lose its limited character upon the interference of the special partner in the business in a manner contrary to the terms of the statute, a termination of the interference does not restore the limited character of the partnership. But when the act is unintentional, under the statutes making such a distinction, there would not appear to apply the same reasoning, and a termination of the interference should prevent unlimited liability thereafter. This is because of the fact that the character of the partnership has not been changed; but the special partner acting has become liable only as to the particular matter³).

5. PREFERENTIAL TRANSFERS. — Every transfer of the property or rights in the property of the partnership made by the partnership while insolvent or in contemplation of insolvency or after or in contemplation of insolvency of any partner or of any of the property or effects of a general or special partner, made by a general or special partner when insolvent or after or in contemplation of insolvency of such partnership or of such partner, with the intent to give a preference to any creditor of such partnership or insolvent partner or other creditor of the partnership and every judgment confessed, lien created, or security given by such partner, under the like circumstances, and with the like intent, is in like manners void as against the creditors of the partnership. Insolvency, under this requirement, means that the partnership does not possess sufficient assets, both in possession or due, to pay all its liabilities⁴). The mere insolvency of the special partnership does not, of itself, deprive a particular judgment creditor of his right to issue execution or prevent an individual creditor from beginning an action for the recovery of his claim⁵). On the insolvency of the partnership, the partnership property is said to become a trust fund for the benefit of the creditors of the partnership, to be distributed rateably among all the creditors; and any creditor may bring a creditors' bill to compel such distribution. This occurs at the moment of the assignment when the rights of the creditors and the special partner become fixed. While the special partner cannot compete as to the then creditors with respect to his then claims, this does not apply to subsequent claims on the part of either⁶).

¹) *Rayne v. Terrell*, (1881) 33 La. Ann. 812; *McKnight v. Ratcliff*, (1863) 44 Pa. 156; *Metropolitan Nat. Bank v. Sirret*, (1884) 97 N. Y. 320; *In re Terry*, (1810) 5 Biss. 110; *Lewis v. Graham*, (1857) 4 Abb. Pr. (N. Y.) 106; *Richter v. Poppenhausen*, (1870) 42 N. Y. 373; *Ulman v. Briggs*, (1880) 32 La. Ann. 657; *Barrows v. Downs*, (1868) 9 R. I. 446. — ²) *McKnight v. Ratcliff*, (1863) 44 Pa. 156; *Farnsworth v. Boardman*, (1881) 131 Mass. 115. — ³) *Bates on Limited Partner-*

ship, sec. 119. — ⁴) *Walkenshaw v. Perzel*, (1866) 32 How. Pr. (N. Y.) 233; *Bailey v. Hornthal*, (1898) 154 N. Y. 648; 61 Am. St. Rep. 645. — ⁵) *Greene v. Breck*, (1860) 32 Barb. (N. Y.) 73; *Stiefel v. Berlin*, (1898) 51 N. Y. Supp. 147. — ⁶) *In re Crocker*, (1902) 74 N. Y. Supp. 624; *In re Crocker*, (1902) 171 N. Y. 15; *Innes v. Lansing*, (1839) 7 Paige (N. Y.) 583; *Jackson v. Sheldon*, (1859) 9 Abb. Pr. (N. Y.) 127.

This restriction on the rights of the special partner applies only as to his contribution and not as to any such dealing as third persons are permitted to have with the partnership¹).

Where the special partner is a party to any act in preference of the creditors of the partnership or consents thereto, he forfeits his right to limited liability as to all the liabilities of the partnership²).

The liability incurred by a special partner by reason of such acts is not a penalty, but simply a withdrawal of the protection of the statute, leaving a liability which can be enforced in another State³).

It is not a violation of the statute for the partners to allow a judgment to be taken or an attachment to be obtained against the partnership by default⁴); nor to make a general assignment for the creditors without preferences⁵); nor to make a sale of the partnership property to a bona fide purchaser⁶).

A creditor may come into equity to protect his rights under this provision without first securing a judgment on his claim against the partnership. The proceedings must be in the names of himself and all other creditors who may make themselves parties thereto⁷).

6. APPLICATION OF ASSETS. — So long as the property of the partnership has not come into the possession of the court by reason of the appointment of a receiver, it is subject to execution process of a judgment creditor⁸). The property of the partnership is subject to the liabilities of the partnership to persons other than partners, except that the special partner may prove *pari passu* with the ordinary firm creditors as to his dealings with the firm which are not related to his contribution or in violation of the statute. Thereafter the special partner may recover the amount of his capital contributed according to the terms of the agreement among the partners, special and general. After insolvency has arisen or the partnership property has come into the possession of the court, the rights of creditors, other than partners, are paramount to the rights of the partners, except as to those rights which a special or limited partner has obtained by reason of his dealings with the firm as any third persons might. After the liabilities to third persons and those to the special partner arising out of his ordinary dealings with the partnership have been satisfied, the court will distribute the remaining assets according to the agreement. In the absence of an agreement, then equally, if the shares of the partners in the capital stock are equal, in some jurisdictions; equally irrespective of the shares of the stock in other jurisdictions; and according to the facts of the particular case in still other jurisdictions. The rules and principles applicable to ordinary partnerships are equally applicable in this instance to limited or special partnerships. The rights of the separate creditors of the individual partners, whether of the general or the special partners, are the same as in the case of an ordinary partnership. Such creditors can subject the partner's share to the payment of his separate debt only in the same manner and to the same extent as in the case of an ordinary partnership; the property subject to such debt or liability is only the amount which the particular partner is entitled to receive after all the partnership liabilities have been satisfied and the equities among the partners have been satisfied and terminated. These equities are the same as in the case of an ordinary partnership. The right of the sheriff or execution officer to take the property of the partnership from the possession, of the partnership for the purpose of subjecting it to the debt of a creditor of an individual partner is the same as in the case of an ordinary partnership; and is governed by the statutes of the particular State and may be said generally not to be permitted. This is true as to both general and special partners. When, for a violation of the statute, the special partner forfeits his rights under the statute,

¹) In *re Price*, (1902) 74 N. Y. Supp. 624; In *re Crocker*, (1902) 171 N. Y. 15. — ²) *Lineweaver v. Slagle*, (1885) 64 Md. 465; *Fannsworth v. Boardman*, (1881) 131 Mass. 115; *Whitcomb v. Fowle*, (1819) 10 Daly (N. Y.) 23; *McArthur v. Chase*, (1857) 13 Gratt. (Va.) 683 *Casola v. Kugelman*, (1898) 33 N. Y. App. Div. 428; *Singer v. Kelly*, (1863) 44 Pa. 145 *Coffin's App.* (1884) 106 Pa. 280. — ³) *Casola v. Kugelman*,

(1898) 54 N. Y. Supp. 89; *Casola v. Vasquez*, (1900) 164 N. Y. 608. — ⁴) *Hall v. Glessner*, (1889) 100 Mo. 155; *Van Alstyne v. Cook*, (1862) 25 N. Y. 489; *Greene v. Breck*, (1860) 32 Barb. (N. Y.) 73. — ⁵) *Schwartz v. Soutter*, (1886) 103 N. Y. 683; *Tracy v. Tuffly*, (1889) 134 U. S. 206. — ⁶) *State Bank v. Blanchard*, (1893) 90 Va. 22. — ⁷) *Crouch v. First Nat. Bank of Chicago*, (1895) 156 Ill. 342. — ⁸) *Van Alstyne v. Cook*, (1862) 25 N. Y. 489.

he is subject to the rules and regulations which govern the ordinary partners in an ordinary partnership as indicated, *supra*¹).

Under the statutes generally the special partner who deals with the partnership as an ordinary creditor is postponed to the creditors who are not partners and any payment made to him after insolvency or on dissolution will be set aside and made subject to the claims of the other creditors²).

The rights of the personal representatives of a general or special partner or of third persons claiming through or under a general or special partner in the application of the partnership property are the same as they are in the case of an ordinary partnership as set forth, *supra*³).

G. Actions by and against Limited Partnerships. — Actions and special proceedings in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special or limited partners. This provision applies, of course, only to such partnerships as are duly formed under the terms of the statute and have not in any manner lost the protection and immunities of the statute. Where such is not the case, all the partners are general partners and the actions and proceedings must be as in the case of an ordinary partnership. The circumstances of the case may, however, raise an estoppel so that the person who intended to be a special partner need not be made a party to the action. Where the creditors of the partnership have pursued their rights against the partnership and later discover that the special partner has forfeited his rights and immunities under the statute, any creditor of the partnership may still pursue the liability of the special partner as a general partner on behalf of himself and all the other creditors if the partnership is insolvent, or in his own behalf in those States in which an action against one or more but not all of the general partners does not extinguish the right as against the other partners who may be latter discovered⁴).

The service is governed by the same rules as in the case of an ordinary partnership and the judgment is binding upon the parties to the same extent as in the case of an ordinary partnership. Where a special partnership is being sued, the fact of the formation under the terms of the statute must be averred⁵).

H. Assignment of a Partner's Share. — Under the terms of the statutes, in some of the States, the special partners may, with the consent of the general partners, assign their interests in the partnership to a third person who thereupon becomes a special partner in place of the assigning partner upon filing the certificate required under such circumstances. No dissolution is produced under such circumstances and the formalities are not as formal as in an original formation or alteration⁶). In a few States, one or more of the general partners, but not all, may assign or transfer their interests in the partnership with the consent of the other partners, both general and special, without causing a dissolution of the partnership, provided such facts are certified and recorded with the same formalities as in the case of original formation⁷). The death of a partner, general or special, as a rule dissolves the partnership as in ordinary partnerships; but in a few States, by the articles of agreement this may be provided against as in the case of an ordinary partnership. In Pennsylvania, this is limited to the case of a special partner but in New York the statute is general. This statute provides that the business must be continued by the surviving partners and the personal representatives of the deceased partner who succeed to the rights and liabilities of the deceased partner. There appears to be a sufficient reason for the provision that the decease of a special partner does not necessarily dissolve the partnership because of the fact that he has contributed only

¹) *Savage v. Carney*, (Tenn. Ch. App., 1898) 47 S. W. 571; *Green v. Hood*, (1889) 42 Ill. App. 652; *Sherwood v. His Creditors*, (1890) 42 La. Ann. 103; *Harris v. Murray*, (1864) 28 N. Y. 574; *Hayes v. Heyer*, (1866) 35 N. Y. 326; *McArthur v. Chase*, (1857) 13 Grat. (Va.) 683; 30 Cyc. 764. — ²) *Appeal of Dunning*, (1863) 44 Pa. 150; *Appeal of Coffin*, (1884) 106 Pa. 280; *Jaffe v. Krum*, (1886) 88 Mo. 669; *Sherwood v. His Creditors*, (1890) 42 La. Ann. 103; *White v. Hackett*, (1859) 20 N. Y. 178. (Permitted under the present

N. Y. Act, sec. 37.) — ³) *Wakkenshaw v. Perzel*, (1866) 4 Robt. (N. Y.) 426; *Sherwood v. His Creditors*, (1890) 42 La. Ann. 103. — ⁴) *Wakkenshaw v. Perzel*, (1866) 32 How. Prac. (N. Y.) 233; *McArthur v. Chase*, (1857) 13 Grat. (Va.) 683; *Durant v. Abendroth*, (1884) 97 N. Y. 132; *Safe Deposit & Trust Co. v. Cahn*, (1906) 102 Md. 530; *Hotopp v. Huber*, (1899) 160 N. Y. 524. — ⁵) 30 Cyc. 764, et seq. — ⁶) See statutes of Pennsylvania, New York, N. Y., and New Jersey. — ⁷) See the statutes of New Jersey and Pennsylvania.

a specific amount, and this amount cannot be withdrawn to the detriment of the creditors of the partnership. But in the case of the general partners, there is support rather for the opposite view. These statutes are not general among the States.

I. Dissolution. — Generally speaking, a dissolution of a special partnership results in the same manner and produces the same results as in the case of an ordinary partnership. Because of the record, however, it is generally required that the partnership cannot be dissolved by act of the parties before the termination of the time stated in the certificate of formation, unless such fact be recorded and advertised as in the case of formation. This appears to be a proper provision necessary to give full effect to the facts appearing on the record. Just what effect the death of one or more of the general or special partners may have on the existence of the partnership may be somewhat doubtful. It is submitted, however, that the only safe way to secure absolute protection, is to record and advertise the fact of dissolution as in other cases. The same is doubtless true as to other causes of dissolution which are not the acts of the parties. Where the dissolution results from the termination of the term stated in the recorded certificate, no advertisement is necessary and the limited partner cannot thereafter be made liable as a general partner except by his own acts and his contribution is not subject to the liabilities incurred by the general partners thereafter. Third persons and creditors of the partnership must take notice of the facts of appearing on the record. The dissolution of the special partnership, as such, caused by the disregard of the terms of the statute has been noted, *supra*. In all such cases the partnership ceases to be a special or limited partnership and becomes forthwith a general partnership, in which all the partners, both general and special, become liable for any and all liabilities incurred thereafter as general partners. It is believed that such persons as were creditors of the special partnership before the time of its termination by such acts have their actions as to the contribution of the special partners as against the rights of the creditors of the partnership in its ordinary capacity¹).

J. Authority of Partners after Dissolution. — The authority of the partners after dissolution is governed by the same rules as in the case of an ordinary partnership. The authority is in the general partners only. Such authority consists only of the power to do such acts as are necessary to wind up and liquidate the business and affairs of the partnership as in the case of an ordinary partnership. The special partner has no right or authority to take any part in the winding up or settlement of the partnership affairs nor to take possession of any of the property or effects of the partnership for that purpose. He has of course the right to come into a court of equity to protect his interest for the purpose of securing an account of the partnership affairs or the appointment of a receiver to conduct the liquidation and settlement of the business and affairs on cause shown. Where the special partner does such acts with the assistance of the court he does not become liable as a general partner, even though the court may appoint him as trustee or receiver for the purpose of winding up the affairs of the partnership. Where some or all of the general partners have become deceased, the rights and duties of the personal representatives of such partner are the same as in the case of an ordinary partnership. The distribution and settlement of the affairs and property of the partnership, as between the partners, whether general or special, are governed by the same rules as in the case of an ordinary partnership²).

¹) *Ames v. Downing*, (1850) 1 Bradf. Sur. (N. Y.) 321; *Outcalt v. Burnet*, (1855) 1 Handy (Ohio) 404; *Andrews v. Schott*, (1848) 10 Pa. 47; *Safe Deposit & Trust Co. v. Cahn*, (1906)

102 Md. 530; 30 Cyc. 766. — ²) 30 Cyc. 767; 38 Cent. Dig. Partnership, secs. 862 et seq.; *Burdick on Partnership*, sec. 393.

Statutes on Partnership.

New York.

Consolidated Laws of New York, 1909. (Wadhams.)

Partnership Law.

Sec. 1. Short title. This chapter shall be known as the "Partnership Law."

Sec. 2. Partnership defined. A partnership, as between the members thereof, is the association, not incorporated, of two or more persons, who have agreed to combine their labor, property and skill, or some of them, for the purpose of engaging in any lawful trade or business and sharing the profits and losses, as such, between them.

Sec. 3. General partnership. A partnership formed otherwise than in the manner prescribed in this chapter for the formation of a limited partnership, is a general partnership.

General provisions.

Sec. 5. Authority of general partner. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner.

Sec. 6. Liability of general partner. Every general partner is liable to third persons for all the obligations of the partnership, jointly and severally with his general copartners.

This section has been held to apply only to limited partnerships. General partners are liable, as heretofore, jointly, and not jointly and severally as declared by the section. *Segilman v. Friedlander*, (1910) 138 N. J. App. Div. 784; 123 N. J. Supp. 583. See also *Burdick, Liability of Partners*, in 11 Col. Law Rev. 101.

Business and partnership names.

Sec. 20. When partnership or business name may be continued. The use of a partnership or a business name may be continued in either of the following cases:

1. Where the business of any firm or partnership in this state, having business relations with foreign countries or which has transacted business in this state for not less than three years, continues to be conducted by some or any of the partners, their assignees or appointees;

2. Where any limited partnership shall hereafter be formed under the laws of this state it may use the firm or corporate name of any general or limited partnership or of any corporation, domestic or foreign, which may theretofore have carried on its business within this state, where said general or limited partnership or corporation has discontinued or shall be about to discontinue its business within the state, and where a majority of the partners, general or special, in either of such last mentioned copartnership, or of the survivors thereof, shall be members of the new limited copartnership, or where a majority of the members of such copartnership theretofore existing or of the surviving members thereof, or where stockholders holding a majority of the stock of such corporation shall consent in writing to the use of such firm or corporate name by such new copartnership; or

3. Where any resident of this state dies, who at the time of his death and for at least five years immediately prior thereto, conducted and carried on in his sole name, any business in this state, or who at the time of his death, so conducted and carried on any business having relation with other states of foreign countries, the right to use the name of such person, for the purpose of continuing and carrying on such business, shall survive and pass and be disposed of and accounted for as part of the personal estate of such deceased person and such business may be continued and carried on under such name by any person who comes into the legal possession thereof.

Sec. 21. Certificate to be filed and recorded. Clerk's fees. Whenever a partnership or business name continues to be used as provided by the last preceding section, the person or persons using such name shall sign and acknowledge a certificate, declaring the person or persons intending to deal under such name, with their respective

places of residence, and file the same in the clerk's office of the county where the principal place of business is located, and cause a copy of such certificate to be published once in each of four consecutive weeks in a newspaper of the city or town in which such principal place of business is located, or if none be published in such city or town, in the newspaper nearest thereto. A county clerk with whom any such certificate is filed, shall keep a book in which all such certificates shall be recorded, with their date of record, and also a register in which shall be entered in alphabetical order the name of every such partnership and of the partners thereof, and every such business name of a deceased person and the names of the persons filing certificates there. The clerk is entitled to a fee of one dollar for filing and recording such certificate and entering such names, and to an additional fee of ten cents for every name of a partner beyond two, and to a fee of fifty cents for a certified copy of such certificate.

Sec. 22. Fictitious firm names prohibited. No person shall hereafter transact business in the name of a partner not interested in his firm, and when the designation "and company," or "and Co.," is used, it shall represent an actual partner; but a violation of this section shall not be a defense in an action or proceeding brought by an assignee for the benefit of creditors, or by a receiver of the property of, or by an executor or administrator of, a person who has violated the same.

Sec. 924, Page 2809. Fictitious copartnership names. A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation "and company," or "and Co.," when no actual partner is represented thereby is guilty of a misdemeanor. But this section does not apply to any case, where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person.

Sec. 84, Page 126. As banking companies. The circulating notes delivered to an individual banker shall express only the individual liability of the banker and shall be signed by him only and not by any attorney or agent. Any banker or person acting as his attorney or agent who shall violate any provision of this section shall forfeit to the people of the state one hundred dollars for each offense, to be collected and paid into the treasury to defray the general expenses of the banking department.

The superintendent shall not issue circulating notes to any individual banker designating such individual as a bank unless as an addition to his own proper name. If such individual shall have partners in the business of banking at the time of commencing the same, such fact shall be known by the words "and company," to be added to his own proper name, upon every note issued to him, or them from the banking department.

If it shall appear, by the return of any individual banker, or by the report of any person designated by the superintendent of banks, that any other person is interested with such individual banker directly or indirectly in the securities deposited by him for the purpose of obtaining circulating notes, or in the business of circulating such notes, or in the benefits or advantages thereof, the superintendent shall withhold all interest and dividends on the securities deposited with him, by such banker, and all circulating notes from such banker, until he shall have filed in the banking department a certificate, signed and acknowledged by every person so returned or reported as interested in such securities, stating that such person is interested with such individual banker in the circulating notes obtained, or to be obtained by him, and in the benefits and advantages of circulating the same. Such certificate shall be evidence that the person signing and acknowledging the same is a general partner with such banker in the business of banking, and as such is liable with him individually for all the debts and obligations created or made by such individual banker in his business.

Sec. 283, Page 212. As mortgage, etc. The superintendent of banks may issue a licence under his hand and official seal in accordance with the provisions of this article, authorizing mortgage companies organized under the laws of any other state to transact business within the limits of this state; and the supervisory power granted by this article shall apply to all associations, copartnerships, individuals, joint-stock companies, firms, or corporations organized under the laws of any other state, who sell, offer for sale, or negotiate bonds or notes, secured by deed of trust or mortgage of real property or bonds, or obligations payable in installments, or capital stock, or choses in action, owned, issued, negotiated, or guaranteed by them; and to all associations, copartnerships, joint-stock companies, or corporations organized

as provided in sections two hundred and eighty, two hundred and eighty-one, and two hundred and eighty-two of this chapter, and the provisions of article two of this chapter shall apply to such.

Sec. 284. Verified statement to be furnished. The companies, associations, and others described in the preceding sections shall annually make and furnish to the superintendent of the banks a true and verified statement of their financial condition in detail on blanks furnished by him for that purpose, which shall show:

1. The amount of capital actually paid in cash;
2. The amount of capital subscribed;
3. The undivided profits or earnings on hand;
4. The total liabilities itemized in such form as may be indicated in the blanks;
5. The total amount of moneys loaned, invested, or guaranteed;
6. The number and amount of all mortgages in arrears of interest for a period exceeding six months prior to the date of the report.
7. The number and amount of mortgages foreclosed during the past year;
8. The present cash value of all real property held or owned through foreclosure, and such other and further information concerning their business affairs and methods as the superintendent shall require.

The statement shall be signed by the officers of the association, company, or corporation or other person making the same, and in such form as the superintendent shall prescribe. The superintendent may, in his discretion, require a like report, either wholly or in part, as to such particulars as he may prescribe, to be made and submitted to him at any time and within such period as he may designate. No licence shall be issued unless the superintendent, either personally or by some competent person or persons appointed by him, has visited and examined thoroughly into the condition, business methods, and affairs generally of any company, association, corporation, copartnership, or individual proposed to be licenced by him; and he may make such examination as often thereafter as he deems necessary, and such examination shall be made at least once in each year. The superintendent and every examiner appointed by him shall have power to administer an oath to any person whose testimony may be required in any such examination; and all books and papers which may be deemed necessary to be examined by the superintendent or examiner shall be produced when demanded in writing by him. On every such examination inquiry shall be made as to the condition and resources generally of the company, corporation, association, copartnership, or individual examined, the mode of conducting and managing its affairs, the actions of its directors or trustees, the investment of its funds, the safety and prudence of its management, the security afforded to those by whom its engagements are held, and whether the requirements of its charter and of law have been complied with in the administration of its affairs.

Sec. 285. Issue of licence. If it shall appear to the satisfaction of the superintendent from such examination made, and the statement or report submitted by any such corporation company, copartnership, firm, association, or individual organized under the laws of any other state, pursuant to the requirements of the preceding section that its affairs are being conducted in a safe and lawful manner, he may issue to such company, corporation, copartnership, firm, or association a licence under his hand and seal, permitting it to transact business in this state for the term of one year from the date thereof.

Sec. 286. Unlicenced companies prohibited. No person, association, corporation, company, or copartnership shall act in this state as the agent or representative of any company, corporation, or others described in section two hundred and eighty-three of this chapter, unless the same has been duly licenced by the superintendent of banks as hereinbefore provided. Every such company, corporation, or others, described in section two hundred and eighty-three of this chapter, organized under the laws of any other state, shall within thirty days after being authorized to transact business in this state, file in the office of the superintendent of banks, a certificate stating the name and business address of every person, association, corporation, company, firm, or others, who act or propose to act in this state as its agent or representative, and in case of any change in such representative, an amended certificate shall be forthwith filed as herein provided. Whoever shall offend against the provisions of this section shall forfeit to the people of the state the sum of one thousand dollars for every offense.

Sec. 287. Revocation of licence. If it shall appear to the superintendent from an examination made of or report submitted by any licensee organized under the laws of any other state under the provisions of this article, or from sufficient information otherwise obtained, that such licensee is conducting the business and affairs in an unsafe and unauthorized manner, he shall, by an order under his hand and official seal, addressed to such licensee, direct it to discontinue such unsafe or illegal practices and to conform to the requirements of its charter and of law, and to provide for the safety and security of its transactions. It such licensee shall neglect, or refuse to make any reports as herein specified, or to comply with such order, or if it shall appear to the superintendent that it is unsafe or inexpedient for any such licensee continue the transaction of business, he shall forthwith revoke the licence granted to any such licensee, and serve a copy of the order of revocation on the company, association, corporation, copartnership, or individual whose licence is revoked, at its principal office for the transaction of business in this state, and also upon each agent or representative thereof within the state specified in the certificate provided for in section two hundred and eighty-six of this chapter, by depositing the same in the post-office directed to such licensee at such principal place of business and to each of such agents at his place of business; and the superintendent may, in his discretion, publish such order with such other facts as he may deem proper, for six successive days in the state paper published in the city of Albany.

Sec. 330, Page 1305. Newspaper, etc., publication of owner's name. Every newspaper, magazine, or other periodically printed publication published in this state, shall publish in every copy of every issue, upon the outer cover, or at the head of the editorial page, the full name and address of the owner, owners, proprietor, or proprietors of such publication; and if said publication shall be owned or published by a partnership, limited partnership, or an incorporated joint-stock association, then the full names and addresses of the partners, or officers, and managers of said partnership, limited partnership, or incorporated joint-stock association shall be published in like manner. The representative capacities of those named shall be indicated in like manner.

Sec. 331. Penalty for failing to publish. Any person, partnership, limited partnership, unincorporated joint-stock association, or corporation publishing in the state of New York a newspaper, magazine, or other periodically printed publication which omits, fails, or neglects to carry out the provisions of the preceding section shall be guilty of a misdemeanor for each issue of such publication over which such neglect or failure so to do extends; and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars.

Sec. 322. Penalty for false statement. Any person, partnership, limited partnership, unincorporated joint-stock association or corporation causing, or knowingly permitting his, their, or its name or names to be published in such manner as to indicate or denote that he, they or it is or are the publisher or publishers of a publication such as is specified in section three hundred and thirty of this article, and not indicating truly, shall be liable to the same extent as the real publisher or publishers would be in any suit for damages involving such publication in the subject-matter thereof, brought against such person, partnership, limited partnership, unincorporated joint-stock association or corporation as the publisher or publishers or as the alleged publisher or publishers of such publication.

Sec. 2, Page 452. Assignments for benefit of creditors. Jurisdiction of proceedings. The term "judge" when used in this article shall apply equally to a county judge of the county within which the assignment is recorded and to justices of the supreme court, and the term "court" when used in this article shall, in like manner, apply to the county court of such county and to the supreme court. All applications hereunder made in the supreme court shall be made to the court or a justice thereof within the judicial district where the assignment is recorded, and all proceedings and hearings under this article had in the supreme court upon the return of a citation shall be had at a special term of said court held in the county where the judgment debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment.

Sec. 3. Requisites of general assignment. Every conveyance or assignment made by a debtor of his estate, real or personal or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence

and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor.

Every such conveyance or assignment shall be duly acknowledged before an officer, authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated.

The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in, or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

Sec. 19, Page 458. Service upon partners. Personal service upon one of two or more creditors who claim as copartners or otherwise as joint-creditors shall be equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service.

Sec. 56, Page 465. Consent of partnership to insolvent's discharge. When a partnership becomes a consenting creditor, the consent may be executed in its behalf, and any affidavit, required of a creditor in the proceedings, may be made, by either of the partners.

Sec. 9, Page 2160. Payment of wages by receiver. Upon the appointment of a receiver of a partnership, or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such partnership shall be preferred to every other debt or claim.

Sec. 230, Page 500. Compositions by joint debtors. A joint debtor may make a separate composition with his creditor. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved, by consent or otherwise. In that case the instrument must release or exonerate him from all liability incurred by reason of his connection with the partnership.

Sec. 231. Right of action against joint debtor where there has been a composition. An instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him appears affirmatively upon the face thereof.

Sec. 232. Defenses by joint debtor who has not compounded. Where a joint debtor including a partner has compounded, a joint debtor who has not compounded, may make any defense or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made.

Sec. 233. Action by joint debtor against compounding debtor. A joint debtor, including a partner who has not compounded, may require the compounding debtor to contribute his ratable proportion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged.

Code of Civil Procedure. (Parsons, 1909.)

Sec. 1932. Judgment against defendants jointly indebted when all are not served. In an action wherein the complaint demands judgment for a suit of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons be served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and if he recovers final judgment, it may be taken against all the defendants thus jointly indebted.

Sec. 1933. Effect of such judgment. Such a judgment is conclusive evidence of the liability of each defendant, upon whom the summons was personally served, or who appeared in the action. Where it is taken against a defendant upon whom

the summons was served by publication or without the state, pursuant to an order for that purpose, it has the effect, as against that defendant, specified in section 445 of this act. As against such a defendant, who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established by other evidence.

Sec. 1934. Execution; indorsement thereupon. An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff, containing the name of each defendant, who was not summoned, and restricting the enforcement of the execution, as prescribed in the next section.

Sec. 1935. How collected. An execution against the person, issued upon such a judgment, shall not be enforced against the person of a defendant, whose name is so indorsed thereupon. An execution against property issued upon such a judgment shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property owned by him, jointly with the other defendants, who were summoned, or with any of them; and out of the real and personal property of the latter or of any of them.

Sec. 1936. Judgment, how docketed; effect of docketing. Where a judgment has been taken, as prescribed in section 1932 of this act, the clerk, with whom the judgment-roll is filed, must write upon the docket, opposite or under the name of each defendant upon whom the summons was not served, the words "not summoned"; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

Sec. 1937. Action to charge defendants not personally summoned. After the recovery of a judgment against joint debtors, as prescribed in section 1932 of this act, an action may be maintained by the judgment creditor, against one or more of the defendants, who were not summoned in the original action, to procure a judgment, charging his or their property with the sum remaining unpaid upon the original judgment.

Sec. 1938. Complaint in such action. The complaint in such an action must be verified; must contain an allegation that the judgment has not been paid; and must state the sum remaining unpaid thereupon at the time of the verification.

Sec. 1939. Answer. The defendant's answer is restricted to defences or counterclaims, which he might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defences or counterclaims, which have arisen since it was rendered.

Sec. 1940. Provisional remedies. For the purpose of obtaining an order of arrest, an injunction order, or a warrant of attachment, the action is regarded as being founded upon the contract, upon which the original judgment was recovered.

Sec. 1941. Judgment. Where the judgment is in favor of the plaintiff, it must determine the sum remaining unpaid upon the original judgment; and it may be docketed and an execution may be issued thereupon, as if it was a judgment for the sum so remaining unpaid, and the costs, if any. Costs must be awarded, as if the action was brought upon the original contract and the sum so remaining unpaid had been recovered therein.

Sec. 1945. Action against persons engaged in transportation. In an action brought against one or more persons engaged as a joint-stock association, partnership, or otherwise, in the periodical transportation of passengers or property, an objection to any of the proceedings cannot be taken, by a person properly made a defendant, on the ground that the plaintiff had joined with him, as a defendant, a person not jointly engaged with him in that business, or on the ground that the plaintiff has failed so to join with a person so jointly engaged; unless the persons so engaged have at least thirty days before the commencement of the action, filed in the clerk's office of each county in which they transport passengers or property, a statement showing the names of all of them. A statement so filed is conclusive, for the purposes specified in this section, as against the persons filing it, until thirty days after filing, in like manner, a new statement, showing a change of interest.

Sec. 1946. When partner not sued remains liable. When, for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand against each omitted partner, setting forth in the complaint the facts specified in this section, as well as the facts constituting his cause of action upon the demand.

Sec. 1947. Continuance of partnership business during action for accounting, etc. In an action brought to dissolve a partnership, or for an accounting between partners, or affecting the continued prosecution of the business, the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action, by one or more of the partners, upon their executing and filing with the clerk an undertaking in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court in the action and perform all things which the judgment therein requires them to perform. The court may impose such other conditions as it deems proper, and it may in its discretion at any time thereafter require a new undertaking to be given. The court may also ascertain the value of the partnership property, and of the interest of the respective partners by a reference or otherwise, and may direct an accounting between any of the partners; and the judgment may make such provision for the payment to the retiring partners, for their interest, and with respect to the rights of creditors, the title to the partnership property, and otherwise as justice requires, with or without the appointment of a receiver, or a sale of the partnership property.

Sec. 693. Partners may apply to discharge attachment. If a warrant of attachment is levied upon the interest of one or more partners in goods or chattels of a partnership, the other partners who are not defendants in the action, or any of them, may at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.

Sec. 694. Undertaking to be given. Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff on demand, the amount of any judgment which may be recovered against the partner who is the defendant in the action, or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a warrant of attachment, or an execution, may come to the sheriff's hands, at any time before the warrant of attachment, which was so levied is vacated or annulled; not exceeding a sum specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or chattels seized, by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.

Sec. 1413. When partners may apply for release of property levied upon. Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them may, at any time before the sale, apply to a judge of the court, or to the county judge of the county, where the seizure was made, upon an affidavit, showing the facts for an order, directing the officer to release the property, and to deliver it to the applicant.

Sec. 1415. Provision, where a warrant of attachment has also been levied, etc. Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in the personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections 693 and 694 of this act, a levy, by virtue of an execution against his individual property, cannot be made upon his interest on the same property, unless the warrant of attachment has been vacated or annulled.

Sec. 2879. Service of summons. Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court

might be delivered as prescribed in sections four hundred and thirty-one and four hundred and thirty-two of this act, or to any director, managing agent or trustee of the corporation, person, partnership, or company by whatever official title he or it is called.

California.

Civil Code, 1909.

Sec. 2395. Partnership, what. Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them.

Sec. 2396. Ship-owners. Part-owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship.

Sec. 2397. Formation of partnership. A partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof.

Partnership property.

Sec. 2401. Partnership property, what. The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby.

Sec. 2402. Partner's interest in partnership property. The interest of each member of a partnership extends to every portion of its property.

Sec. 2403. Partner's share in profits and losses. In the absence of any agreement on the subject the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

Sec. 2404. When division of losses implied. An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.

Sec. 2405. Application of partnership property. Each member of a partnership may require its property to be applied in the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance it any due to him.

Sec. 2406. Partnership property by presumption. Property, whether real or personal, acquired with partnership funds, is presumed to be partnership property.

Mutual obligation of partners.

Sec. 2410. Partners trustees for each other. The relations of partners are confidential. They are trustees for each other within the meaning of chapter one of the title on trusts, and their obligations as such trustees are defined by that chapter.

Sec. 2411. Good faith to be observed between them. In all proceedings connected with the formation, conduct, dissolution, and liquidation of a partnership, every partner is bound to act in the highest good faith toward his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Sec. 2412. Mutual liability of partners to account. Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf.

Sec. 2413. No compensation for services to firm. A partner is not entitled to any compensation for services rendered by him to the partnership.

Sec. 2417. Renunciation of future profits exonerates from liability. A partner may exonerate himself from all future liability to a third person, on account of the partnership, by renouncing, in good faith, all participation in its future profits, and by giving notice to such third person, and to his own copartners, that he has made such renunciation, and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future.

Sec. 2418. Effect of renunciation. After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.

General partnership.

Sec. 2424. General partnership, what. Every partnership that is not formed in accordance with the law concerning special or mining partnerships, and every special partnership, so far only as the general partners are concerned, is a general partnership.

Powers and authority of partners.

Sec. 2428. Power of majority of partners. Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business.

Sec. 2429. Authority of individual partner. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business, in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

Sec. 2430. What authority partner has not. A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting:

1. To make an assignment of the partnership property or any portion thereof to a creditor, or to a third person in trust for the benefit of a creditor or of all creditors;

2. To dispose of the good-will of the business;

3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise;

4. To do any act which would make it impossible to carry on the ordinary business of the partnership;

5. To confess a judgment;

6. To submit a partnership claim to arbitration;

7. To do any other act not within the scope of the preceding section.

Sec. 2431. Partner's acts in bad faith when ineffectual. A partner is not bound by any act of a copartner, in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value, in reliance upon such act.

Sec. 2435. Profits of individual partner. All profits made by a general partner, in the course of any business usually carried on by the partnership, belong to the firm.

Sec. 2436. In what business partner may not engage. A general partner who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

Sec. 2437. In what he may engage. A partner may engage in any separate business, except as otherwise provided by the last two sections.

Sec. 2438. Must account to firm for profits. A general partner transacting business contrary to the provisions of this article may be required by any copartner to account to the partnership for the profits of such business.

Liability of partners.

Sec. 2442. Liability of partners to third persons. Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners.

Sec. 2443. Liability for each other's acts as agents. The liability of general partners for each other's acts is defined by the title on agency.

Sec. 2444. Liability of one held out as partner. Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons, to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership.

Sec. 2445. No one liable as partner unless held out as such. No one is liable as a partner who is not such in fact, except as provided in the last section.

Termination of partnership.

Sec. 2449. Duration of partnership. If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.

Sec. 2450. Total dissolution of partnership. A general partnership is dissolved as to all the partners:

1. By lapse of the time prescribed by agreement for its duration;
2. By the expressed will of any partner, if there is no such agreement;
3. By the death of a partner;
4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property;
5. By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or
6. By a judgment of dissolution.

Sec. 2451. Partial dissolution. A general partnership may be dissolved as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject however to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution.

Sec. 2452. Partner entitled to dissolution. A general partner is entitled to a judgment of dissolution:

1. When he, or another partner, becomes legally incapable of contracting;
2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or
3. When the business of the partnership can be carried on only at a permanent loss.

Sec. 2453. Notice of termination. The liability of a general partner for the acts of his copartners, even after a dissolution of the copartnership, in favor of the persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons until such dissolution has been advertised in a newspaper, published in every county where the partnership at the time of its dissolution had a place of business, if a newspaper is there published, to the extent in either case to which such persons part with value in good faith, and in the belief that such partner is still a member of the firm.

Sec. 2454. Notice by change of name. A change of the partnership name, which plainly indicates the withdrawal of a partner, is sufficient notice of the fact of such withdrawal to all persons to whom it is communicated; but a change in the name, which does not contain such an indication, is not notice of the withdrawal of any partner.

Liquidation.

Sec. 2458. Powers of partners after dissolution. After the dissolution of a partnership, the powers and authority of the partners are such only as are prescribed by this article.

Sec. 2459. Who may act in liquidation. Any member of a general partnership may act in liquidation of its affairs, except as provided by the next section.

Sec. 2460. Who may not act in liquidation. If the liquidation of the partnership is committed, by consent of all the partners, to one or more of them, the others have no right to act therein: but their acts are valid in favor of persons parting with value, in good faith, upon credit thereof.

Sec. 2461. Powers of partners in liquidation. A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property.

Sec. 2462. What partner may do in liquidation. A partner authorized to act in liquidation may indorse in the name of the firm, promissory notes or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm, by an acknowledgment, when an action thereon is barred under the provisions of the code of civil procedure.

Sec. 2466. Fictitious names, duties of those using. Except as otherwise provided in the next section, every partnership transacting business in this state under a

fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated, a certificate, stating the names in full of all the members of such partnership, and their places of residence and publish the same once a week for four successive weeks in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in the adjoining county.

Sec. 2467. Style of foreign partnership. A commercial or banking partnership, established and transacting business in a place without the United States, may without filing the certificate or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

Sec. 2468. Certificates, execution, filing, etc. The certificate filed with the clerk, as provided in section twenty-four hundred and sixty-six, must be signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. Where the partnership is hereafter formed, the certificate must be filed, and the publication designated in that section must be made within one month after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership; where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act. Persons doing business as partners contrary to the provisions of this article, shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name in any court of this state until they have first filed the certificate and made the publication herein required.

Sec. 2469. New certificates on change of partner. On every change in the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned in section twenty-four hundred and sixty-seven, a new certificate must be filed with the county clerk, and a new publication made as required on the formation of such partnership.

Sec. 2470. Register of such firms to be kept by county clerk. Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him, pursuant to this article, entering in alphabetical order the name of every such partnership and of each partner therein.

Sec. 2471. Certified copies of register and proof of publication to be evidence. Copies of the entries of a county clerk, as herein directed, when certified by him, and affidavits of publication as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

Sec. 2472. Foreign copartnership. Designation of agent. Every copartnership, other than those mentioned in section two thousand four hundred and sixty-seven of this code, domiciled without this state, and having no regular place of business within this state, must within forty days from the time it commences to do business therein, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state, may be served. A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment. Such process may be served on the person so designated, or, in the event that no such person is designated then on the secretary of state, and the service is a valid service on such copartnership.

Code of Civil Procedure.

Sec. 383. Suits on commercial paper. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers, separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judg-

ment a several judgment must be rendered against each of such insurers according as his liability shall appear.

Sec. 388. Actions in the firm name. When two or more persons associated in any business, transfer such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in each case being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.

Sec. 389. Other parties may be brought in. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemented pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Sec. 414. Proceedings where only one person is served. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Sec. 579. Proceedings against those not bound by judgment. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Proceedings against joint debtors.

Sec. 989. Summons against those not bound by judgment. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section four hundred and fourteen, those who were not originally served with the summons and did not appear to the action may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

Sec. 990. When and how served. The summons, as provided in the last section, must describe to the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time, as the original summons. It is not necessary to file a new complaint.

Sec. 991. Affidavit. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

Sec. 992. Answer. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, by reason of any defense existing at the commencement of the action.

Sec. 993. Pleadings. If the defendant, in his answer, denies the judgment, or sets up any defense which may have arisen subsequently, the summons with the affidavit annexed, and the answer, constitute the written allegations in the case; if he denies his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations, subject to the right of the parties to amend their pleadings as in other cases.

Sec. 994. Trial of issues. Verdict. The issues formed may be tried, as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

Sec. 1870. Facts which may be given in evidence. Evidence may be given upon trial of the following facts: After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

Sec. 1963. Presumption of partnership. Persons acting as copartners are presumed to have entered into a contract of copartnership.

Sec. 1585. Duties of surviving partner. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect, or refusal, may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

Sec. 564. Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

Sec. 641. Partner may not be referee. A party may object to the appointment of any person as referee, on one or more of the following ground: 2. Standing in the relation of guardian and ward, master and servant, employer and clerk or principal and agent to either party; or being a member of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party.

Sec. 1524. Executor's sale of firm interest. Partnership interests, or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or any other person, the court or judge must carefully inquire into the condition of the partnership affairs and must examine the surviving partner, if in the county and able to be present in court.

Montana, North Dakota, South Dakota, and Oklahoma.

The Western Code States of Montana, North Dakota, South Dakota, and Oklahoma have, in general, copied the law of California. The articles on Partnerships differ from those of California in the following particulars:

Montana.

Revised Codes of Montana (1907) omits section 2396: "Part-owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship".

Sec. 2467, of the California Code: "A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate, or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious or do not show the names of the persons interested as partners in such business," is omitted from the Revised Codes of Montana (1907).

Sec. 5505, of the Revised Codes of Montana (1907) differs from **Sec. 2468** of California in that the assignees of partners are included.

Sec. 2472, of the California Code is omitted from the Rev. Codes of Mont. (1907) and in lieu thereof **Sec. 5509,** reading, "Individual using fictitious name in business

must file certificate: Every individual now transacting business, or who may hereafter transact business, in this state under a fictitious name, or a style or designation purporting to be a firm name or corporate name, shall file and publish, or cause to be filed and published, the certificates described in Sec. 5504 (3280), 5505 (3281) and 5506 (3282) of the Civil Code of the State of Montana. Anyone doing business contrary to the provisions of this section shall be subject to the disabilities and provisions of section 5505 (3281) of this Code¹. (10th Sess. Chap. 150.)" is inserted.

Sec. 5857, reading: "**Surviving partner's authority.** On the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation; even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to this other personal property," is inserted instead of sec. 2462 of California Code.

Sections 5860 and 5861 differ from section 2468 of California in that they are general and do not distinguish between existing and future partnerships. The substance is, however, the same.

North Dakota.

Sec. 2472, of the California Code reading: "Every copartnership other than those mentioned in section two thousand four hundred and sixty-seven of this code, domiciled without this state, and having no regular place of business within this state, must within forty days from the time it commences to do business therein, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served. A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment. Such process may be served on the person so designated, or in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such copartnership," is omitted from the North Dakota Code.

South Dakota.

Compiled Laws of South Dakota (1908) omit sec. 2472 of the California Code, and contains sec. 1761 in addition to the sections thereof, reading as follows: "A partner, authorized to act in liquidation may indorse, in the name of the firm, promissory notes, or other obligations held by the partnership, for the purpose or collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm, by an acknowledgment, when an action thereon is barred under the provisions of the code of civil procedure. On the death of a partner, the surviving partners succeed to the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property."

Oklahoma.

Sec. 4875 of General Statutes of Oklahoma (1908) differs from Sec. 2462 of California in the following manner: "On the death of a partner, the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purpose of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property," is added to section 4875 of Oklahoma and is not contained in the California Code.

Sec. 4878 of General Statutes of Oklahoma (1908) differs from sec. 2468 of California in that it does not differentiate between existing and future partnerships and adds a proviso on the curing of the disability. The result in the decisions is the same in both cases.

Sec. 2472, of California, reading: "Every copartnership other than those mentioned in section two thousand four hundred and sixty-seven of this code, domiciled without this state, and having no regular place of business within this state, must, within forty days from the time it commences to do business therein, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served.

¹) Act approved March 7, 1907.

A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment. Such process may be served on the person so designated, or, in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such copartnership," is omitted from General Statutes of Oklahoma (1908).

Louisiana.

Saunders' Revised Civil Code, 1909.

I. General provisions.

Sec. 2801. Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties.

Sec. 2802. It may be made by all persons capable of contracting.

Sec. 2803. It is regulated by the rules laid down in the title: Of Conventional Obligations, in all things not differently provided for by this title.

Sec. 2804. All partnerships are null and void which are formed for any purpose forbidden by law or good morals. But all the partners in such a partnership are liable in solido to third persons who may contract with them without a knowledge of the illegal or immoral object of the partnership.

Sec. 2805. Partnerships must be created by the consent of the parties.

Sec. 2806. A community of property, does not of itself create a partnership, however that property may be acquired, whether by purchase, donation, accession, inheritance or prescription.

Sec. 2807. The community of property, created by marriage is not a partnership; it is the effect if a contract governed by rules prescribed for that purpose in this code.

Sec. 2808. Property, when brought into partnership, or acquired by it, and the profits, when they are kept undivided, for the benefit of the partnership, are called partnership stock.

Sec. 2809. Property, credit, skill, and industry being the sources from which the profits of a partnership may be drawn, each of the partners may furnish either or all of these, in such proportions as they may mutually agree.

Sec. 2810. By credit, in the foregoing article, is meant, not only a reputation for responsibility as to pecuniary concerns, but also any quality or other circumstance that may acquire the good will of others, and contribute to the prosperity of the partnership.

Sec. 2811. It is of the essence of this contract that a profit is contemplated, and that each of the parties is to partake therein; the proportion they are respectively to receive is regulated by the stipulation of the parties, where they make any; where none are made for this purpose, the proportion is regulated by law.

Sec. 2812. It is not necessary, under the last article, that the contract of partnership should provide for the actual partition of the profits. A stipulation that the profits shall be converted into stock for the benefit of all the parties in determined proportions, is valid.

Sec. 2813. A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses. But the proportion, like that of the profits, may be regulated by the stipulation of the parties, and where they make none, is provided for by law.

Sec. 2814. A stipulation that one of the contracting parties shall participate in the profits of a partnership, but shall not contribute to losses, is void, both as it regards the partners and third persons. But in the case of a partnership in commendam, hereinafter provided for, the liability to loss may be limited to the amount of stock furnished.

Sec. 2815. The foregoing article does not prevent the partners, or any one of them, from making a donation of their or his profits arising from the partnership stock, to another, or even from selling the same for a valuable consideration; but the donee or vendee is not on that account considered as a partner.

Sec. 2816. A partnership cannot be executor, curator, or tutor, and cannot exercise any other private office.

Sec. 2817. By private office, in this code, is meant such trust as relates solely to the interest or affairs of one or more designated individuals, but which cannot be executed without the assent of the magistrate.

Sec. 2818. The nomination of a partnership to any private office is not of itself void; where it is a trust susceptible of being exercised by more than one person, it shall be considered as a nomination of all the members of the partnership, individually, who belonged to it at the time of such nomination; where the trust can, by law, only be exercised by one person, the first named partner shall be deemed to have been the person intended.

Sec. 2819. A partnership may be appointed attorney or agent for the performance of any act or duty, which comes within the object for which the partnership is formed; and the responsibility of such trust or agency attaches to all the members; and they are also entitled to all the advantages resulting therefrom, although one of them may execute the trust in the name of the partnership, unless it be differently provided in the appointment.

Sec. 2820. Where a partnership is appointed to perform a trust or agency, foreign to the object for which the partnership was formed, the appointment is not void; it may be performed in the name of the partnership if all the partners assent, and then the like responsibilities and advantages attach to the partners, as are set forth in the last preceding article; if the assent of all the partners be not given, the trust or agency cannot be performed under the power.

Sec. 2821. If the trust or agency is executed by writing, whether required by law to be so done or not, the assent required by the last article must also be in writing.

Sec. 2822. In an ordinary partnership, if a partner having no authority to make purchases for the joint account, shall make any purchase in the name of the partnership or in his own name with the partnership funds, the other partners may elect whether they will take such purchase on the joint account or not.

Sec. 2823. The partnership property is liable to the creditors of the partnership, in preference to those of the individual partner; but the share of any partner may, in due course of the law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; but such seizure, if legal, operates as a dissolution of the partnership.

II.

1. Of the division of partnerships.

Sec. 2824. Partnerships are divided, as to their object, into commercial partnerships and ordinary partnerships.

Sec. 2825. Commercial partnerships are such as are formed:

1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture;
2. For buying or selling any personal property whatever, as factors or brokers;
3. For carrying personal property for hire, in ships or other vessels.

Sec. 2826. Ordinary partnerships are all such as are not commercial; they are divided into universal and particular partnerships.

Sec. 2827. Commercial partnerships are divided into two kinds, general and special.

Sec. 2828. There is also a species of partnership, which may be incorporated with either of the other kinds, called partnership in commendam.

2. Of universal partnerships.

Sec. 2829. Universal partnership is a contract by which the parties agree to make a common stock of all the property they respectively possess; they may extend it to all property, real or personal, or restrict it to personal only; they may, as in other partnerships, agree that the property itself shall be common stock or that the fruits only shall be such; but property which may accrue to one of the parties, after entering into partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to obtaining the property aforesaid, is void.

Sec. 2830. A universal partnership of profits includes all the gains that may be made from whatever source, whether from property or industry, with the restriction

contained in the last article, and subject to all legal stipulations to be made by the parties.

Sec. 2831. If nothing more is agreed between the parties, than that there shall be a universal partnership, it shall extend only to the profits of the property each shall possess, and of their credit and industry.

Sec. 2832. If commercial business be carried on under a universal partnership, it must, as to that business be governed by the rules prescribed for other commercial partnerships.

Sec. 2833. Universal partnership shall only be contracted between persons, who are not respectively incapacitated by law from conveying to or receiving from each other, to the injury of others.

Sec. 2834. Universal partnership cannot be created without writing signed by the parties, and registered in the manner hereafter prescribed.

3. Of particular partnerships.

Sec. 2835. Particular partnerships are such as are formed for any business not of a commercial nature.

Sec. 2836. If any part of the stock of this partnership consists of real state, it must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter prescribed with respect to partnership in commendam.

Sec. 2837. The business of this partnership must be conducted in the name of all the persons concerned, unless a firm is adopted by the articles of partnership, reduced to writing, and recorded in the manner directed by the last article.

Sec. 2838. If the articles be recorded, the parties may themselves adopt a firm which shall be composed of the names of one or more of the partners, but no other name than those of the concerned shall enter in such firm.

"It shall be unlawful for any person of persons engaged in any occupation to make fraudulent use of the name of any person not having an interest therein, or to do business under the name of any person or persons not having an interest therein." Violation is misdemeanor punishable by fine or imprisonment or both. Act 119, 1888, p. 182. — See also Rev. Stats., Secs. 2668—2669, forbidding use of the words "& Co." when they do not represent an actual partner.

4. Of commercial partnerships.

Sec. 2852. All the provisions of this title are also applicable to commercial partnerships, except as otherwise provided for.

III.

1. Of the obligations of partners towards each other.

Sec. 2853. When a partnership is made without specifying any time for its commencement, it begins at the time the contract is made.

Sec. 2854. If there has been no agreement respecting the time the partnership is to last, it is supposed to have been entered into for the whole time of the life of the partners, under the modifications mentioned in article 2884, or if the partnership be entered into for some affair, the duration of which is limited, for the whole time such affair is to last.

Sec. 2855. The contract of partnership may depend upon conditions.

Sec. 2856. Every partner owes to the partnership all that he has promised to bring into the same. When this proportion consists of a certain thing, and the partnership is evicted from the same, such partner is accountable for it towards the partnership, in the same manner as a seller is answerable towards the purchaser who buys from him.

Sec. 2857. The partner who promised to bring into the partnership a certain thing, is bound in case of eviction of it, in the same manner as a seller towards the purchaser who buys from him.

Sec. 2858. The partner who promised to put a sum of money into the partnership, owes the interest on the same from the day when he was bound to pay such sum. In the same manner he owes the interest on such sums as he may have taken out of the funds of the partnership, from the day he has received them.

Sec. 2859. Any partner, who has bound himself to bring into partnership his skill, industry, or credit, owes the partnership all the profits which he has made by

the exercise of such skill, industry, or credit, or of such proportion thereof as he was bound to furnish.

Sec. 2860. When one of the partners is, for his own particular account, creditor of a person, who is at the same time indebted unto the partnership for a debt of the same nature which is due likewise, the partner is bound to apply what he receives from the debtor to the discharge or what is due to the partnership and to him, in the proportion of both debts, although by his receipt he should have applied the whole sum paid to what is due to him in particular.

Sec. 2861. When one of the partners has received his full share of what is due to the partnership, if the debtor has become insolvent since, the partner who has received his full share is bound to return the same to the partnership, although he should have given a receipt for his own share.

Sec. 2862. Every partner is answerable to the partnership for the damages which it may have suffered by his fault, without being able to compensate such damages by the profits which his industry, skill, or credit may have produced in the business of the partnership; provided that no partner shall be held liable for any loss which has happened in consequence of any thing bona fide done or omitted by him in the legal exercise of his power, either as administrator or partner, although such act or omission be injudicious and injurious to the partnership.

Sec. 2863. If the use only of certain specified property has been brought into partnership, and that property is of such a nature that it may be used and enjoyed without destroying it, the ownership remains in the partner who brought it in and is at his risk. But if such property be destroyed, or grow worse by keeping or by the use that is made of it, if it was brought into partnership with the intent that it should be sold, or if it was taken at an estimated value ascertained by an inventory or some other writing, in either of these cases, although the use only was contributed, the property is at the risk of the partnership; and in case of loss or injury, the partner, who brought it in, is a creditor of the partnership, to the amount of credit or loss; provided that all the provisions of this article may be controlled by the covenants of the parties.

Sec. 2864. A partner may be a creditor of the partnership not only for the sums which he has disbursed, but likewise for the obligations he has entered into bona fide for the partnership, and for losses reasonably incurred in his administration.

Sec. 2865. When the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.

Sec. 2866. If the partners have agreed to refer to one of them or to a third person, for the regulation of the shares, this regulation cannot be annulled, unless it be by certain proofs that it is contrary to equity.

Sec. 2867. The partner intrusted with the administration of the affairs of the partnership by a special power given in writing, either by the articles of partnership or otherwise, may without the assent of the other partners and contrary to their prohibition, do any act which they have authorized him to do by such power, provided it be without fraud, and in his opinion for the advantage of the society.

This power, if contained in the articles of copartnership, cannot be revoked without a lawful cause, as long as the partnership lasts. But if the power of administration be given subsequent to the articles of partnership, it is a simple mandate and may be revoked.

Sec. 2868. When several partners are intrusted with the administration without their duties being pointed out, or when it is not expressed that one shall not be able to act without the other, they may do separately all the acts relating to such administration.

Sec. 2869. If it has been stipulated that one of the administrators shall not do anything without the other, one alone cannot act, even when the other is prevented by sickness or otherwise from taking a part in the acts which relate to the administration until there be a new agreement between the partners.

Sec. 2870. When there is no agreement respecting administration in the act of partnership, the following rules are adhered to:

1. The partners are supposed to have given, reciprocally, to each other the power of administering one for the other. What one does is valid, even for the share of his partners, without receiving their approbation, saving the right which they or every one of the partners has to oppose the operation, before it be concluded.

2. Every partner may make use of the things belonging to the partnership, provided he employs the same to the uses for which they are intended, and he does not use them in such a manner as to prevent his partners from using them according to their rights, or against the interest of the partnership.

3. Every partner has a right to bind his partners to contribute with him to the expenses which are necessary for the preservation of the things of the partnership.

4. A partner can neither dispose of nor make any change in any real property belonging to the partnership, without the consent of his partners, should even this disposition or change be advantageous to the partnership.

5. In other than commercial partnerships, a partner cannot, as partner only, and if he has not the administration, alienate or engage the things which belong to the partnership.

Sec. 2871. Every partner may, without the consent of his partners, enter into a partnership with a third person, for the share which he has in the partnership, but he cannot, without the consent of his partners, make him a partner in the original partnership, should he even have the administration of it.

He is responsible for the damages occasioned by this third person to the partnership, in the same manner as he answers for those he has occasioned himself, according to article 2862.

2. Of the obligations of partners towards third persons.

Sec. 2872. Ordinary partners are not bound in solido for the debts of the partnership, and no one of them can bind his partners, unless they have given him power so to do, either specially, or by the articles of partnership.

Commercial partners are bound in solido for the debts of the partnership.

Sec. 2873. In the ordinary partnership, each partner is bound for his share of the partnership debt, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to.

Sec. 2874. If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or that of the partnership, the other partners will be bound each for his share, provided it be proved that the partnership was benefited by the transaction.

Sec. 2875. All engagements made relative to the partnership affairs, by the person appointed to administer the business of an ordinary partnership by articles of partnership duly recorded and pursuant to those powers, shall bind all the partners.

IV. Dissolution of partnership.

Sec. 2876. A partnership ends:

1. By the expiration of the time for which such partnership was entered into;
2. By the extinction of the thing, or the consummation of the negotiation;
3. By the death of one of the partners, or by his interdiction;
4. By his bankruptcy;
5. By the will of all the parties, legally expressed, or by the will of any of them, founded on a legal cause, and expressed in the manner directed by law.

Sec. 2877. When a partnership has been entered into for a limited time, it ends of course at the expiration of that time.

Sec. 2878. The prorogation which may be agreed upon between the parties shall be made and proved in the same manner as the contract of partnership itself.

Sec. 2879. If a partnership has been entered into, the stock of which is to be formed with the proceeds of a sale, to be made in common, of several things belonging to each partner, and if it happen that the thing belonging to one of them is destroyed, the partnership shall be extinguished.

Sec. 2880. Every partnership ends by right on the death of one of the partners, unless an agreement has been made to the contrary.

Sec. 2881. The death of one partner dissolves the partnership between the surviving partners, unless there be a contrary stipulation.

Sec. 2882. If it has been stipulated that, in the case of the death of one of the partners, the partnership should continue between the heir of the deceased and the surviving partners, or between the surviving partners only, either of these stipulations shall be observed.

But if the stipulation be that the partnership shall continue between the survivors only, the heir of the deceased shall be entitled to a division of the partnership

property, as it stood at the day of the death of his ancestor, and to a share in the profits of any partnership operation in which his share of the stock was employed, and which was unfinished at that time.

Sec. 2883. The interdiction of one of the partners, or his bankruptcy, has, as to the dissolution of the partnership, the same effect as the death of one of the partners.

Sec. 2884. If the partnership has been contracted without any limitation of time, one of the partners may dissolve the partnership by notifying to his partners that he does not intend to remain any longer in the partnership, provided, nevertheless, the renunciation to the partnership be made bona fide, and it does not take place unseasonably.

Sec. 2885. The renunciation is not bona fide when the partner renounces for the purpose of appropriating to himself the profits which the partners expected to receive from the partnership.

Sec. 2886. The renunciation is made unseasonably, if it be made at the time when things are no longer entire, and when the interest of the partnership requires that its dissolution be postponed. The common interest of the partnership is considered, and not the interest of the partner who opposes the renunciation.

Sec. 2887. Although the partnership may have been entered into for a limited time, one of the partners may, provided he has a just cause for the same, dissolve the partnership before the time, even where inconveniences might result for the partners, and although it might have been stipulated that the partners could not desist from the partnership before the stipulated time.

Sec. 2888. There is just cause for a partner to dissolve the partnership before the appointed time, when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of the partnership, which require his presence or his personal attendance.

Sec. 2889. The renunciation of the partnership by one of the partners does not operate the dissolution of the partnership, unless it be notified to all the other partners.

Sec. 2890. The rules concerning the partition of successions, the manner of making such partition, and the obligations which result from the same, between heirs, apply to partners.

Ohio.

General Code, 1910.

Discharge of a joint debt.

Sec. 8079. When a partnership is dissolved, by mutual consent or otherwise, any partner may make a separate composition or compromise with any of its creditors. Such composition or compromise shall be a full and effectual discharge to the debtor who makes it but to him only, from all liability to the creditor with whom it is made, according to the terms thereof.

Sec. 8080. Every debtor who makes such composition or compromise, may take from the creditor with whom he makes it a note or memorandum, in writing, exonerating him from all individual liability incurred by reason of his connection with the partnership, which note or memorandum may be given in evidence by such debtor, in bar of such creditor's right of recovery against him. If such liability be by judgment in a court of record in this state, then on a production to and filing with the clerk thereof, the note or memorandum, the clerk shall discharge such judgment of record as far as the compromising debtor is concerned.

Sec. 8081. Such compromise or composition with an individual member of a firm shall not discharge the other partners, nor impair the right of the creditor to proceed against members of the partnership who have not been discharged. A member of the partnership so proceeded against, may set off any demand against the creditor which could have been set off had the suit been brought against all the individuals composing the firm.

Sec. 8082. A compromise or discharge of an individual of a firm shall not prevent the other members thereof from availing themselves of any defense that would have been available had not this chapter been passed, except that they shall not set up the discharge of one individual as a discharge of the other partners, unless it appears that all were intended to be discharged. But the discharge of such partner shall be

deemed a payment to the creditor equal to the proportionate interest of the partner discharged in the partnership concern.

Sec. 8083. Such compromise or composition of a member of a firm with a creditor of such firm shall in no wise affect the right of the other partners to call on the member who makes it for his ratable portion of such partnership debt.

Sec. 8084. The foregoing provisions in reference to partners shall extend to other joint debtors, who individually may compound or compromise for their joint indebtedness, with the same effect in reference to creditors and to joint debtors of the individual so compromising, as is above provided in reference to partners.

Duties and rights of surviving partners.

Sec. 8085. When a member of any partnership in this state dies, the surviving partner or partners, upon the appointment of an executor or administrator of the estate of such deceased partner, shall, forthwith, make application to the probate court of the county in which the partnership existed, upon first giving notice of the time of the hearing of such application to the executor or administrator, for the appointment of three judicious disinterested appraisers, who shall make out, under oath, a full and complete inventory and appraisal of the entire assets of the partnership, including any real estate, together with a schedule of debts and liabilities thereof, and deliver it to the surviving partner or partners, to be by him or them forthwith filed in the probate court of the county in which such appraisers were appointed.

Sec. 8086. When the executor or administrator is appointed in a county other than that in which the partnership existed, a certified copy of such inventory and appraisal must be forthwith filed by such surviving partner or partners in the probate court of that county, and it shall be docketed under the settlement of the estate of the deceased partner. When the whole or a part of the assets of such partnership consists of real estate, it shall be inventoried and appraised upon a separate schedule, which schedule must be recorded in the record of inventories of such court.

Sec. 8087. If the person or persons entitled to administer upon the estate of such deceased partner, fails or neglects for thirty days after his death, to take out letters testamentary or of administration, such surviving partner or partners may make application to the proper court and cause the estate of the deceased to be administered upon.

Sec. 8088. If the surviving partner or partners neglect or refuse to have such inventory or appraisal made, the administrator or executor of the deceased partner must have it made, in accordance with the provisions of the next three preceding sections.

Sec. 8089. With the consent of the administrator or executor of the deceased partner, and the approval of the probate court by which such executor or administrator was appointed, the surviving partner or partners may take the interest of such deceased partner in the partnership assets, at the appraised value thereof, first deducting therefrom the debts and liabilities of the partnership, upon giving to the executor or administrator his or their promissory note or notes, with good and approved security, for the payment of the interest of the deceased partner in the partnership assets. Such note or notes shall be payable with interest, in not to exceed nine months from the time the surviving partner or partners elect to take such assets, which election must be made within thirty days from the date of filing the inventory and appraisal, or a verified copy thereof in such court.

Sec. 8090. Such surviving partner or partners shall give bond to the executor or administrator, with surety or sureties to the approval of the court for the payment of the partnership debts and liabilities, and for the performance of all contracts for which the partnership is liable.

Sec. 8091. In the event that such surviving partner or partners refuse or neglect to take the interest of the deceased partner in the partnership assets within the time, and in the manner above provided, such executor or administrator forthwith shall apply to a court of competent jurisdiction for the appointment of a receiver for the partnership, who thereupon must proceed to wind it up and dispose of its assets, in accordance with the statutes governing receivers. The probate court shall be a court of competent jurisdiction in the appointment and control of the receiver herein provided for.

Sec. 8092. When the original articles of a partnership in force at the death of a partner, or the will of a deceased partner dispenses with an inventory and appraisal of the partnership assets, and with a sale of the deceased partner's interest therein, and such article or will provides for a different mode for the settlement of such interest, and for a disposition thereof different from that provided for herein, such interest shall be settled and disposed of in accordance with the provisions of such articles or will.

Sec. 8093. Upon bond being given as provided in section eighty hundred and ninety, it must be filed in the probate court by which such executor or administrator was appointed. Thereupon, the surviving partner or partners shall cause notice thereof to be published for three consecutive weeks in some newspaper of general circulation in the county wherein such court is located.

Sec. 8094. An affidavit of a surviving partner, or of a person employed by him to give such notice, if made, filed, and recorded, together with a copy of the notice in such probate court, within one year after giving such bond, shall be admitted as evidence of the time, place, and manner in which the notice was given.

Sec. 8095. Creditors must present their claims to the surviving partner or partners, who may require satisfactory vouchers in support thereof, and also an affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that, to his knowledge there are no set-offs against it, as in the authentication of claims against the estate of a person deceased. Actions on claims against such partnership, not so authenticated and filed, within one year from the publication of such notice, shall be barred.

Sec. 8096. Upon payment by the surviving partner or partners of all the valid claims against such partnership filed within one year, and so authenticated, such surviving partner or partners must file an account thereof as provided for filing executors' or administrators' accounts. All provisions relating to executors' or administrators' accounts and their settlement shall apply to the accounts of surviving partners. Such account shall contain a list, duly sworn to, of all creditors whose claims were filed within such period of one year, together with the respective amounts thereof.

Sec. 8097. Upon settlement of such account, such surviving partner or partners and his or their sureties shall be discharged from all liability on the bond as hereinbefore provided for.

Sec. 8098. When the real estate of a partnership is appraised and elected to be taken by the surviving partner or partners, upon the execution or delivery of the note or notes, and the bond hereinbefore provided for, the probate court shall order the executor or administrator to execute and deliver to the purchaser or purchasers, a deed for the deceased partner's interest in such real estate, which deed shall pass the title thereto. The real estate of such a partnership shall be held to include only such lots, tracts, and parcels of real estate as are used in whole or in part in the transaction of its business.

Fictitious names.

Sec. 8099. Except as otherwise provided in the next following section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners therein, must file with the clerk of the common pleas court of the county in which its principal office or place of business is situated, a certificate to be indexed by him, stating the names in full of all the members of the partnership and their places of residence.

Sec. 8100. A commercial or banking partnership established and transacting business without the United States, without filing the certificate prescribed in the next preceding section, may use in this state the partnership name used by it there, although it be fictitious or does not show the names of the persons interested as partners in the business.

Sec. 8101. The certificate filed with the clerk, as provided in section eighty hundred and ninety-nine, must be signed by the partners and acknowledged by some officer authorized to take acknowledgment of deeds; except that in case of a joint stock company or a commercial or banking partnership, whose capital stock is represented by shares or certificates of stock transferable on the books of the concern and whose business is conducted by a board of directors and officers, the president, secretary, or cashier of such company or commercial or banking partnership, may

sign and acknowledge such certificate, giving therein the names of all the persons interested as partners or shareholders in such company or partnership.

Sec. 8102. On every change of the members of a partnership transacting business in this state under a fictitious name or designation which does not show the names of the person interested as partners in the business, except in cases mentioned in section eighty-one hundred, a new certificate must be filed with the clerk of the common pleas court as required by section eighty hundred and ninety-nine, on the formation of such partnership. But in case of a joint stock company or banking partnership, it shall be sufficient if such certificate is filed once in each year, on or before the first Monday in April. For the filing and indexing of each certificate, such clerk shall be entitled to charge the partnership filing it the sum of forty cents.

Sec. 8103. Every clerk of the court of common pleas must keep a register of the names of firms and persons mentioned in the certificates so filed in his office, entering in alphabetical order the name of every such partnership, and of each partner interested therein.

Sec. 8104. Any person doing business as partners contrary to the provisions of the next five preceding sections, shall not commence or maintain an action on or an account of any contracts made, or transactions had in their partnership name in any court of this state, until they first file the certificate therein required. But if such partners at any time comply with such provisions, then it may commence an action, or if one has been commenced maintain it on all such partnership contracts and transactions entered into prior to as well as after such compliance.

Sec. 8105. Copies of the entries of a clerk of the common pleas court as herein directed, when certified by him, as herein directed, are presumptive evidence of the facts therein stated.

Sec. 11260. A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued, by the usual to ordinary name which it has assumed, or by which it is known. In such case, it shall not be necessary to allege or prove the names of its individual members.

Sec. 11614. If not a resident of the county in which the action is brought, or a partnership suing it by its company name, or an insolvent corporation, the plaintiff must furnish sufficient security for costs. The surety must be a resident of the county and approved by the clerk. His obligation shall be complete by indorsing the summons or signing his name on the petition as surety for costs. He shall be bound for the payment of the costs, which may be adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it may be carried, and for all costs taxed against the plaintiff in such action, whether he obtain judgment or not.

Sec. 11615. The plaintiff may deposit with the clerk of the court such sum of money as security for costs in the case, as in the opinion of the clerk, will be sufficient for the purpose. On motion of the defendant and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or personal security to be given.

Sec. 11664. The writ of execution against the property of a judgment debtor issuing from a court of record shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels, he cause his lands and tenements to be sold for cash. If the court rendering the judgment so decrees or orders, real estate may be sold under execution as follows: one-third cash on the day of the sale, one-third in one year, one-third in two years thereafter, with interest on deferred payments, to be secured by mortgage on the premises so sold. An execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. The exact amount of the debt, damages, and costs, for which the judgment is entered, shall be indorsed on the execution.

Revivor of and new parties to judgment.

Sec. 11644. When a judgment is rendered in this state on a joint contract or instrument, parties to the action who were not summoned, and persons whose liability was not known to the plaintiff at its rendition, may be made parties thereto by action in the same court, if they can be summoned in the state. When the judgment is rendered elsewhere, the plaintiff may bring suit upon such contract or instrument

against parties not summoned, or persons whose liability was unknown, in any county where any such parties reside or may be summoned.

Sec. 11645. When a judgment, including judgments rendered by a justice of the peace or mayor, a transcript of which has been filed in the court of common pleas for execution is dormant, or when a finding for money in equitable proceedings remains unpaid in whole or part, under the order of the court therein made, such judgment may be revived, or such finding made subject to execution as judgments at law are, in the manner prescribed for reviving actions before judgment, or by action in the court in which such judgment was rendered or finding made, or in which transcript of judgment was filed.

Sec. 11646. When either party to such dormant judgment or finding, his agent or attorney, makes affidavit showing that the adverse party is not a resident of the state, that such judgment or finding remains unsatisfied in whole or part and the amount owing thereon, service may be made by publication, as in other cases, but only for judgments or findings in which personal service originally was made on the adverse party.

Sec. 11647. If sufficient cause be not shown to the contrary, the judgment shall stand revived, and the finding be subject to execution for the amount which the court finds to be due and unsatisfied thereon. The lien of the judgment for the amount due shall be revived and operate from the time of the entry of the conditional order or the filing of the petition.

Sec. 11648. An action to revive a judgment can only be brought within twenty-one years from the time it became dormant, unless the party entitled to bring such action, at the time the judgment became dormant, was within the age of minority, of unsound mind, or imprisoned, in which cases the action may be brought within fifteen years after such disability is removed.

Sec. 11649. In case of the death of either or both parties after judgment is rendered, and before its satisfaction, his or their representatives, real or personal, or both, as the case requires, may be made parties to the judgment; and it be revived by an action brought for that purpose; or they may be made parties thereto in the manner prescribed for the revival of actions before judgment. Such judgment may be rendered and execution awarded as might or should have been given or awarded against the representative, real or personal, or both, of such deceased party.

Sec. 11650. When a judgment or decree has been rendered in the circuit court of a county and a mandate directed to the common pleas to carry it into execution, on the death of either or both parties thereto before its satisfaction, it may be revived in such common pleas court in conformity with the next preceding section.

Sec. 11651. The members of a partnership, against which a judgment has been rendered by its firm name may be made parties to the judgment by action.

Proceedings in garnishment.

Sec. 10265. When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear before the justice, at the return of the order and answer as provided in this chapter.

Sec. 11833. If the garnishee is a person, a copy of the order and notice shall be served upon him personally, or left at his usual place of residence. When a partnership is garnished by its company name, they shall be left at its usual place of doing business, or with a member of such partnership; and if a corporation, with the president or other principal officer, or its secretary, cashier, or managing agent. If such corporation is a railroad company, the copies may be left with a regular ticket or freight agent thereof, in any county in which the railroad is located.

Service of process.

Sec. 10266. If the garnishee is a person, the copy of the order and notice shall be served upon him personally, or left at his usual place of residence. If a partnership

is garnisheed by its company name, they shall be left at its usual place of doing business, or be served personally on one of its members; and if a corporation, they shall be left with the president or other principal officer, or its secretary, cashier, or managing agent. If such corporation is a railroad company, they may be left with any regular ticket or freight agent thereof in the county.

Sec. 11286. The service shall be made at any time before the return day, by delivering a copy of the summons, with the endorsements thereon, to the defendant personally, or by leaving a copy at his usual place of residence; or if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business, or with any member of such partnership. The return must be made at the time mentioned in the writ and the time and manner of service shall be stated on the writ.

Sec. 11495, 5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor. This rule applies without regard to the character in which the parties sue or are sued.

Sec. 11894. A receiver may be appointed by the supreme court or a judge thereof, the circuit court, or a judge thereof in his circuit, the common pleas court or a judge thereof in his district, or the probate court in causes pending in such courts respectively, in the following cases: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to this claim, or between partners or others owning or jointly interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured; 2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt; 3. After judgment, to carry the judgment into effect; 4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment; 5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; 6. In all other cases in which receivers heretofore have been appointed by the usages of equity.

Sec. 10625. When a person dies, whether testate or intestate, not being at the time of death a resident of this state, but having been engaged in business herein, as partner or otherwise, and leaving in this state property belonging in whole or in part to his estate, the probate court of the county in which such business was prosecuted, or of any county in which the property is situated, or where a debtor of such decedent resides, upon the application of a creditor of his, whose claim is founded on a contract made or a right of action which accrued in this state, shall grant to such creditor or other person, administration of all and singular the assets of such decedent in this state. The proceeds of such assets shall be applied to the payment of the debts proved against such estate before the administrator. The surplus, if any, must be paid into the court granting administration for the benefit of the estate of the decedent, in the state where he resided at the time of this death.

Sec. 13142. Whoever, being a partner, is guilty of fraud in the affairs of the partnership, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both, and be liable in damages to the party injured.

Sec. 13591. In an indictment for an offence committed upon, or in relation to property belonging to partners or joint owners, it shall be sufficient to allege the ownership of such property to be in such partnership by its firm name, or in one or more of such partners or owners, without naming all of them.

Massachusetts.

Revised Laws of 1902, and Supplement of 1906.

Use of another's name, restrained. A person who carries on business in this commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives.

The supreme judicial or the superior court shall have jurisdiction in equity to restrain the use of names or labels in violation of the provisions of this chapter. — 1902, p. 620, secs. 5 and 6.

Actions, set-off — dormant partner. If there are several plaintiffs or defendants, the claim set off shall be due from all the plaintiffs jointly and to all the defendants jointly, except that in an action by or against partners, one of whom is a dormant partner, a claim due to or from the person with whom the contract was made may be set off as though such dormant partner were not a party to the action. — 1902, p. 1572, sec. 3.

Use of names by corporation. A corporation which is organized under general laws may assume any name which shall indicate that it is a corporation as distinguished from a natural person or a partnership; but it shall not assume the name of another domestic corporation, or of a foreign corporation, or of any partnership or association, carrying on business in this commonwealth at the time of such organization or within three years prior thereto, or a name so similar thereto as to be liable to mistaken for it, except with the consent in writing of such existing corporation, association, or partnership filed with the articles of organization. The supreme judicial court or the superior court shall have jurisdiction in equity, upon the application of any corporation, partnership, association, or person interested or affected, to enjoin such corporation from doing business under a name assumed in violation of the provisions of this section although its articles of organization may have been approved and a certificate of incorporation may have been issued to it. — 1906, p. 496, sec. 5.

Equitable attachment of a partner's interest. Suits by creditors to reach and apply in payment of a debt, any property, right, title or interest, legal, or equitable, of a debtor, within or without this commonwealth, which cannot be reached to be attached or taken in execution in an action at law, although the amount of the debt is less than one hundred dollars or the property sought to be reached and applied is in the hands, possession, or control of the debtor independently of any other person or cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal, or by any means within the ordinary procedure of the court. In such suit, the interest of a partner of the defendant in the partnership property may be reached and applied in payment of the plaintiff's debt; but unless it is a judgment debt, the business of the partnership shall not be enjoined or otherwise interrupted further than to restrain the withdrawal of any portion of the debtor's share or interest therein until the plaintiff's debt is established; and if either partner gives to the plaintiff a sufficient bond with sureties approved by the clerk, conditioned to pay to the plaintiff the amount of his debt and costs with thirty days after it is established, the court shall proceed no further therein than to establish the debt; and upon the filing of such bond, any injunction previously issued in such suit may be dissolved.

Suits to reach and apply in payment of a debt any property, right, title, or interest, real or personal, of a debtor, liable to be attached or taken on execution in an action at law against him and fraudulently conveyed by him with intent to defeat, delay, or defraud his creditors, or purchased, or directly or indirectly paid for, by him, the record or other title to which is retained in the vendor or is conveyed to a third person with intent to defeat, delay or defraud the creditors of a debtor. — 1906, p. 802, sec. 3; s. c. 1902, p. 1388, secs. 7 & 8.

Trustee process. A trustee writ issued by a police, district or municipal court or trial justice shall be returnable not more than thirty days after the date thereof and shall be served seven days at least before the return day. If co-partners are so summoned as trustees and the partnership is properly described in the writ, service of the writ upon one partner shall be sufficient. — 1902, p. 1651, sec. 6.

Insolvency proceedings. Upon petition by one or more partners who are insolvent to the court for the county, if any, in which the partnership has last had a usual place of business for three consecutive months before filing of such petition, otherwise to the court for the county in which it has or last had a usual place of business, after notice to the other partners if within the commonwealth, or upon petition by a creditor of the partners, the judge may issue a warrant as provided in this chapter, upon which the property of the firm and the separate estate of each of the partners, not exempt from attachment, shall be taken, and the creditors of the firm and the separate creditors of each partner may prove their respective debts.

The assignee shall be chosen by the creditors of the firm and shall keep separate accounts of the joint property of the firm, and of the separate estate of each member thereof; and after deducting the whole amount received by him the total expenses and disbursements paid, the net proceeds of such joint property shall be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is a balance of the separate estate of a partner after the payment of his separate debts, it shall be added to such joint property for the payment of the firm creditors. If there is a balance of such joint property after the payment of the firm debts, it shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein and as it would have been if the partnership had been dissolved without insolvency; and the amount so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts.

The provisions of the two preceding sections shall apply to insolvent limited partnerships formed under the provisions of chapter seventy-one or the corresponding provisions of earlier laws; but the separate estates and separate debts of the special partners shall not be subject to the proceedings against the partnership.

Each partner shall be entitled to allowance as hereinbefore provided for the maintenance of himself and family; and the allowance from the net proceeds of the estates as provided in section one hundred and thirteen shall be computed on the firm estate and also on each of the separate estates as if there had been a separate warrant against each; but none of the partners shall receive in all more than five hundred dollars.

The certificate of discharge shall be granted or refused to each partner as it would or ought to be of the proceedings had been against him alone; otherwise the proceedings against partners shall be the same as against an individual.

If upon the dissolution of a partnership, one or more of the partners or a new partnership formed by the addition of new members has agreed to pay any outstanding debts of such partnership, or if a person or firm, in consideration of the receipt or transfer of property, has agreed to pay any outstanding debts of the person from whom such property was received or transferred, and the person agreeing to pay has become insolvent, such debts may, if the creditors so elect, be proved against the estate of such insolvent debtor or debtors, and the proof and allowance thereof shall discharge the person originally liable therefor. If the original debtor, in either of such cases has been compelled to pay the debt so agreed to be paid, he may prove the amount so paid as the original creditor might have done. — 1902, p. 1460, secs. 137—142.

Pennsylvania.

P. & L. Dig. Laws (1911) cols. 5615—5626; 169—174.

I. Formation.

Sec. 1. Name, etc., of partnership to be filed in office of prothonotary. From and after the tenth day of August next, all persons who are now doing business in a partnership capacity in this commonwealth shall file or cause to be filed in the office of the prothonotary, in the county or counties where the said partnership is carried on, the names and location of the members of such partnership, with the style and name of the same; and as often as any change of members in said partnership shall take place, the same shall be certified by the members of such new partnership as aforesaid; and in default or neglect of such partnership so to do, they shall not be permitted, in any suits or actions against them in any court, or before any justice of

the peace or alderman in this commonwealth, to plead any misnomer or the omission of the name of any member of the partnership, or the inclusion of the names of persons not members of said partnership. 1851, April 14; P. L. 612, § 13.

Sec. 2. Acts to apply to future partnerships. Hereafter, where two or more persons may be desirous of entering into any business whatever, in a partnership capacity, they shall, before they engage or enter into any such business as aforesaid, comply with and be subject to all the provisions and restrictions in the next preceding section of this act. 1851, April 14; P. L. 612, § 14.

II. Lawsuits, judgments, and execution.

Sec. 3. Suits by one firm against another, when same persons are members of both firms. No action now pending on a writ of error, or otherwise, or hereafter to be brought, by partners or several persons, against partners or several persons, shall abate, or the right of such partners or several persons plaintiffs to sustain their action be defeated, by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs, and also of the parties defendants, in the same suit, nor shall the judgment rendered therein, if still pending on a writ of error, be affirmed against the right of such plaintiff or plaintiffs to sustain such action, nor reversed for the purpose of defeating such right, but the same shall proceed to trial and judgment, as though the parties plaintiffs and defendants were separate and distinct persons, and the acts and declarations of the partners or persons so being of both the parties plaintiffs and defendants shall be evidence to affect each party, respectively, in like manner and to the same extent as the acts and declarations of the other partners, or persons plaintiffs or defendants, would affect the respective firms or parties: Provided, That no act or declaration of the party shall be given in evidence in his own favor, to the prejudice of others. 1838, April 14; P. L. 457, § 1.

Sec. 4. Judgment obtained against one partner not to bar recovery against partners not served. In all suits, now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, co-partners, promisors, or the endorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process, or judgment shall not be a bar to recovery in another suit against the defendant or defendants not served with process. 1830, April 6; P. L. 277, § 1.

Sec. 5. Amicable confession of judgment not to affect partners who do not join. In all cases of amicable confession of judgment, by one or more of several obligors, co-partners, or promisors, or the endorsers of promissory notes, such judgment shall not be a bar to recovery in such suit or suits as may have to be brought against those who refuse to confess judgment. 1830, April 6; P. L. 277, § 2.

Sec. 6. Death of one copartner not to discharge his estate from payment of joint judgment. Where a judgment shall hereafter be obtained against two or more co-partners, or joint or several obligors, promisors, or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone. 1848, April 11; P. L. 536, § 3.

Sec. 7. Suits against executors of deceased partner. In any suit or suits which may hereafter be brought against the executors or administrators of a deceased copartner, for the debt of the firm, it shall not be necessary to aver in the record, or prove on the trial, that the surviving partner or partners is or are insolvent, to enable the plaintiff to recover. 1848, April 11; P. L. 536, § 4.

Sec. 8. Judgment against co-partners, etc., not to bar future recovery against others. Where a judgment shall be hereafter recovered against one or more of several co-partners, joint or joint and several obligors, promisors, or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suits is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons, who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably, or by adversary process. 1848, April 11; P. L. 536, § 5.

Sec. 9. Execution against partners. Whenever any judgment has been or hereafter shall be obtained against one or more of the members of a partnership, upon any individual indebtedness of such defendant or defendants, any such creditor may have execution, fieri facias, issued from the court where such judgment is entered: Provided, The same be entered in the county where the chief office or place of business of the said partnership is or was last located, which shall command the sheriff or other officer to levy the sum of said judgment, with interest and costs of suit, upon the interest of the defendant or defendants in said writ, of any personal, mixed, or real property, rights, claims, and credits in such partnership, and thereupon proceed and sell the same; and the purchaser at such sale shall thereupon have a right to compel a settlement of the partnership accounts of such partnerships, by proceeding in equity, and to determine and receive the interest of said judgment debtor or debtors in the partnership property, rights, claims, and credits aforesaid; in case of judgment obtained or entered of record in a county, other than that wherein the chief office or place of business of said partnership is or was located, the plaintiff may issue a testatum writ of fieri facias, commanding the sheriff or other officer to proceed as in other cases where such writ may issue, and levy the sum of said judgment, with interest and cost of suit, in the same way and with the same force and effect as herein provided in case of sale under execution of fieri facias: Provided, That such rights, claims, and credits shall be proceeded against and sold in the manner provided in cases for the sale of personal property, except where real estate is taken in execution, in which case the same shall be advertised three weeks in manner as is provided by law: And also provided further, That this act shall not apply to any suit or suits at law or in equity now pending in any of the courts of this commonwealth, nor in anywise affect, enlarge, restrain, or impair the rights of either or any of the parties thereto; and that this act shall not apply or be extended to or embrace the sale of any property, real, personal, or mixed, made prior to the passage of this act, nor empower the purchaser or purchasers at any such sale, made prior to the passage of this act, to compel a settlement of the partnership account by proceeding in equity: Provided, Upon any judgment now entered, and sales hereafter made, upon any execution hereafter issued, same shall apply. 1873, April 8; P. L. 65, § 1.

III. Partnership accounts, and compromises.

Sec. 10. Jurisdiction of courts in settlement of partnership accounts. The supreme court, the several district courts, and courts of common pleas, within this commonwealth, shall have all the powers and jurisdiction of courts of chancery in settling partnership accounts, and such other accounts and claims, as by the common law and usages of this commonwealth have heretofore been settled by the action of account render; and it shall be in the power of the party desirous to commence such action, to proceed either by bill in chancery, or at common law, but no bill in chancery shall be entertained, unless the counsel filing the same shall certify that in his opinion the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay. 1840, Oct. 13; P. L. (1841) 1, § 19.

Sec. 11. Co-partners, in dissolved firms, may make separate compromises with creditors. Whenever any co-partnership firm shall be dissolved by mutual consent, or otherwise, it shall and may be lawful for any one or more of the individuals, who was or were embraced in such co-partnership firm, to make a separate composition or compromise with any one or all of the creditors of such co-partnership firm; and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such co-partnership firm, according to the terms of such compromise. 1862, March. 22; P. L. 167, § 1.

Sec. 12. Note or memorandum of compromise may be given in evidence—Judgments may be discharged, on production thereof. Every such debtor or debtors, making such composition or compromise, may take from the creditor or creditors, with whom he may make the same, a note or memorandum in writing, exonerating him or them from all and every individual liability incurred by reason of such connection with such co-partnership firm, which note or memorandum may be given in evidence by such debtor or debtors, in bar of such creditor's right of recovery against him or them; and if such liability shall be by judgment in any court of record in this

state, then on a production to and filing with the clerk of such court the said note or memorandum in writing, lawfully acknowledged, such clerk shall discharge such judgment of record, so far as the said compromising debtor or debtors shall be concerned. 1862, March 22; P. L. 167, § 2.

Sec. 13. Compromise with one co-partner not to discharge others. Such composition or compromise with an individual member of a firm shall not be so construed as to discharge the other co-partners, nor shall it impair the right of the creditor to proceed against the members of such copartnership firm as have not been discharged; and the member or members of such co-partnership firm, so proceeded against, shall be permitted to set off any demand against said creditor or creditors, which could have been set off had such suit been brought against all the individuals composing such firm; nor shall such compromise or discharge of an individual of such firm prevent the other members from availing themselves of any defense that would have been available had not this act passed, except that they shall not set up the discharge of one individual as a discharge of the other co-partners, unless it shall appear that all were intended to be discharged: Provided, That the discharge of any such co-partner shall be deemed a payment to the creditor, equal to the proportionate interest of the partner discharged, in the partnership concern, unless he shall have paid more than his proportioned interest, in which event, the full amount paid by such discharged debtor shall be credited. 1862, March 22; P. L. 167, § 3.

Sec. 14. Co-partner compromising to be liable for ratable proportion of partnership debt. Such compromise or composition of an individual of a firm, with a creditor of such firm, shall in no wise affect the right of the other co-partners to call on the individual making such compromise, for his ratable portion of such co-partnership debt, the same as if this law had not been passed. 1862, March 22; P. L. 167, § 4.

Sec. 15. Provisions of act extended to joint debtors. The above provisions in reference to co-partners of a firm shall extend to joint debtors, who are hereby authorized, individually, to compound or compromise for their joint indebtedness, with the like effect in reference to creditors and joint debtors of the individuals so compromising, as is above provided in reference to co-partners. 1862, March 22; P. L. 167, § 5.

IV. Certain acts not to constitute partnership.

Sec. 16. Loan with reservation of share of profits, not to constitute partnership. From and after the passage of this act, it shall be lawful for any person or persons to loan money to any individual, firm, association, or corporation, doing business in this commonwealth, upon agreement to receive a share of the profits of such business as compensation for the use of the money so loaned, in lieu of interest; and such agreement, or the reception of profits under such agreement, shall not render the person or persons making such loans liable as a co-partner in such business, to other creditors of such individual, firm, association, or corporation, except as to the money so loaned: Provided, That such agreement for loan shall be in writing; and that this act shall not apply to any loan made by a member of any such firm, association, or corporation, or to one who holds himself out as such, and shall not be construed to repeal or affect any portion of the law relating to special partnerships: Provided, however, That any person so loaning money under this act shall not hold himself out as a general partner, so as to induce credit to be given to any party or parties, association or corporation, to whom the said loan shall be made. 1870, April 6; P. L. 56, § 1.

Sec. 17. Allowance of interest in profits to employes, not to create partnership. Individuals and corporations employing labor may give to employes, in addition to regular wages, or in lieu thereof, a conditional interest in the profits of the business, to be regulated and determined by agreement between the parties; and the employe receiving such conditional share of profits shall not by reason thereof be deemed liable for the debts or losses of the business, or have any voice in the management, except in so far as may be clearly defined in the constitution or agreement under which the association is organized or operations conducted. 1871, June 15; P. L. 389, § 1.

Sec. 18. Acceptance of act. Any manufacturing, mining, or improvement company, firm, or partnership, now doing business under the laws of this commonwealth, or which may hereafter be chartered, may, without change of name, accept the provision of this act, and organize its business in accordance therewith, first giving notice to the auditor of its intention so to do, and filing with him a statement of the capital to be employed and in what it consists, and a copy of the articles of

agreement, or constitution and by-laws, by which the operations of the company or association is to be governed. 1871, June 15; P. L. 389, § 2.

Sec. 19. Distribution of net profits. No company shall be entitled to the benefits of this act which shall not, in its agreement or articles of association, filed with the auditor general as aforesaid, provide for the distribution of at least one-half of the net profits of its business to its employees, after paying a dividend of not more than ten per centum per annum upon its stock. 1871, June 15; P. L. 389, § 3.

Accounts at Law and Equity.

I. At common law.

Sec. 1. Arbitrators may decide in actions of account render. The act, entitled "An act regulating arbitrations," passed the 20th of March, 1810, and the several supplements thereto, shall be deemed to extend to actions of account render; and the arbitrators appointed by virtue thereof, shall hear, and a majority of them determine on the whole merits of the cause and report the balance due by either party to the other; and shall also make and annex to their report from the account of the parties, their allegations and proofs, such an account between them as they shall think just; which account shall result in the balance reported in their award. 1821, March 30; 7 Sm. 429, § 1.

Sec. 2. Jury to have power to settle accounts — Court to make orders. In all actions of account render, now pending or to be brought, the jury before whom the same shall be tried, shall have full power to settle the accounts of the parties, and find in favor of the plaintiff, or of one or more of the defendants, such sum or sums as shall appear to be due; and the court in which said action is pending, or any judge thereof, may make such orders upon any of the parties, in relation to books, documents, or papers, as may appear to be necessary, for a full and equitable adjustment of the controversy. 1831, April 4; P. L. 492, § 1.

Sec. 3. Actions may be brought against executors of will for amount of legacy. It shall be lawful for any person to whom any bequest of money, or other goods or chattels, may be made by last will or testament, to commence and prosecute an action of debt, detinue, account render, or an action on the case for the recovery thereof, after it becomes due, against the executors of such will, having in their hands sufficient assets to pay all the just debts of the testator, and the legacies by him bequeathed. 1834, Feb. 24; P. L. 73, § 50.

Sec. 4. Court may appoint auditors or jury to settle accounts. — Interrogatories — Books and papers must be produced. In all actions of account render, now pending or which may hereafter be brought, after it shall have been found, or admitted by the pleadings, that the defendant is liable to account to the plaintiff, it shall be in the discretion of the court in which the same is or shall be pending, to either appoint auditors and proceed according to the practices and usages of the common law, or direct a jury to be impaneled to settle the accounts of the parties, and find the balance due the plaintiff or defendant. And on the application of either of the parties, and interrogatories filed, it shall be lawful for the court to require the adverse party to disclose, on oath, his knowledge of such facts as shall, in the opinion of said court, be necessary for a just and equitable adjustment of the controversy; and on the party being so called on, and refusing to answer, on the requisition of the court, the fact stated by the adverse party, in his interrogatory, shall be taken as admitted; and the parties shall have power to compel the production of such books, papers, and documents, either in court or before the auditors, as may be necessary for a just and equitable settlement of the controversy, according to the provisions of the 1st section of the act of 27th February, 1798, entitled "An act extending the powers of the supreme court and courts of common pleas." 1840, Oct. 13; P. L. (1841) 7, § 18.

II. In equity.

Sec. 5. Courts to have powers and jurisdiction of courts of chancery. — Party commencing action may proceed in equity or at common law. — Certificate. The supreme court, the several district courts and courts of common pleas, within this commonwealth, shall have all the powers and jurisdiction of courts of chancery in settling partnership accounts, and such other accounts and claims, as by the common law and usages of this commonwealth, have heretofore been settled by the action

of account render; and it shall be in the power of the party desirous to commence such action, to proceed either by bill in chancery, or at common law, but no bill in chancery shall be entertained, unless the counsel filing the same shall certify that, in his opinion, the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay. 1840, Oct. 13; P. L. (1840) 7, § 19.

Sec. 6. Equity jurisdiction of supreme court. The equity jurisdiction of the supreme court, within the city and county of Philadelphia, and of the court of common pleas for said county, shall be extended to all cases arising in said city and county, over which courts of chancery entertain jurisdiction on the grounds of fraud, accident, mistake, or account. 1840, June 13; P. L. 666, § 39.

Georgia.

Code of Georgia, 1911.

Of partnership.

Sec. 3155. How created. A partnership may be created either by written or parol contract, or it may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal.

Sec. 3156. Extent of partnership. As among partners, the extent of the partnership is determined by the contract and their several interests. As to third persons, all are liable, not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property.

Sec. 3157. Open partner, etc. An ostensible partner is one whose name appears to the world as such, and he is bound, though he have no interest in the firm. A dormant or secret partner is one whose connection with the firm is really or professedly concealed from the world.

Sec. 3158. What constitutes a partnership. A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in the profits alone does not.

Sec. 3159. Time of commencement. If no time is specified for the commencement of the partnership, it commences immediately.

Sec. 3160. Death of a partner as it affects continuance. If the contract specifies the term for which the partnership is formed, it will continue for that time, or till the death of one partner. If it is desired to continue notwithstanding the death of a partner, it must be so specified.

Sec. 3161. Duration and dissolution. If there is no agreement as to the time of continuance, the partnership is at will and may be dissolved at any time by any partner on giving three months notice to his copartners.

Sec. 3162. How it is dissolved. Every partnership is dissolved at any time by the mutual consent of the parties, by the death, insanity, or conviction for felony of one of the parties, by the extinction of the business for which it was formed, or by such misconduct of either partner as will justify a court of equity to decree a dissolution.

Sec. 3163. Notice of dissolution. The dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world. By the retiring of a dormant partner, it must be made known by all who had knowledge of his connection with the firm.

Sec. 3164. Effect of dissolution. A dissolution puts an end to all the powers and rights resulting from the partnership to the partners, except for the purpose of a general account and winding up of the business. As to third persons, it absolves the partners from all liability for future contracts and transactions, but not for the transactions that are past.

Sec. 3165. False partner. No partnership may lawfully insert in their firm name or style the name of any individual not actually a copartner, nor continue in such firm name or style the name of a retired partner. And each member of the firm violating this provision shall forfeit the sum of one hundred dollars for every day's violation, to be recovered by any person who may prosecute for the same.

Sec. 3166. Denial by defendant. Partners suing or being sued in their firm name, the partnership need not be proved unless denied by the defendant, upon oath, on plea in abatement filed.

Sec. 3167. Suits by and against. Judgments may be entered up and execution issue in the name of the firm or against a firm. And service of process on one partner with a return of non est inventus as to the others, shall authorize a judgment against the firm binding all the firm assets and the individual property of the one served.

Sec. 3168. Executing bond. In all legal proceedings wherein it becomes necessary for partners to give bond, any one of the partners may execute such bond in the firm name.

Rights and liabilities of partners among themselves.

Sec. 3169. Interest of each. Unless otherwise provided in the agreement, partners are equally interested in all the stock or property brought into the business, it matters not by which; partners are equally entitled to share the profits, and equally bound to pay the losses.

Sec. 3170. Contribution in case of insolvent partner. If one of several partners proves to be insolvent, each partner is bound to contribute according to his interest to sustain the pro rata loss of such insolvent in the debts of the firm.

Sec. 3171. Good faith inter se. The strictest good faith is required among partners, and that which would not amount to fraud as to third persons may be such a violation of this faith as to justify a court of equity to compel a partner to give up any advantage thus obtained.

Sec. 3172. Power of each partner. Every partner has a right to examine into the affairs of the firm, and, unless otherwise agreed, to have joint possession of its effects, to collect and apply its assets, to contract or otherwise bind the firm in matters connected with its business, and to execute any writing or bond in the course of the business; at no time transgressing the privileges of other partners or seeking in bad faith to evade or violate their wishes.

Sec. 3173. Introducing new partner. No partner, by assigning his interest or otherwise, can introduce a new partner without the consent of the others, unless such power is reserved in the contract.

Sec. 3174. Incoming partner bound for debts, when. An incoming partner is not bound for the old debts of the firm in the absence of an express agreement, on sufficient consideration, to assume the old indebtedness.

Sec. 3175. Power of majority. Unless otherwise stipulated, a majority of the partners must control on any question within the scope of the partnership business; but outside of such business, any partner may veto the use of the partnership assets.

Sec. 3176. Surviving partner. The surviving partner, in case of death, has the right to control the assets of the firm to the exclusion of the legal representatives of a deceased partner, and he is primarily liable to the creditors of the firm for their debts. But where copartnerships have been, or shall be, dissolved by the death of one or more partners, and the debts of the firm are all paid, then the assets of the firm, as far as possible, may be divided in kind between surviving copartners and the representatives of the dead copartner, by three disinterested appraisers, chosen by the parties as arbitrators, or appointed by the ordinary of the county where the survivors reside, either in term or vacation, on application of either party, said appraisers to be sworn to make fair appraisements and divisions to the best of their ability; and after such division, the representatives of the dead partners shall have the right to sue in their own names upon all choses in action assigned to them in the division.

Sec. 3177. Powers of surviving partner as to personality. Title to personal property vests in the surviving partners, who have the right to dispose thereof for paying the debts and making distribution.

Sec. 3178. Power of survivor as to real estate. In equity real estate of the firm is considered personal property to the extent necessary to pay debts. The surviving partner can dispose of the entire equitable interest therein, and the purchaser may compel a conveyance from the heirs of the deceased partner.

Rights and liabilities of partners to third persons.

Sec. 3179. Secret stipulations. Third persons are bound by no stipulations among the partners themselves, unless actual notice of such stipulation be proven prior to their actions.

Sec. 3180. Bound by acts of partner. All the partners are bound by the acts of any one, within the legitimate business of the partnership, until dissolution or the commencement of legal process for that purpose, or express notice of dissent to the person about to be contracted with.

Sec. 3181. Duty of agent. An agent of the partnership is generally bound to obey each partner. If contradictory instructions are given by different partners, he is not bound to obey either, but should act for the best interest of the partnership.

Sec. 3182. Matters outside of partnership. Third persons acting with a partner in a matter not legitimately connected with the partnership, have no right against the firm or any other member.

Sec. 3183. Lending money to partner. A person lending money to a partner for the firm is not bound to see to its application, but if he knows, or has reasonable grounds to suspect that it is intended to be applied to other purposes than the business of the firm, he cannot recover it from the partnership.

Sec. 3184. Purchasing from partner. Third persons acquire no title to partnership assets by purchase from one member, when notice or a reasonable ground of suspicion is known to them that the partner is misapplying, or seeks to misapply such assets.

Sec. 3185. Indorsements, etc. A guaranty or an accommodation indorsement is not within the legitimate business of ordinary partnership.

Sec. 3186. Liability for fraud of one partner. All the partners are responsible to innocent third person for damages arising from the fraud of one partner in matters relating to partnership.

Sec. 3187. For torts of partner or servant. Partners are not responsible for torts committed by a copartner. For the negligence or torts of their agents or servant they are responsible under the like rules with individuals.

Sec. 3188. Power after dissolution. After dissolution, a partner has no power to bind the firm by a new contract, or to revive one for any cause extinct, nor to renew or continue an already existing liability, nor change its dignity or its nature.

Sec. 3189. Disposition of assets among creditors. When a partnership is insolvent, and one of the partners is deceased insolvent, the creditors of the partnership, in equal degree with individual creditors, cannot claim to share in the individual assets of the deceased partner until the individual creditors shall have first received upon their debts such a percentage from the individual assets as such partnership creditors have received from the partnership assets.

Sec. 3190. Garnishment on partner's interest. The interest of a partner in the partnership assets may be reached by a judgment creditor by process of garnishment served on the firm, and shall not be subject to levy and sale. The lien on such interest shall attach from the date of the judgment against the partner.

Sec. 4627. Relation between partners confidential. Any relations shall be deemed confidential arising from nature or created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another, or where, from similar relation of mutual confidence, the law requires the utmost good faith, such as partners, principal and agent, etc.

Sec. 4387. Effect of new promise after dissolution. After the dissolution of a partnership, a new promise by one partner revives or extends the partnership debt only as to himself, and not as to his copartners.

Sec. 4586. Equity jurisdiction in account. Equity jurisdiction over matters of account growing out of privity of contract, or where accounts are complicated and intricate, or where a discovery or writ of ne exeat is prayed and granted, or where the account is of a trust fund, or accounts between partners and tenants in common, or where a multiplicity of suits would render a trial difficult, expensive, and unsatisfactory at law.

Sec. 5396. Suits against representative, how brought. Where any person shall be in possession, (in his own right, or in any other capacity) of any note, bill, bond, or other obligation in writing, signed by two or more persons, and one or more of the persons whose names are so signed as aforesaid shall die before the payment of the money, or the compliance with the conditions of said bond or obligation in writing the

person holding such bill, bond, note, or other obligation in writing shall not be compelled to sue the survivors alone, but may at his discretion sue the survivor or survivors, or the representatives of such deceased person or persons, or survivor or survivors, in the same action with the representative or representatives of such deceased person or persons; provided, nothing herein contained shall authorize the bringing of an action of any kind whatever against the representative or representatives of any estate or estates, until twelve months after the probate of the will, or the granting of letters of administration on such estate or estates.

Sec. 5397. The preceding section shall be so construed as to embrace debts against copartners, as well as against joint or joint and several contractors.

Sec. 5591. When two or more joint contractors, or joint and several contractors, or copartners, are sued in the same action, and service shall be perfected on one or more of said contractors or copartners, and the officer serving the writ shall return that the rest are not to be found, it shall and may be lawful for the plaintiff to proceed to judgment and execution against the defendants who are served with process, in the same manner as if they were the only or sole defendants; and if either of the defendants die pending such action, his representative may be made a party and the case proceed to judgment and execution as in other cases against the representatives of deceased persons.

Sec. 5592. Judgments against, bind what. Judgments so obtained shall bind, and execution may be levied on the joint copartnership property, and also the individual property, real and personal, of the defendant or defendants who have been served with a copy of the process, but shall not bind or be levied on the individual property of the defendant or defendants who are not served with a process.

Sec. 5687. Amendment in suits by. In all suits by or against partners or where any two or more persons sue or are sued in the same action, and the name of any person who ought to be joined in such action as plaintiff or defendant is omitted, the omission shall, on motion, be amended by adding the proper party instant.

Sec. 5529. Venue of suits against. Joint, or joint and several obligors or promisors, or joint contractors, or copartners, residing in different counties, may be sued as such in the same action in either county in which one or more of the defendants reside.

Sec. 6541. Suits against joint obligors, etc. Suits against joint obligors, joint promisors, copartners, or joint trespassers, residing in different counties, may be tried in either county.

Sec. 5858. Who are competent to testify. No person offered as a witness shall be excluded by reason of incapacity, for crime or interest, or from being a party, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or party having, by law or consent of parties, authority to hear, receive, and examine evidence; but every person so offered shall be competent, and compellable to give evidence on behalf of either or any of the parties to the said suit, action or other proceeding, except as follows:

Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested.

Sec. 5006. Appeals by partners, joint contractors and corporations. When several partners or joint contractors sue or are sued as such, any one of said partners or joint contractors may enter an appeal in the name of such firm or joint contractors, and sign the name of such firm or joint contractors to the bond required by law, which shall be binding on the firm and such joint contractors as though they had signed it themselves; and in case of corporations, the appeal may be entered by the president or any agent thereof managing the case, or by the attorney of record.

Sec. 5941. Judgments in favor of or against firms. Judgments entered up, or executions issued, in favor or against copartners, when the partnership style is used therein instead of the individual names of such persons composing said firm, shall be good.

Limited Partnerships.

New York.

Consolidated Laws, 1909, (Wadhams) 2671.

Sec. 4. Limited partnership. A limited partnership consists of one or more persons, called general partners, and also one or more persons called special partners.

Sec. 7. Liability of a special partner. A special partner, except as declared in this chapter, is liable for the obligations of the limited partnership only to the amount of capital invested by him therein.

Sec. 30. Formation. Two or more persons may form a limited partnership, which shall consist of one or more persons of full age, called general partners, and also of one or more persons of full age, who contribute in actual cash payments, a specified sum as capital, to the common stock, called special partners, for the transaction within this state of any lawful business, except banking and insurance, by making, severally signing and acknowledging, and causing to be filed and recorded in the clerk's office of the county where the principal place of business of such partnership is located, a certificate in which is stated:

1. The name or firm under which such partnership is to be conducted and the county wherein the principal place of business is to be located;

2. The general nature of the business intended to be transacted;

3. The names, and whether of full age, of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence;

4. The amount of capital which each special partner has contributed to the common stock;

5. The times at which the partnership is to begin and end. If the partnership has places of business situated in different countries, a copy of the certificate, and of the acknowledgment thereof, certified by the clerk in whose office it is filed, under his official seal, shall be filed and recorded in like manner, in the office of the clerk of each such county.

Sec. 31. Affidavit to be filed. At the time of filing such original certificate, an affidavit of one or more of the general partners, stating that the sums specified in the certificate to have been contributed to the common stock by each of the special partners have been actually and in good faith paid in cash, shall also be filed in the same office, and a copy thereof, certified by the county clerk, filed in each office in which a copy of the original certificate is filed.

Sec. 32. Terms of partnership to be published. Immediately after the filing of the certificate, a copy of same or a notice containing the substance thereof, shall be published once in each week for six successive weeks, in two newspapers of the county in which the original certificate is filed, to be designated by the county clerk, one of which newspapers shall be a newspaper published in the city or town in which the principal place of business is intended to be located, if a newspaper be published therein; or, if no newspaper is published therein, in the newspaper nearest thereto, and proof of such publication by affidavit of the printer or publisher of each of such newspapers must be filed with the original certificate.

Sec. 33. Renewal or continuance of partnership. Every such partnership may be renewed or continued beyond the time fixed for its duration, in the manner required for its original formation; and no such partnership shall be deemed to have been originally formed, or so renewed or continued, until a certificate is made, acknowledged, filed, and recorded, an affidavit filed, and the certificate or notice published as required by law.

Sec. 34. Effect of false statements or failure to publish terms. If any false statement be made in any such certificate or affidavit, made either upon the formation or renewal, or continuance or increase of capital of such partnership, or if any such certificate or notice is not so published, or if such partnership be renewed or continued in any other manner, the persons interested therein shall all be liable as general partners.

Sec. 35. The firm name; list of members to be posted. The business of partnership must be conducted under a firm name, which must consist of the name of the

general partner, or if there be two or more general partners, of the names of one or more of such partners, with or without the addition of the words "And company," or "and Co." If the name of any special partner be used in such firm name, with his privity, he shall be deemed and be liable as a general partner. The partnership must cause to be placed in a conspicuous place on the outside and in front of the building in which is its principal place of business, a sign on which is printed in legible English, the names in full, of all the members of such partnership, designating which are general and which are special partners. If such sign be not so placed, no action against the partnership shall abate or be dismissed by reason of the failure of the plaintiff to correctly allege in his pleadings, or prove as alleged, the number and names of the members of the partnership; but his pleadings may be amended on the trial to conform to the proof in that respect, without costs.

Sec. 36. Liability of partners. The general partners in such partnership, shall be jointly and severally liable as general partners are by law. The special partners shall not be liable for the debts of the partnership beyond the fund contributed by them respectively to the capital of the partnership.

Sec. 37. General powers of partners. Except as provided in this section the general partners only may transact business of the partnership, and they shall be liable to account to each other and to the special partners, for their management of the business, as other partners are by law. Except as provided in this section, a special partner may not sign for the partnership nor bind the same, nor transact any business on account of the partnership, nor be employed for that purpose, as agent, attorney, or otherwise. A special partner may, from time to time, examine into the state and progress of the partnership business, and advise as to its management; may loan money, to and advance and pay money for the partnership; may take and hold the notes, drafts, acceptances, and bonds of or belonging to the partnership, as security for the repayment of such money and interest, and may use and lend his name and credit as security for the partnership, in any business thereof, and has the same rights and remedies in these respects as other creditors might have; may lease to the general partners any real or other property for the purposes of the partnership, at such rents and on such terms as may be agreed on; and may negotiate sales, purchases, and other business for the partnership, but no business so negotiated is binding on the partnership until approved by a general partner. If a special partner interfere contrary to these provisions, he shall be deemed and be liable as a general partner. If such partnership become insolvent or bankrupt, a special partner shall not, except for claims contracted in pursuance of this section, be allowed to claim as creditor, until the claims of all other creditors of the partnership are satisfied.

Sec. 38. Actions by and against the partnership. Actions and special proceedings in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners.

Sec. 39. Capital of special partner not to be withdrawn, when he may receive interest. No part of the sum which any special partner contributes to the capital stock, shall be withdrawn by him or paid or transferred to him, in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any such partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profits remain to be divided, he may also receive his portion of such profit. But if to the payment of such interest or profits to any special partner the original capital is reduced, the partner receiving the same must restore the amount necessary to make good his share of the capital, with interest, and he becomes liable as a general partner for debts contracted, until he returns such amount, to the extent of the amount as withdrawn.

Sec. 40. Fraudulent transfers of property by partnership or partner. Every sale, assignment, or transfer of any of the property or effects of such limited partnership, made by such partnership when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, or of any of the property or effects of a general or special partner, made any general or special partner, when insolvent or after, or in contemplation of the insolvency, of such partnership or such partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of the partnership, and every judgment confessed, lien created, or security given, by such partnership or partner, under the like circumstances, and with like intent, is void as against the creditors of the part-

nership. Every special partner, who violates this section, or concurs in, or assents to, any such violation by the partnership, or by any individual partner, is liable as a general partner.

Sec. 41. Dissolution by alteration; by death of partner; when partnership may be continued by survivors. Except as provided in this section, every alteration made in the names of general partners, in the nature of the business, or in the capital, or shares thereof contributed, held or owned, or to be contributed, held or owned, by any of the special partners, or the death of any partner, whether general or special, dissolves the limited partnership, or if such partnership be continued, constitutes such partnership a general partnership, in respect to all business transacted after such alteration or death, unless the articles of partnership provide that in the event of the death of a partner, the partnership may be continued by the survivors, in which case it shall be continued with the consent of the personal representatives of the deceased partner, and personal representatives may succeed to the partnership rights of such deceased partner, and continue the business the same as if such partner had remained alive. But any special partner may from time to time increase the amount of capital stock contributed, held or owned by him, or one or more special partners may be added to the partnership, on actually paying in an additional amount of the capital to be agreed on by the general and special partners, and on filing in the office of the clerk with whom the original certificate was filed, an additional certificate of the general partners in the partnership name, verified by the oath of one of them, stating the increase of such capital stock, and by whom, and the names and residences of such additional special partners, and whether of full age, and the amounts contributed by each to the common stock, together with the affidavit of one or more of the general partners stating that the sums specified in such additional certificate have been actually and in good faith paid in cash; and such alteration does not make the partnership general. No additional publication of the terms of the partnership nor of the alteration thereof is required in any of the cases provided for in this section. Any special partner or the legal representatives of any such special partner, deceased, may sell his interest in the partnership, without working a dissolution thereof, or rendering the partnership general, if a notice of such sale be filed within ten days thereafter in the office of the clerk with whom the original certificate of partnership was filed, and the purchaser thereof thereupon becomes a special partner with the same right as an original special partner.

Sec. 42. Dissolution by acts of partners. A limited partnership may be dissolved by acts of the partners before the time specified for its termination in the certificate of formation, renewal, or continuance. But such a dissolution does not take effect, until a notice of the dissolution has been filed with the clerk of the county in which the original certificate is filed and published at least once in each of four successive weeks in a newspaper published in each county where the partnership has a place of business.

California.

Civil Code, 1909.

Sec. 2477. Formation of special partnership. A special partnership may be formed by two or more persons, in the manner and with the effect prescribed in this chapter, for the transaction of any business except banking or insurance.

Sec. 2478. Of what to consist. A special partnership may consist of one or more persons called general partners, and one or more persons called special partners.

Sec. 2479. Certified statement. Persons desirous of forming a special partnership must severally sign a certificate, stating:

1. The name under which the partnership is to be conducted;
2. The general nature of the business intended to be transacted;
3. The names of all the partners and their residences, specifying which are general and which are special partners;
4. The amount of capital which each special partner has contributed to the common stock.

5. The periods at which such partnership will begin and end.

Sec. 2480. Acknowledged and recorded. False statement. Certificates under the last section must be acknowledged by all the partners, before some officer authori-

zed to take acknowledgment of deeds, one to be filed in the clerk's office and the other recorded in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be filed in the clerk's office, and recorded in like manner in the office of the recorder in every such county. If any false statement is made in any such certificate, all the persons interested in the partnership are liable, as general partners, for all the engagements thereof.

Sec. 2481. Affidavit as to sums contributed. An affidavit of each of the partners, stating that the sums specified in the certificate of the partnership as having been contributed by each of the special partners, have been actually and in good faith paid, in the lawful money of the United States, must be filed in the same office with the original certificate.

Sec. 2482. No partnership until compliance. No special partnership is formed until the provisions of the last five sections are complied with.

Sec. 2483. Certificates to be published. The certificate mentioned in this article, or a statement of its substance, must be published in a newspaper printed in the county where the original certificate is filed, and if no newspaper is there printed, then in a newspaper in the state nearest thereto. Such publication must be made once a week for four successive weeks, beginning within one week from the time of filing the certificate. In case such publication is not so made, the partnership must be deemed general.

Sec. 2484. Affidavit of publication filed. An affidavit of the making of the publication mentioned in the preceding section, made by the printer, publisher, or chief clerk of the newspaper in which such publication is made, may be filed with the county recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated.

Sec. 2485. Renewal of special partnership. Every renewal or continuance of a special partnership must be certified, recorded, verified, and published in the same manner as upon its original formation.

Powers, rights, and duties of partners.

Sec. 2489. Who to do business. The general partners only have authority to transact the business of a special partnership.

Sec. 2490. Special partners may advise. A special partner may at all times investigate the partnership affairs, and advise his partners, or their agents, as to their management.

Sec. 2491. May loan money. Insolvency. A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.

Sec. 2492. General partners may sue and be sued. In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners.

Sec. 2493. Withdrawal of capital. No special partner, under any pretense, may withdraw any part of the capital invested by him in the partnership during its continuance.

Sec. 2494. Interest and profits. A special partner may receive such lawful interest and such proportion of profits as may be agreed upon, if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses.

Sec. 2495. Result of withdrawing capital. If a special partner withdraws capital from the firm, contrary to the provisions of this article, he thereby becomes a general partner.

Sec. 2496. Preferential transfer void. Every transfer of the property of a special partnership, or of a partner therein, made after or in contemplation of the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created, or security given, in like manner and with the like intent, is in like manner void.

Liability of partners.

Sec. 2500. Liability of partners. The general partners in a special partnership are liable to the same extent as partners in a general partnership.

Sec. 2501. Of special partners. The contribution of a special partner to the capital of the firm and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows: 1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable, as a general partner, to all the creditors of the firm; 2. If he has wilfully interfered with the business of the firm, except as permitted in article two of this chapter, he is liable in like manner, or; 3. If he has wilfully joined in or assented to an act contrary to any of the provisions of article two of this chapter, he is liable in like manner.

Sec. 2502. Liability for unintentional act. When a special partner has unintentionally done any of the acts mentioned in the last section, he is liable, as a general partner, to any creditor of the firm who has been actually misled thereby to his prejudice.

Sec. 2503. Who may question existence of a special partnership. One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by article one of this chapter.

Alteration and dissolution of partnership.

Sec. 2507. When special partnership becomes general. A special partnership becomes general if, within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate of such fact, duly verified and signed by one or more of the partners, is not filed with the county clerk and recorder with whom the original certificate of the partnership was filed, and notice thereof published as is provided in article one of this chapter for the publication of the certificate.

Sec. 2508. How new special partners may be admitted. New special partners may be admitted into a partnership upon a certificate, stating the names, residences, and contributions to the common stock of each of such partners, signed by each of them, and by the general partners, verified, acknowledged, or proved, according to the provisions of article one of this chapter, and filed with the county clerk and recorder with whom the original certificate of the partnership was filed.

Sec. 2509. Dissolution of special partnership. Notice. A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution, by the act of the partners, is complete until a notice thereof has been filed and recorded in the office of the county clerk and recorder with whom the original certificate was recorded, and published once in each week for four successive weeks, in a newspaper printed in each county where the partnership has a place of business.

Sec. 2510. Th. name of a special partner not used, unless. The name of a special partner must not be used in the firm name of partnership, unless it be accompanied with the word "Limited."

Montana, North Dakota, South Dakota, and Oklahoma.

The Western Code States of Montana, North Dakota, South Dakota, and Oklahoma have, in general, copied the Code Law of California. The articles on Partnerships differ from those of California in the following particulars.

Sec. 5534, reading "When special partner is liable as general partner". The business of the partnership shall be conducted under a firm name, in which the names of the general partners only shall be inserted. If the name of any special partner shall be used in such firm name with his consent, or if he shall personally make any contract respecting or concerning the partnership with any person except the general

partner, he becomes liable as a general partner," replaces sec. 2509 of the California Code in the Revised Codes of Montana, 1907.

Sec. 5854. Rev. Codes of N. Dak. (1905), reading, "Who may not act. If the liquidation of a partnership is committed by consent of all the partners to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value in good faith upon the credit thereof. (Civ. C. 1877, Sec. 1440; R. C. 1899, Sec. 4406.)," replaces sec. 2510 of the California Code.

Louisiana.

Saunders' Revised Civil Code, 1909.

Of Partnership in commendam.

Sec. 2839. Partnership in commendam is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.

Sec. 2840. He who makes this contract, is called, with respect to those to whom he makes the advance of capital, a partner in commendam. Every species of partnership may receive such partners. It is, therefore, a modification, of which the several kinds of partnerships are susceptible, rather than a separate division of partnerships.

Sec. 2841. The proportion of profits to be received by the partner in commendam may be regulated by the covenant of the parties, as may also, with respect to each other, the proportion of losses and expenses to be borne by each of the partners; but as respects third persons, the whole sum furnished, or agreed to be furnished by such partner, is liable for the debts of the partnership.

Sec. 2842. In no case, except as is hereinafter expressly provided, shall the partner who has no other interest in the concern than that of partner in commendam, be liable to pay any sum beyond that which he has agreed to furnish by his contract. If it has been paid and lost in the business of the partnership, he is exonerated from any other payment. If only part be unpaid, he is liable for that amount and no more, to the creditors of the partnership.

Sec. 2843. The partner in commendam can not be called upon by the partnership or its creditors to refund any dividend he may have received of net profits, fairly made during the solvency of the partners and bona fide, at a time stipulated in the articles of partnership.

Sec. 2844. The partner in commendam can not bind the other partner by any act of his; he is not considered as a partner further than is specially provided in this section.

Sec. 2845. Partnership in commendam must be made in writing, and must be recorded in the manner hereinafter directed, or otherwise the partner in commendam will be considered as a common partner in the concern, and will be subject to all the responsibilities towards third persons that would attach to any of the other partners, in the business for which he made his advance.

Sec. 2846. The contract must express the amount furnished, or agreed to be furnished, by the partner in commendam, the proportion of the profits he is to receive and of the expenses and losses he is to bear. It must state whether it has been received, and whether in goods, money, or how otherwise; and if not received, it must contain a stipulation to pay or deliver it. It must be signed by the parties in the presence of one or more witnesses, and shall be recorded in full by the officer authorized to record mortgages in the place where the principal business of the partnership is carried on. If it be a commercial partnership, and consists of several houses or establishments, in different parts of the state, such recording shall be made in each of such places.

Sec. 2847. The record mentioned in the preceding article shall be made in six days from the time of the execution of the contract in the place where the principal establishment is situated, and if there are more than one, then allowing one day for every two leagues distance between such principal establishment and the others.

Sec. 2848. The officer authorized to record mortgages, shall keep a separate book for the purpose of recording acts of partnership, which shall be, at all office hours, open for the inspection of any person who may choose to consult the same, and shall receive the same fees to which he is entitled for the recording of mortgages and for certificates and copies. When the act is under private signature, the record shall be only made on the acknowledgment of the act, before a recorder, a notary, or the person authorized to make the record, or by a proof of the execution made in the same manner by one of the subscribing witnessed.

Sec. 2849. The business of the partnership, to which the partner in commendam has contributed his advance, must not be carried on in the name of such partner, or in his name jointly with others, or by him or by his agency as agent, or attorney for the other partners, but by those to whom he has made the advance, and in their name or firm; and if the advance in commendam has been made to one person only, such person must carry on the business in his sole name, and must not make the addition "and company," or adopt any firm that may cause it to be understood that he has any partners.

And if the partner in commendam shall take any part in the business of the partnership, or permit his name to be used in the firm, or knowingly permit any single person to whom he has made the advance, to add any words to his name or firm, that may imply that he has other partners besides the partner in commendam, when in fact he has none, such partner in commendam shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.

Sec. 2850. If the person to whom the partner in commendam has made the advance, shall, without his consent, use his name in the firm, or if, not having any other partner, he shall adopt or use any such addition as is expressed in the last preceding article, the partner in commendam may immediately withdraw the sum he has advanced, and, on giving notice in two of the public newspapers, shall be freed from all responsibility, either to the partners or to third persons from the time of such notice.

Sec. 2851. The partner in commendam can not withdraw the stock he has furnished at a time when those to whom he has advanced it are in failing circumstances, or when there is a reasonable apprehension that they will become insolvent.

Ohio.

General Code, 1910.

Sec. 8036. Limited partnerships, for the transaction of mercantile, mechanical, manufacturing, or mining business within this state, may be formed by two or more persons, upon the terms, and subject to the conditions and liabilities prescribed in this chapter; but nothing herein shall authorize such partnerships for the purpose of banking or insurance.

Sec. 8037. Such partnerships may consist of one or more persons, who shall be called general partners, and be jointly and severally responsible as general partners are by law, and also of one or more persons who shall contribute, in actual cash payments, a specific sum, as capital, to the common stock, who shall be called special partners, and not be liable for the partnership debts, except in the cases hereinafter mentioned. The capital invested by a special partner shall be held liable for all the debts of such firm.

Sec. 8038. The persons forming such partnership shall make and severally sign a certificate which must contain: 1. The name or firm under which the partnership is to be conducted; 2. The names and respective places of residence of all the partners, distinguishing who are general and who are special partners; 3. The amount of capital which each special partner has contributed to the common stock; 4. The general nature of the business to be transacted; and 5. When the partnership is to commence, and when it is to terminate.

Sec. 8039. Such certificate shall be acknowledged before an officer authorized to take the acknowledgment of deeds. When either of the partners resides out of this state, the certificate may be acknowledged by such partner before a justice of the peace, or judge of any of the courts of the state or territory where he resides. Such acknowledgment shall be certified by the officer taking it.

Sec. 8040. The certificate so acknowledged shall be recorded by the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection. If the partnership has places of business in different counties, the certificate and acknowledgment shall be recorded in like manner in the office of the recorder in every such county. If a false statement is made in such certificate, all the persons interested in the partnership shall be liable, as general partners, for all its engagements.

Sec. 8041. The partners shall publish a copy of such certificate for six weeks immediately after it is recorded, in a newspaper printed in the county where the principal place of business is situated. A like publication shall be made in every county where the partnership has a place of business. In case such publication is not so made, the partnership shall be deemed general.

Sec. 8042. Such partnership shall not be deemed to be formed until such certificate has been made, acknowledged, and recorded.

Sec. 8043. Upon every renewal of a limited partnership, or its continuation beyond the time originally agreed upon for its duration, a certificate thereof shall be made, acknowledged, recorded, and published, in like manner as is provided in this chapter for the original formation of limited partnerships. Every such partnership, which is not renewed in conformity with the provisions of this section, shall thereafter be deemed a general partnership.

Sec. 8044. Every alteration made in the names of the partners, in the nature of the business, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership. Every such partnership carried on in any manner after such alteration, shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the next preceding section.

Sec. 8045. The business of the partnership shall be conducted under a firm name, in which the names of all general partners shall be inserted, except when there are two or more general partners, the name may consist of the names of either one or more of such partners, with the addition of the words "& Co." If a special partner permits his name to be used, he shall be deemed a general partner.

Sec. 8046. In a conspicuous place, on the outside and in front of the building in which it has its chief place of business, the partnership shall put up a sign, on which must be placed in legible English letters, all the names in full of the general partners therein, in default of which no action against the partners shall abate or be dismissed because the plaintiff fails to prove the allegation in his pleadings as to the names and numbers of the members of the firm.

Sec. 8047. A firm of general partners that have transacted business under one firm name for more than five years, may organize a special partnership to continue the same business, containing any of the same or additional partners, and adopt the firm name before used by such general partnership, but subject to the provisions of the next two preceding sections requiring such special partnership to put up a sign containing the names in full of all the general partners.

Sec. 8048. No part of the sum contributed to the capital stock by a special partner, shall be withdrawn by him, or paid or transferred to him, in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership. Such partner may annually receive lawful interest on the sum contributed by him, if its payment will not reduce the original amount of the capital. If, after payment of such interest, further profits remain to be divided, he also may receive his portion thereof.

Sec. 8049. If it appears that, by the payment of interest or profits to a special partner, the original capital has been reduced, the partner receiving it shall be bound to restore the amount necessary to make good his share of capital, with interest.

Sec. 8050. From time to time a special partner may examine into the condition and progress of the partnership affairs and business, and advise as to their management. He may be constituted and appointed by the general partners the agent of the partnership for the purpose of negotiating sales, making purchases, and transacting other business within the scope of the partnership business, upon disclosing his agency to the person with whom he is dealing. Unless so authorized, he shall not transact the partnership business, nor act as agent, attorney or otherwise, for the firm. If he interferes contrary to these provisions he shall be deemed a general partner.

Sec. 8051. The general partners shall be liable to account to each other, and to the special partners, both in law and equity, for their management of the partnership affairs and business, as other partners are by law liable. Partnerships formed under this chapter shall be liable to be dissolved in the manner, and for such frauds and mismanagement as furnish sufficient grounds for the dissolution of other partnerships formed for a certain and definite period.

Sec. 8052. Every partner guilty of a fraud in the affairs of the partnership shall be liable civilly to the party injured to the extent of his damage.

Sec. 8053. Every sale, assignment, or transfer of any of the property or effects of the partnership, made by it when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of a partner, with the intent of giving a preference to a creditor of the partnership, or insolvent partner, over other creditors of the partnership, and every judgment confessed, lien created, or security given by the partnership, under the like circumstances, and with the like intent, shall be void as against the creditors of the partnership.

Sec. 8054. Every special partner who violates any provision of the next preceding section, or concurs in or assents to such violation by the partnership, shall be liable as a general partner.

Sec. 8055. In case of the insolvency of the partnership, no special partner under any circumstances, shall be allowed to claim as a creditor, until the claims of all the other creditors of the partnership are satisfied.

Sec. 8056. No dissolution of a limited partnership shall take place by the acts of the partners, previous to the time specified in the certificate of its formation or renewal, until a notice of such dissolution is recorded in the office in which the original certificate was recorded, and published once a week for four weeks, in a newspaper printed in each of the counties where the partnership has places of business.

Sec. 8057. When a partnership is formed as provided in this chapter, for manufacturing or mining purposes, and purchases or possesses lands necessary or convenient for carrying on its business, it may rent, cultivate, or improve such lands, which shall not be deemed a departure from its regular business.

Sec. 8058. All actions respecting the business of such partnership shall be prosecuted by and against the general partners only, except in those cases in which, by the provisions of this chapter, special partners are deemed general partners, and special partnerships deemed general partnerships; in which cases all the partners deemed general partners may join or be joined in such suits.

Massachusetts.

Revised Laws of 1902, pp. 617—619.

Sec. 1. A limited partnership may be formed by two or more persons for the transaction of any lawful business except the business of insurance.

Sec. 2. Such partnership shall consist of one or more general partners who shall be jointly and severally liable for all the debts of the partnership, and of one or more special partners who shall each contribute to the common stock in actual cash payment a specific amount as capital and who shall not be personally liable for the debts of the partnership except as hereinafter provided.

Sec. 3. The business of such partnership shall be conducted under a firm name in which the names of the general partners only shall be inserted, without the addition of the word "company" or of any other general term; or, with the consent of the members of a former firm or their legal representatives to whose business such a partnership lawfully succeeds, it may be conducted under the name of such former firm. The names of not more than three general partners shall be required to be inserted in such firm name. A special partner who consents or is privy to the use of his name in the firm name shall be liable as a general partner; but if his surname is the same as that of a general partner whose surname is used in the firm name, or if it appears in the name of a former firm adopted as aforesaid by such partnership, he shall not be so liable.

Sec. 4. The members of such partnership shall make and severally sign a certificate, which shall contain the firm name under which the business of the partnership is to be conducted, the names and residences of all the partners, distinguishing who

are general and who special partners, the amount of capital which each special partner has contributed to the common stock, the general nature of the business to be transacted, the time when the partnership is to commence and the time when it is to terminate. If a false statement is made in such certificate, all the partners shall be liable as general partners.

Sec. 5. Such certificate shall be acknowledged by all the partners before a justice of the peace or, if a partner resides out of the commonwealth, before a United States consul, notary public, or other magistrate authorized to take acknowledgments of deeds of land in this commonwealth, and shall be filed in the office of the secretary of the commonwealth and recorded in said office in a book to be kept for that purpose which shall be open to public inspection. The fee for filing such certificate shall be one dollar.

Sec. 6. A copy of such certificate shall, immediately after such filing, be published once in each of six successive weeks in a newspaper, if any, published in the county in which the principal place of business of the partnership is situated; otherwise, in a newspaper published in the city of Boston. Within sixty days after the filing of said certificate, an affidavit of one of said partners stating the newspaper in which and the dates upon which the copy of said certificate was published shall be filed in the office of the secretary of the commonwealth and recorded as provided in the preceding section.

Sec. 7. Upon the renewal or extension of a limited partnership beyond the time originally limited for its termination, the capital contributed by the special partners shall equal or exceed the aggregate capital originally contributed by them, and a certificate of such renewal or extension stating the amount of capital contributed by each of the special partners at such renewal or extension and that the whole amount thereof equals or exceeds the amount originally contributed by them, shall be made, acknowledged, filed, recorded, and published and an affidavit of publication filed and recorded in like manner as is herein provided for the certificate of its original formation.

Sec. 8. During the continuance of such partnership no part of its capital shall be withdrawn, nor shall any division of interest or profits be so made as to reduce such capital below the amount stated in said certificates; but a special partner may withdraw from the profits the interest on the capital contributed by him at any rate agreed on, not exceeding six per cent per annum, if such withdrawal does not impair the capital. If at any time during the continuance or at the termination of the partnership its assets are not sufficient to pay its debts, the special partners shall severally be held liable for all the money by them in any way withdrawn or received, except as above provided, with interest thereon from the time when it was so withdrawn or received.

Sec. 9. All suits relating to the business of such partnerships shall be prosecuted by and against the general partners only, except when special partners are held liable as general partners and except when special partners are held severally liable on account of money by them withdrawn from the common stock as provided in the preceding section, in which case all the partners so liable may join or be joined.

Sec. 10. No such partnership shall be dissolved, except by operation of law, before the time specified in the certificate of its formation or renewal or extension, unless a notice of such dissolution is filed and recorded in the office of the secretary of the commonwealth, and is published and an affidavit of publication is made as provided in section six.

Sec. 11. Except as provided in this chapter, the members of limited partnerships shall be subject to all the liabilities and entitled to all the rights of general partners.

Pennsylvania.

P. & L. Dig. of Laws (1911), cols. 4625—4636.¹⁾

I. Formation.

Sec. 1. Limited partnerships may be formed. Limited partnerships for the transaction of any agricultural, mercantile, mechanical, mining and transporting of coal, or manufacturing business, within this state, may be formed by two or more persons,

¹⁾ Because of the strict construction with the act, by permission of T. and J. W. applied in this state, the cases are given Johnson, Publishers.

upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance. 1836, March 21; P. L. 143, § 1.

In order to form a limited partnership, the terms of the act must be strictly complied with; *Andrews v. Schott*, 10 Pa. 47, 1848; *Richardson v. Hogg*, 38 Pa. 153, 1861; *Haddock v. Grinnell Mfg. Corp.*, 109 Pa. 372, s. c., 16 W. N. C. 549, 1885, affirming *Grinnell Mfg. Corp. v. Haddock*, 17 Phila. 213, s. c., 16 W. N. C. 96, 1885.

Limited partnerships referred to in the revenue laws are such as are formed under the provisions of the act of 1874 and its supplements, and do not comprehend within their meaning the limited partnerships or special partnerships created under this act. *Limited Partnerships*, 18 Pa. C. C. 87; s. c. sub nom. *In re Taxation of Limited Partnership*, 5 D. R. 288, 1896.

For history of limited partnership legislation, see *Lafin & Rand Co. v. Steytler*, 146 Pa. 434, 1892.

See 15 P. & L. Dig. of Dec. 26343 & 26368 et seq.; also, 21 P. & L. Dig. of Dec. 36718 et seq.

Sec. 2. General and special partners. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership¹) beyond the fund so contributed by him or them to the capital²). 1836, March 21; P. L. 143, § 2.

1. The payment by a special partner of a portion of the capital contributed by him in the checks of third persons, (it being conceded that they represented cash, and the amount actually going into the firm business,) will not render him liable as a general partner; *Hogg v. Orgill*, 34 Pa. 344, 1859.

2. See *infra*, 3. — See 15 P. & L. Dig. of Dec. 26346.

Sec. 3. Special partners may contribute goods or merchandise as stock. It shall and may be lawful for any special partner to make his contribution to the common stock of any limited partnership he may become a member of, in cash, goods, or merchandise: Provided, That when such contributions are made in goods or merchandise, the same shall first be appraised, under oath, by an appraiser, who shall be appointed by the court of common pleas of the county in which such partnership is to be carried on: And provided also, That in the certificate now required by law the nature and value of the said goods shall be fully set forth and described. 1865, March 30; P. L. 46, § 1.

A partnership, to be limited, under this act, must show a compliance with all the provisions of the act; if there is no appraising of goods or posting of the sign in a conspicuous place, it is a fatal defect; *Vandike v. Rosskam*, 67 Pa. 330, 1871; *Conrow v. Gravenstine*, 17 W. N. C. 204, 1886; *Siegel v. Wood*, 3 D. R. 463, 1894; subscription cannot be made in notes of third person; *Frank v. Machine Co.*, 41 P. L. J. 33, 1894.

See *Haslet v. Kent*, 160 Pa. 85, 1894.

Under this act the special partners will be liable as general partners, unless the goods contributed by them are first appraised as the act requires, and the nature and value of said goods are fully set forth and described in the certificate of the formation of the partnership, and the certificate is also duly acknowledged and recorded, together with the affidavit of a general partner. *Siegel v. Haines*, 15 Pa. C. C. 40; s. c., 35 W. N. C. 355, 1894. A certificate is insufficient to relieve a special partner from general liability which merely sets forth that "the amount of the capital stock contributed by said special partners is two hundred thousand dollars, one-half thereof being in goods and merchandise." A creditor is entitled to have such a statement in detail of the nature and value of the goods or property contributed as cash, as will enable him to form his own judgment as to its value. *Blumenthal Bros. & Co. v. Whitaker*, 170 Pa. 309; s. c., 33 Atl. Rep. 103; s. c., sub. nom. *Blumenthal v. Haines*, 37 W. N. C. 81, 1895; *Blumenthal Bros. & Co. v. Bacon*, 170 Pa. 317; s. c., 33 Atl. Rep. 106; s. c., sub nom. *Bacon's Appeal*, 37 W. N. C. 84, 1895.

Sec. 4. General partners only to act. The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same. 1836, March 21; P. L. 143, § 3.

Sec. 5. Certificate. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:

I. The name or firm under which such partnership is to be conducted.

II. The general nature of the business intended to be transacted.

III. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.

IV. The amount of capital which each special partner shall have contributed to the common stock.

V. The period at which the partnership is to commence, and the period at which it will terminate. 1836, March 21; P. L. 143, § 4.

Sec. 6. Certificate to be acknowledged. The certificate shall be acknowledged by the several persons signing the same, in the manner, and before the same persons, that deeds are now acknowledged, and the said acknowledgment shall be certified in the same manner as the acknowledgment of deeds are now certified. 1836, March 21; P. L. 143, § 5.

Sec. 7. Certificate to be recorded. The certificate so acknowledged and certified shall be recorded and filed in the office of the recorder of deeds of the proper county, in which the principal place of business of the partnership shall be situated, and shall also be recorded by him at large, in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, a transcript of the certificate and of the acknowledgment thereof, duly certified by the recorder in whose office it shall be filed, and under his official seal, shall be filed and recorded in like manner in the office of the recorder of every such county. 1836, March 21; P. L. 143, § 6.

Sec. 8. Certificate of limited partnership to be forwarded to auditor general—Contents of certificate. From and after the passage of this act it shall be the duty of the recorders of deeds of the several counties of this commonwealth, upon the filing in their respective offices of the articles of association of any limited partnership association, or joint stock association, to certify to the auditor general upon a blank form which shall be prepared and furnished them by the auditor general, the following information relative to said limited partnership association or joint stock association filing its articles of association as aforesaid:

1. Name of association.
2. Purpose for which organized.
3. Term for which organized.
4. Location of principal office.
5. Date of organization.
6. Authorized amount of capital stock.
7. Name and postoffice address of chairman.
8. Name and postoffice address of secretary.
9. Name and postoffice address of treasurer. 1895, June 24; P. L. 230, § 1.

Sec. 9. Fees for furnishing certificate—Payment. For their services in furnishing the auditor general with the said information, the said recorders of deeds shall be paid at the rate of twenty-five cents for each limited partnership or joint stock association, the information concerning which they shall have certified to the auditor general in the manner above provided for. The said fee of twenty-five cents shall be paid to the said recorders of deeds by the limited partnership associations or joint stock associations at the time of filing the articles of association thereof to be in addition to the fees now prescribed by existing laws for the filing and recording of the same. 1895, June 24; P. L. 230, § 1.

Sec. 10. Affidavit of general partners. At the time of filing the original certificate, with the evidence of the acknowledgment thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, and to have been actually, and in good faith, paid in cash. 1836, March 21; P. L. 143, § 7.

The affidavit is prima facie evidence that the act has been complied with; *Hogg v. Orgill*, 34 Pa. 344, 1859; *Reiter v. Fruh*, 150 Pa. 623, 1892.

Under this act the special partners are liable as general partners unless their contributions are paid in cash; *Siegel v. Haines*, 15 Pa. C. C. 40; s. c. 35 W. N. C. 355, 1894.

Sec. 11. Liability in case of false statement. No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged and filed, and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners. 1836, March 21; P. L. 143, § 8.

A false certificate and affidavit will make a special partner liable for the engagements of the firm as a general partner, but will not make him a general partner in fact, and liable for the

contracts of the firm after his retirement at the end of the term, without notice of the dissolution; *Vandike v. Roskam*, 67 Pa. 330, 1871; *Tilge v. Brooks*, 124 Pa. 178, s. c., 23 W. N. C. 293, 1889.

Where the original certificate filed by a special partnership under this act is fatally defective in having no statement of the nature and value of the goods contributed, a renewal certificate which refers to a detailed statement of the merchandise and its value as filed in the court of common pleas, but does not itself contain any statement of the nature and value of the goods is insufficient to cure the original fatally defective organization, and the partnership remains, as before, a general partnership. *Blumenthal Bros. & Co. v. Whitaker*, 170 Pa. 309; s. c., 37 W. N. C. 81; 33 Atl. Rep. 103, 1895; *Blumenthal Bros. & Co. v. Bacon*, 170 Pa. 317; s. c., 37 W. N. C. 81, 84; 33 Atl. Rep. 106, 1895.

Where a renewal certificate falsely states that the special capital is unimpaired, the fact that the partnership had on hand at the time of the filing of the certificate, merchandise of a value in excess of the special capital is insufficient to relieve the special partner of general liability, if it appears that the debts of the firm were at the time in excess of its assets. *Fourth St. Nat. Bank v. Haines*, 170 Pa. 297; s. c., 37 W. N. C. 74; 33 Atl. Rep. 100, 1895; affirming 15 Pa. C. C. 34; s. c., 35 W. N. C. 353, 1894, *Fourth St. Nat. Bank v. Bacon*, 170 Pa. 305; s. c., 37 W. N. C. 74, 80; 33 Atl. Rep. 103, 1895.

A special partner in a limited partnership under this act is liable for the debts of the firm as a general partner, where a renewal of the form filed in the recorder of deed's office falsely states that the capital is unimpaired, although the special partner has no knowledge that the certificate is false. It is his legal duty to know the truth or falsity of the certificate. *Reitzel v. Haines*, 170 Pa. 306; s. c., 37 W. N. C. 80; 33 Atl. Rep. 103, 1895; reversing 15 Pa. C. C. 48; s. c., 35 W. N. C. 359, 1894.

Sec. 12. Publication of terms of partnership. The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in two newspapers, to be designated by the recorder of deeds of the county in which such registry shall be made, and to be published in the county or counties in which their business shall be carried on; and if such publication be not made, the partnership shall be deemed general. 1836, March, 21; P. L. 143, § 9.

Sec. 13. Manner of publication. The terms of the partnership required to be published by the ninth section of the act to which this is a further supplement shall consist of:

I. The name of the firm under which such partnership shall be conducted. II. The general nature of the business intended to be transacted. III. The names of the general partners, and their respective places of residence. IV. The aggregate amount of capital contributed by the special partners to the common stock. V. The period at which the partnership is to commence, and the period at which it will terminate. 1858, April 21; P. L. 383, § 1.

Sec. 14. Affidavits. Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published may be filed with the recorder directing the same, and shall be evidence of the facts therein contained. 1836, March 21; P. L. 143, § 10.

Sec. 15. Renewal of partnership. Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership, which shall be otherwise renewed or continued, shall be deemed a general partnership. 1836, March 21; P. L. 143, § 11.

A renewal, with the capital of the special partner impaired, renders the latter liable as general partner; *Bank v. Haines*, 3 D. R. 437, 1894.

See *Reitzel v. Haines*, 3 D. R. 523, 1894; *Siegel v. Wood*, 3 D. R. 463, 1894.

Sec. 16. Alteration of partnership. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership, according to the provisions of the last section. 1836, March 21; P. L. 143, § 12.

Where a limited partnership expires by limitation under an agreement, and a new member is admitted as a general partner, with a renewal under the agreement, and the continuing special partner does not make a new cash payment, but allows the cash paid into the former special partnership to remain with the new firm, the special partner becomes a general partner in the new firm; *Andrews v. Schott*, 10 Pa. 47, 1848.

During any period intervening between the expiration of a limited partnership and the date of its renewal such partnership is general, and the special partners of the old firm are liable

for all debts incurred during that period; *Haddock v. Grinnell Mfg. Corp.*, 109 Pa. 372, s. c., 16 W. N. C. 549, 1885, affirming 17 Phila. 213 s. c., 16 W. N. C. 96, 1885. Quære, will such a break in the continuity of a limited partnership of itself operate so as to prevent the renewal from inuring to the benefit of the special partner; *Haddock v. Grinnell Mfg. Corp. supra.*

A special partner, by a failure to comply with the law regulating limited partnerships, may become a general partner to the public, but remain a special one as to his partners; *Guillou v. Peterson*, 89 Pa. 163, 1879.

Where a special partner in a limited partnership formed under this act gives the notice required by the partnership articles of his intention to withdraw his capital from the firm at a certain time, but afterwards consents to withdraw it gradually, and the firm is not dissolved, he is entitled to participate in profits earned up to the actual dissolution of the partnership following a notice given by one of the other partners. *Smith v. Ervin*, 168 Pa. 271; s. c., 36 W. N. C. 339; 31 Atl. Rep. 1067, 1895.

Sec. 17. Increase of capital. The capital of the firm may be increased, either by taking in new special partners, or new subscriptions of capital from the partners previously in the firm; such increase being made in pursuance of the consent of the partners, as expressed in the original articles of partnership, or in any subsequent instrument of writing. 1858, April 21; P. L. 383, § 3.

Sec. 18. Increase to be certified and recorded. Every such increase of capital shall be duly acknowledged, certified, and recorded; but no neglect in recording the certificate of any such increase of capital, or of any sale or transfer of the interests or shares of the special partners, or any of them, shall be construed to operate as a dissolution of the firm, or to make the special partners liable as general partners. 1858, April 21; P. L. 383, § 4.

2. Management.

Sec. 19. Business to be conducted under a firm. The business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted, without the addition of the word "company," or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner. 1836, March 21; P. L. 143, § 13.

See *infra*, 21.

Sec. 20. Conduct of business. The business of the partnership shall be conducted under a firm, in which the names of all the general partners shall be inserted, except, that when there are more than two general partners, the firm name may consist of either two of such partners, with the addition of the words, "and company," but the said partnership shall put up, upon some conspicuous place on the outside, and in front of the building in which it has its chief place of business, some sign on which shall be painted, in legible English characters, all the names, in full, of all the members of said partnership, stating who are general, and who are special, partners. 1865, March 30; P. L. 46, § 2.

Sec. 21. Firm name to include the words "and company". The firm name of any limited partnership may consist of the name of any general partner, with the addition of the words "and company"¹⁾, notwithstanding the name of such general partner may be common to him and any special partner; but the said partnership shall put up the sign required by the second section²⁾ of the act approved March 30, 1865, to which this is a supplement. 1868, Feb. 21; P. L. 42, § 1.

1. Limited partnerships have no right to add the words "and company" where there is only one general partner, or to drag into the firm the name of the special partner under that designation, or to allow it to be added to the name of a firm in which the names of all the general partners appear; *Vilas Bank v. Bullock*, 10 Phila. 309, 1875; *Metropolitan Bank v. Gruber*, 14 W. N. C. 12, 1883, s. c., 16 Phila. 198, 1883.

2. See *supra*, 20.

Sec. 22. Suits. Suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. 1836, March 21; P. L. 143, § 14.

Sec. 23. Liability for debts—Interest and profits. No part of the sum which any special partner shall have contributed to the capital stock, shall be liable for any debts previously contracted by the general partners, nor shall any part of such sum be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital and if, after the payment of such interest, any profits shall remain

to be divided, he may also receive his portion of such profits. 1836, March 21; P. L. 143, § 15.

A general partner cannot assume, without consideration, the debt created by the special partner in procuring the money which he pays into the firm as his special contribution; the special contribution must be appropriated to firm creditors; *Coffin's Appeal*, 106 Pa. 280, s. c., 15 W. N. C. 52, 1884, reversing *Coffin v. Gruber*, 14 W. N. C. 140, 1883.

Sec. 24. Original capital not to be impaired. If it shall appear that, by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital, with interest. 1836, March 21; P. L. 143, § 16.

Sec. 25. Powers of special partners. A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise; if he shall interfere contrary to these provisions, he shall be deemed a general partner. 1836, March 21; P. L. 143, § 17.

A special partner is not liable for a trespass of the general partners, or their agents, employes, or servants, in the legitimate conduct of the partnership business; *McKnight v. Ratcliff*, 44 Pa. 156, 1863.

A special partner may, after the dissolution of the limited partnership, wind up the affairs of the concern; *Lawson v. Wilmer*, 3 Phila. 122, 1858.

Where it was stipulated in the articles of partnership that the son of the special partner should keep the books, and have a general supervision over the business during the partnership, at a salary, and that the general partner should sign no note, or check on bank, for firm money, without the son's knowledge and approval, it was held that the partnership was not limited but general, and the this special partner was liable for the firm debts; *Richardson v. Hogg*, 38 Pa. 153, 1861.

Sec. 26. Liability of general partners. The general partners shall be liable to account to each other and to the special partners, for the management of their concern, both in law and equity, as other partners now are by law. 1836, March 21; P. L. 143, § 18.

For accounting purposes, all the partners may be regarded as general partners, and their partnership subject to the legal and equitable rules relating to general partnerships. *Bunting v. Bunting*, 199 Pa. 27; s. c., 48 Atl. Rep. 681, 1901. But one partner is not bound to make good to another a loss due to the failure of a third person to pay a debt due the firm. *Ibid.* Unless the articles of agreement expressly stipulate for an equal division of losses. *Erben v. Heston* 202 Pa. 406, 1902.

Sec. 27. Fraud. Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable civilly to the party injured, to the extent of his damage. 1836, March 21; P. L. 143, § 19.

The provisions of this act can only be invoked by the firm creditors, but are no bar to a suit by a special partner against the firm to recover his contribution, notwithstanding creditors remain unpaid; *Brooke v. Alexander*, 3 W. N. C. 304, 1876.

A special partner cannot claim as a creditor of an insolvent firm, of which he was a member, as against creditors; *Dunning's Appeal*, 44 Pa. 150, 1863.

Sec. 28. When sale, assignment, transfer, etc., void. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership. 1836, March 21; P. L. 143, § 20.

A voluntary assignee of a limited partnership cannot avoid an assignment made contrary to the provisions of the act; such assignee represents only the assignor, and not the creditors; *Bullitt v. Chartered Fund*, 26 Pa. 108, 1856.

The purchase of shares in an unincorporated banking association, and a continuance of the business without any separation of past from future liabilities, or discrimination between past and future profits, will not make the purchaser liable for the pre-existing indebtedness of the bank; *Christy v. Sill*, 131 Pa. 492, 1889.

Sec. 29. When sale, assignment, etc., void as to creditors. Every such sale, assignment, or transfer of any of the property or effects of the general or special partner, made by such general or special partner when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership,

with the intent of giving to any creditor of his own or of the partnership a preference over creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership. 1836, March 21; P. L. 143, § 21.

A judgment confessed by one partner to another, to secure the amount of the capital stock advanced by such partner, who had agreed to enter into a special partnership, but became a general partner by reason of non-compliance with the requisitions of the act of assembly, is valid against a separate creditor of the partner who confessed the judgment; *Purdy v. Lacock*, 6 Pa. 490, 1847.

A confession of judgment by the general partners in favor of individual creditors of the special partner who have loaned money to him, to be contributed as special capital, is void as against partnership creditors; *Coffin & Hurlbut's Appeal*, 15 W. N. C. 52, 1884; *Dunning's Appeal*, 44 Pa. 150, 1863.

Sec. 30. Liability. Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner. 1836, March 21; P. L. 143, § 22.

A bona fide compromise of a suit to compel the settlement of a partnership, and the special partner's receipt for what he may believe due him, does not make him a general partner of an expired partnership; *Pusey v. Dusenbury*, 75 Pa. 437, 1874.

Where the general partner misappropriates the contribution of a special partner, the latter is not liable as a general partner for the debts of the partnership, when he is not privy to the misappropriation; *Seibert v. Bakewell*, 87 Pa. 506, 1878.

Sec. 31. Rights of creditors. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied. 1836, March 21; P. L. 143, § 23.

In a suit by a special partner against the firm to recover his contribution, the act is no bar to judgment, notwithstanding creditors remain unpaid; the act protects the creditors, and if it is to be invoked they must do it; the firm cannot; *Brooke v. Alexander*, 3 W. N. C. 304, 1876.

3. Dissolution.

Sec. 32. Dissolution. No dissolution of such partnership, by the act of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the recorder's office in which the original certificate was recorded, and published once in each week, for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business. 1836, March 21; P. L. 143, § 24.

Sec. 33. Disposal of interest of general partners. A general partner in any limited partnership, may, with the assent in writing of his partner, by deed duly acknowledged and recorded, or by last will and testament in writing, sell, assign, dispose of, or bequeath his interest in such limited partnership; and when such general partner dies without having disposed of his interest in such limited partnership, his administrator or executor may, in like manner, sell, assign, and transfer his interest therein for the benefit of his estate, and on every such sale, transfer, or bequest, a corresponding alteration shall be made in the name or firm under which the business of such partnership is conducted, and the same shall be forthwith acknowledged, certified, recorded, and published, in the same manner as is provided by law in the case of the original formation of the partnership. 1838, April 16; P. L. 689, § 1.

Sec. 34. Special partner may sell or assign his interest. A special partner, with the assent of his partner, in writing, first had and obtained, may sell or assign his interest in a limited partnership, without causing thereby a dissolution of the partnership. 1838, April 16; P. L. 689, § 1.

Sec. 35. Transfer of interest. The consent of the partners to a sale or transfer, by either the general or special partners, of their respective interests in the partnership, in pursuance of the resolution of April 16, 1838, may be given in advance, either in the original articles of partnership or other like instrument; and a sale or transfer of any part or share of the interest in the firm of any partner, if made in pursuance of the articles of copartnership, or previously expressed consent of the partners as aforesaid, shall be equally valid as a sale of the whole interest of any one or more of the partners; and it shall further be lawful for the general partner

or partners, or either of them, to purchase part or the whole of the interest or shares of one or more of the special partners. 1858, April 21; P. L. 383, § 2.

Sec. 36. Insolvency of special partner not to cause dissolution. The insolvency of any special partner shall not cause a dissolution of the limited partnership, but his interest therein shall be sold by his assignees for the benefit of his creditors. 1838, April 16; P. L. 689, § 1.

Sec. 37. Powers of executors and administrators. When any special partner shall die, without having disposed of his interest in the limited partnership, his executor or administrator may either continue his interest therein for its unexpired term, for the benefit of his estate, or may sell the same at public auction, under the direction of the orphans' court of the county in which the principal place of business of such partnership may be, in the same manner as the estates of intestates are now by law sold; testamentary dispositions, in writing, of the interest of special partners, may also be made; the decease of special partners shall not dissolve such limited partnership, unless by the agreement between the parties it is provided that such decease shall have that effect. 1838, April 16; P. L. 689, § 1.

Sec. 38. Notice of alteration to be given. Every alteration in such limited partnership, according to the provisions of this resolve, shall be notified to the general partner, and shall be duly acknowledged, certified, and recorded, as in the case of the original formation of such partnership. 1838, April 16; P. L. 689, § 1.

Sec. 11. Service of summons, attachment-execution, and scire facias upon a corporation, partnership limited or joint stock company. The writ of summons, the writ of attachment in execution, and the writ of scire facias by the sheriff upon a corporation, a partnership limited, or a joint stock company, in the county wherein it is issued, in any of the following methods: a) By handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk, or other executive officer, personally; or, b) By handing a true and attested copy thereof to an adult member of the family of any one of said officers, at his dwelling-house; or¹) c) By handing a true and attested copy thereof, at his place of residence, to an adult member of the family of the person with whom any of said officers resides; or d) By handing a true and attested copy thereof, at his place of residence, to the manager or clerk of the hotel, inn, apartment-house, boarding-house, or other place of lodging, where any of said officers reside; or e) By handing an attested copy thereof, at any of its offices, depots, or places of business, to its agents or persons for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed; or f) If the corporation, partnership limited, or joint stock company has no office or place of business in actual operation in the county where the cause of action arose, then service may be made in such county upon any member of its board of directors, in any of the methods set forth in clauses a, b, c, or d hereof; or g) If the corporation, partnership limited, or joint stock company has no office or place of business in actual operation in the county in which the cause of action arose, and no member of its board of directors, or other officer, is a resident of the county in which the cause of action arose, then service may be made in any of the methods set forth in clauses a, b, c, d, e, or f hereof, in any other county than that in which the writ issues, by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the writ issues. 1903, April 3; P. L. 139, § 1.

1. This act amends the act of 1901, July 9; P. L. 614, § 1.

Sec. 12. Service on registered foreign corporation, partnership limited or joint stock company. In the case of a registered foreign corporation, partnership limited, or joint stock company, by serving its duly registered attorney as in the case of a summons issued against him personally, or by leaving a true and attested copy thereof for him, at the registered place, if he be not found there during the usual business hours of any business day, with the person for the time being in charge of the business carried on at such place. 1903, April 3; P. L. 139, § 1.

This act amends the act of 1901, July 9; P. L. 614, § 7.

Georgia.

Code of Georgia, 1911.

Sec. 3191. Purposes. Limited partnership, for the transaction of any mercantile, commercial, mechanical, manufacturing, mining, or agricultural business within this state, may be formed by two or more persons, upon the terms, upon the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this article shall not be construed to authorize any such partnership for the purposes of banking or making insurance.

Sec. 3192. How constituted. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners, and of one or more persons who shall contribute in actual cash a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital, except as hereinafter provided.

Sec. 3193. Business, by whom transacted. The general partners only shall be authorized to transact business, and sign for the partnership, and to bind the same.

Sec. 3194. Specifications of certificate. Persons desirous of forming such partnership shall make, and severally sign, by themselves or attorney in fact, a certificate which shall contain:

1. The name of the firm under which such partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the general and special partners inserted therein, distinguishing which are general and which are special partners, and their respective places of residence.

4. The amount of capital which each special partner shall have contributed to the common stock.

5. The period at which the partnership is to commence, and the period at which it shall terminate; and when made by such attorney in fact, the power of the attorney, duly authenticated, shall be recorded along with such certificate.

Sec. 3195. How acknowledged. The certificate shall be acknowledged by several persons signing the same, or their attorney in fact, before a judge of the superior court, ordinary, or a justice of the peace, or notary public, and such acknowledgment shall be certified by the officer by whom the same is made.

Sec. 3196. Certificate and power of attorney, when and where filed. The certificate and power of attorney in fact, so acknowledged and certified, shall be filed in the office of the clerk of the superior court of the county in which the principal place of business of the partnership shall be situated, and also be recorded by him at large in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, and transcript of the certificate, and power of attorney in fact, and of acknowledgment thereof, duly certified by the clerk in whose office it shall be filed, under his official seal, shall be filed, and recorded in like manner in the office of the clerk of the superior court in every such county; and the clerk for each and every registry required by this article shall be entitled to the sum of five dollars.

Sec. 3197. Affidavit. At the time of filing the original certificate, with the evidence of acknowledgment thereof, as before directed, an affidavit or affidavits of the several general partners shall also be filed in the same office, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash, and a certified copy of such certificate, power of attorney, and affidavits, shall be evidence in all courts and places whatever.

Sec. 3198. Informal partnerships. No such partnership shall be deemed to have been formed until such certificate as is herein mentioned shall have been made, acknowledged, filed, and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in any such certificate or affidavit, or if such partnership business be commenced before such certificate or affidavit is filed, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners.

Sec. 3199. How published. The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in at least two newspapers published in the county in which the place of business is situated: Provided, there are two papers there published; but if not, then in one; and if no newspaper should be published in the county in which the business is to be transacted, the notice shall be published in the newspaper in which the sheriff advertises; and if such publication be not made within two months from the filing of such certificate and affidavit, the partnership shall be deemed general.

Sec. 3200. Evidence of publication. The affidavits of the publication of such notice by the printers, publishers, or editors of the newspapers in which the same shall be published may be filed in the office of the clerk of the superior court in which the certificate has been filed, and shall be evidence of the facts contained therein.

Sec. 3201. Renewal or continuance of partnership. Every renewal or continuance of such partnership beyond the time fixed for its duration, shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership.

Sec. 3202. Alteration of names, etc., deemed a dissolution. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last section.

Sec. 3203. Firm name. The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word "company," or any other general term; and if the name of any special partner shall be used in such firm, he shall be deemed a general partner.

Sec. 3204. Suits. Suits to be brought by any partnership to be formed under this code, shall be in the name or names of the general partners only, and suit against such partnership shall be brought against the general partners only, except in cases where the special partners shall be rendered liable as general partners, in which cases suits may be brought against all the partners jointly or severally, or any one or more of the special partners may be sued in the same action with the general partners.

Sec. 3205. Privileges of special partner. A special partner may at any time examine into the condition and progress of the partnership concerns, may advise as to the management of the same, and when the general partner or partners may be rendered incompetent to act on account of illness, temporary absence, or other cause, may direct and control the business of the partnership as a general partner may do; provided such special partner, before assuming such direction and control, shall cause to be placed in a position easily to be seen by all parties dealing with said partnership a placard or sign showing who are the general and who the special partners constituting such partnership; otherwise the special partner or partners shall not transact any business on account of the said partnership, nor be employed for that purpose as agent or in any capacity akin thereto. If, contrary to the provisions of this section, the special partner shall in any manner interfere with the business and affairs of the partnership, he shall be deemed a general partner; but a special partner may act as the attorney or counselor at law for the partnership without being liable to become a general partner.

Sec. 3206. Capital stock not to be withdrawn. No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him, in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership, but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if, after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits, but shall not be liable for any debts previously contracted by the general partners.

Sec. 3207. Interest and profits, etc. If it shall appear that, by the payment of interest or profits to any special partner, the original capital has been reduced, or the firm shall be unable to pay its debts, the partner receiving the same shall be bound to restore the interest or profits received by him necessary to make good his original share of the original stock.

Sec. 3208. Liability of general partners. The general partners shall be liable to each other, and to special partners, for their management of the business of the firm, both in law and equity, as other partners are now by law and equity.

Sec. 3209. Partners guilty of fraud, etc. Every partner who shall be guilty of any fraud in the affairs or business of the partnership shall be liable civilly to the party injured, to the extent of his damage, and shall also be liable to an indictment for a misdemeanor.

Sec. 3210. Fraudulent assignments invalid. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances and with the like intent, shall be void as against the creditors of such partnership.

Sec. 3211. By general or special partners. Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, who may have become liable as a general partner, made by such general or special partner when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intention of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances, and with the like intent, shall be void as against the creditors of the partnership.

Sec. 3212. Liability of special partners, etc. Any special partner who shall violate any provisions of the last two preceding sections, or who shall concur in, or assent to, any such violation by the partnership, or by any individual partner, shall be liable as a general partner.

Sec. 3213. Special partners, etc. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all the other creditors of the partnership shall be satisfied.

Sec. 3214. Dissolution, how effected. No dissolution of such partnership, by the acts of the parties, shall take place previous to the time specified in the certificate of its renewal, until a notice of such intended dissolution shall have been filed and recorded in the clerk's office in which the original certificate was recorded, and published at least once a week for four weeks in a newspaper printed in each of the counties where the partnership has places of business; but if no newspaper be printed in such counties, then the notice shall be published for four weeks in a newspaper in which the sheriff of said county advertises, which notice shall be signed by all the partners, or their representatives. Provided, that nothing herein contained shall be so construed as to affect the collection of any demand against either of the special partners which may have been contracted previous to the commencement of such special partnership.

Other States.

Limited partnerships exist generally in the various states. For ready reference, the citations to those of the other states, which are on the whole like the ones quoted, are as follows: — Alabama Code, 1907, secs. 5265—5289; Arkansas Dig. of Statutes, 1904, (Kirby) 5803—5830; Colorado Rev. Statutes, 1908, 4768—4788; Connecticut General Statutes, 1902, 4016—4024; Delaware Rev. Code, 1893, p. 531, 532; Idaho Rev. Codes, 1908, 3336—3360; Illinois Anno. Statutes, 1896, p. 2646; Indiana Statutes Annotated (Burns) 1908, 9693—9711; Iowa Code, and Supplements 1897, 3106—3121; Kansas Gen. Statutes, 1905, 4766—4786; Kentucky Gen. Statutes, 1909, 3767—3779; Maine Rev. Statutes, 1903, p. 376; Maryland Gen. Laws, 1904, p. 1612; Michigan, Act of 1883, pp. 6055—6078; Minnesota Rev. Laws, 1905,

2819—2837; Mississippi Code, 1906, 3129—3147; Missouri Anno. Statutes, 1906, 4435—4446; Montana Rev. Codes, 1907, 5510—5534; Nebraska Comp. Laws (Cobbey), 1907, 9703—9727; Nevada Comp. Laws, 1900, 2773—2785; New Jersey Rev. Laws, 1895, p. 2437—2442; New Hampshire Pub. Statutes, 1901, p. 381; North Carolina Rev. Laws 1905, 2521—2539; North Dakota Codes, 1905, 5865—5889; Oklahoma Statutes, 1908, 4882—4906; Oregon Codes & Statutes, 1902, 4393—4402; Rhode Island Rev. Gen. Laws, 1909, p. 609; South Carolina Code, 1902, 1680—1707; South Dakota Comp. Laws, 1908, pp. 252—254; Tennessee Code, 1896, 3119—3141; Texas Gen. Statutes (Sayles) 1889, 3442—3464; Utah Comp. Laws, 1907, 1687—1707; Vermont Pub. Statutes, 1906, 4891—4900; Virginia Code, 1904, 2863—2886; Washington Gen. Statutes, 1910, § 8359—8368; West Virginia Code, 1906, 3456—3470; Wisconsin Comp. Statutes, 1898, 1703—1724; Wyoming Comp. Laws, 1910, 3397—3421.

Partnership Associations.

Pennsylvania.

P. & L. Dig. of Laws, (1911) 5625—5638.¹⁾

I. Formation of, management, etc.

Sec. 1. Formation of partnership associations—Telegraph and telephone companies—Limit of capital stock. When any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation, including the construction, equipment, installation, and operation of a telephone or telegraph line, within the United States, or elsewhere, whose principal office or place of business shall be established and maintained within this state, by subscribing and contributing capital thereto, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge, before some officer competent to take the acknowledgment of deeds, a statement, in writing, in which shall be set forth the full names of such persons, and the amount of capital of said association subscribed for by each; the total amount of capital, and when and how paid; the character of the business to be conducted, and the location of the same; the name of the association, with the word "limited" added thereto as part of the same; the contemplated duration of said association, which shall not in any case exceed twenty years, and the names of the officers of said association, selected in conformity with the provisions of this act; and any amendment of said statement shall be made only in like manner, which said statement and amendments shall be recorded in the office of the recorder of deeds of the proper county; Provided, however, That the capital stock of any telephone or telegraph company, incorporated or created in accordance with the provisions of this act, shall not be capitalized at more than the sum of five thousand dollars. 1907, June 7; P. L. 432, § 1.

This act amends section 1 of the act of 1874, June 2; P. L. 271.

See sections 14 and 15 as to payment of subscriptions in property. A false statement filed as to subscriptions to capital stock renders the partners liable as general partners; *Bement v. Brick Co.*, 12 Phila. 494, 1878; *Keystone Boot & Shoe Co., Ltd. v. Schoelkopf's Sons*, 11 W. N. C. 132; s. c., 14 Lanc. Bar 137, 1881; *Elliot v. Himrod*, 108 Pa. 569, 1885, affirming *Elliot v. Himrod*, 15 W. N. C. 77, 1884; *Hite Natl. Gas Co.'s Appeal*, 118 Pa. 436, 1888; *Snedden v. Wire Co.*, 5 Pa. C. C. 418, 1888; *Lauder v. Logan*, 123 Pa. 34, 1888; *Hill v. Stetler*, 127 Pa. 145, 1889, on reargument from 21 W. N. C. 255; s. c., 1 Wilcox, 97, 1888, reversing 4 C. P. Rep. 119, 1887; *Gearing v. Carroll*, 151 Pa. 79, 1892. Contributions cannot be made in the personal property of a company subject to its indebtedness; *Haslet v. Kent*, 160 Pa. 85, 1894.

The names of the associates shall be in the form habitually used by them in business, and by which they are generally known in the community; *Gearing v. Carroll*, 151 Pa. 79, 1892; *Lafin & Rand Co. v. Steytler*, 146 Pa. 434; s. c., 29 W. N. C. 230, 1892. A member is a debtor for unpaid subscriptions; *Lauder v. Tillia*, 117 Pa. 304, 1887.

At least three persons are absolutely necessary to create a partnership association; *Collins's Appeal*, 107 Pa. 590, 1883.

¹⁾ By permission of T. & J. W. Johnson, Pub. Co.

Such an association is not technically a corporation, yet it has many of the characteristics of one; *Oak Ridge Coal Company, Limited v. Rogers*, 108 Pa. 147, 1885.

There must be a strict compliance with the act, to avoid general liability; *Hill v. Stetler*, 127 Pa. 145, 1889, on reargument from 1 Wilcox, 97; s. c., 21 W. N. C. 255, 1888, reversing 4 C. P. Rep. 119, 1887.

A failure to record the articles of association before the commencement of negotiations which resulted in a contract after the articles were recorded does not render the members of the association liable as individuals, or as general partners, for the goods delivered to the association under the contract; *Hinds v. Battin*, 163 Pa. 487, 1894.

An association organized under this act is a corporation and a citizen of Pennsylvania, within the meaning of the statutes of the United States requiring diversity of citizenship to give federal jurisdiction, though the assignee of the interest of a member in the capital stock cannot participate in the affairs of the company unless elected to membership therein by a majority of its members; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585, 1898. But see *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 1900, where it was held that such a partnership is not a corporation within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of the litigation, to be one by or against citizens of the state creating the corporation. It is not sufficient that the association may be described as a quasi corporation or as a "new artificial person". The rule does not embrace a new artificial person that is not a corporation.

Where an existing business is the basis of a limited partnership under this act, the law does not require in the schedule minute specification of details that may change from day to day. Certainty to a fair business intent is the safe practical criterion; *Robbins Electric Co. v. Weber*, 172 Pa. 635, 1896. Where the articles of association set forth the names of the persons contributing property, and the amount contributed by each, and an itemized statement of the property contributed is attached to the articles, there is a sufficient compliance with the statute, although the itemized statement of property is not signed by the parties; *Ibid*.

The members may accept real estate, at a valuation agreed upon, as the basis of capital stock, and such capital stock is taxable under the act of June 7, 1879; *Commonwealth v. S. & R. Improvement Co.*, 3 Dauph. Co. 116, 1881. See also *Commonwealth v. Sandy Lick Gas, Coal & Coke Co.*, 1 Dauph. Co., 314, 1883; *Commonwealth v. Natural Gas Co.*, 2 Dauph. Co. 130, 1883.

Where an association expires by its own limitation being at the time insolvent, and a new association is formed by the same members, who contribute the property of the old company as capital, pay some of the old company's debts, and finally become likewise insolvent, they are liable as general partners, not having complied with the statute; *Lee & Bacchus v. Burnley*, 195 Pa. 58, 1900.

Where two persons ask a third to join them in a partnership merely for the sake of complying with the statute, equity will forbid them pleading this fact and such person will be entitled to his number of shares according to the articles of agreement; *Sturgeon v. Apollo Oil & Gas Co.*, 48 P. L. J. 197, 1900.

The orphans' court has jurisdiction to authorize an executor or administrator to borrow money to preserve a partnership business in which the estate is largely interested, but this power should be very cautiously and very rarely exercised, as upon the insolvency of the partnership the person who loans the money under the decree of the court is entitled to be paid in full out of the testator's estate; *Mustin's Estate*, 188 Pa. 544, 1898.

This act is complied with where two of the persons uniting are married women, and the others are their husbands; *Bernard & Leas Mfg. Co. v. Packard & Calvin, Ltd.*, 64 Fed. Rep. 309, 1894.

Limited partnerships referred to in the revenue laws are such as are formed under the provisions of this act and its supplements, and do not comprehend within their meaning the limited partnerships or special partnerships created under the act of 1836 and its supplements; *Limited Partnerships*, 18 Pa. C. C. 87, 1896. (Opinion of attorney general.)

Where the by-laws provide that the annual meeting of the company shall be held on a particular date, the terms of the officers begin from that date, although they may have been elected on a particular occasion at a later date; *Commonwealth v. McCarty*, 23 Pa. C. C. 145, 1899. Where the by-laws provide that the members shall be entitled to one vote each for each share of stock which they hold, the officers must be elected by a stock vote, and an adjournment of a meeting can only be had by a stock vote; *Ibid*.

Where three persons form a partnership association, signing the necessary papers for that purpose and holding themselves out as limited partners, two of them will not be heard to aver subsequently that the third was but a straw partner and had no interest in fact in the partnership; *Sturgeon v. Apollo Oil & Gas Co. Ltd.*, 203 Pa. 369, 1902; affirming 48 P. L. J. 197, 1900.

Failure of the partners to sign, acknowledge, and record the statement required by the act, and the signature of an amendment by one partner only, fastens upon all, liability as general partners; *Chatham National Bank v. Gardner*, 31 Pa. Super. Ct. 135, 1906.

See 10 P. & L. Dig. of Dec. 17256 et seq.

Sec. 2. Liability of members. The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be ob-

tained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided; that is to say, if any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof, whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the members to the extent of the portions of their subscriptions, respectively, in the capital of the association not then paid up: Provided always, That no such execution shall issue against any member, except upon an order of court or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof and the amount of capital remaining to be paid upon their respective subscriptions, and from them, or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times. 1874, June 2; P. L. 271, § 2.

Members have no general right to inspect the books and papers of the association; *Patterson v. Tidewater Pipe Co.*, 12 W. N. C. 452, 1883. For rights of creditors to recover unpaid subscriptions, see *Cox v. Watts*, 33 W. N. C. 124, 1893; *Frank v. Lewis Foundry Co.*, 41 P. L. J. 33, 1894.

In an action by a limited partnership association under this act a letter written under the letterhead of the company, and signed by a person who was not shown to have been a manager of the company, is admissible for the purpose of proving that the goods were sold and delivered not to the defendant, but to the defendant's brother; *Abington Dairy Co. v. Reynolds*, 24 Pa. Super Ct. 632, 1904; reversing 17 York, 5; s. c., 4 Lack. Jur. 145, 1903.

A schedule which enumerates real estate as contributed at a certain valuation, without any reference whatever to an existing lien on the real estate, is defective, and the members of the association are liable for its debts as general partners; *Bank v. Creveling, Miles & Co.*, 177 Pa. 270; s. c., 39 W. N. C. 110; 35 Atl. Rep. 595, 1896. Failure to keep a subscription list-book renders the association a general partnership; *Ibid.* The articles must provide a fixed time at which subscriptions to the capital should be paid; *Ibid.*

The members will be held to be general partners when the statement filed was materially untrue and a subscription book had never been kept; *Mantel Co.'s Assigned Estate*, 4 Pa. Super. Ct. 106, 1897.

The partners are not liable for the payment of contributions or assessments to pay the debts of the firm, and the latter has no authority to demand contributions for that purpose from the members; hence a judgment of a justice of the peace in favor of such an association will not be sustained where the record only shows that plaintiff's demand is an assessment to pay debts of the company; *Farmers' Supply Co. Ltd. v. Foulke*, 18 Pa. C. C. 566, 1896.

See 2 P. & L. Dig. of Dec. 1903 et seq.

Sec. 3. Use of word "limited." The word "limited" shall be the last word of the name of every partnership association, formed under the provisions of this act; and every such association shall paint or affix and shall keep painted or affixed, its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position, in letters easily legible, and shall have its full name mentioned in legible characters in all notices, advertisements and other official publications of such association, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters and other writings used in the transaction of the business of the partnership association:¹) Provided, That the omission of the word "limited" in the use of the name of the partnership association shall render each and every person participant in such omission, or knowingly acquiescing therein, liable for any indebtedness, damage or liability arising therefrom¹). 1874, June 2; P. L. 271, § 3.

1. The full name of the partnership association must be set forth in checks and other writings; *German v. Moodie*, 9 W. N. C. 221, 1880. A partner signing a check, omitting the word "limited", is individually liable; *Sellersville Nat. Bank v. Banks*, 9 Pa. C. C. 92, 1890; *B. & O. Railroad Co. v. Wilkins*, 10 Pa. C. C. 269, 1890.

The use of the abbreviation "Ltd." in a signature does not create a general liability; *Bernard & Leas Mfg. Co. v. Packard & Calvin, Ltd.*, 64 Fed. Rep. 309, 1894.

There is nothing in this act requiring the word "Limited" to be used in the company's name in a contract under a penalty of a forfeiture of the right to recover thereon; *Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co.*, 20 Pa. Super. Ct. 384, 1902. A departure from the strict style of a corporation or association will not avoid its contract if it substantially appears that

the particular corporation was intended; and a latent ambiguity may, under proper averments, be explained by parol evidence in this as in other cases to show the intention; *Ibid*.

The use of the abbreviation "Ltd." instead of "Limited" after the company's name on the letter head, will not make the person who signed the letter a general partner so that his declarations and acts will have the same force and effect in all cases as the acts and declarations of a co-partner in a ordinary partnership. The omission to use the word limited merely imposes liability for indebtedness on members who participate in the omission, or knowingly acquiesce therein; *Abington Dairy Co. v. Reynolds*, 24 Pa. Super. Ct. 632, 1904; reversing 17 York, 5; s. c., 4 Lack Jur. 145, 1903.

2. They must be charged as general partners; *Brown v. Benner Syphon Trap Co.*, 18 W. N. C. 114, 1886.

See 2 P. & L. Dig. of Dec. 2825; also, 11 P. & L. Dig. of Dec. 19149.

Sec. 4. Interests in such associations to be personal property. Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned, under such rules and regulations as such partnership associations shall from time to time prescribe by a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations, the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisalment shall be subject to the approval of said court. 1885, June 25; P. L. 182, § 1.

This act amends § 4 of the act of 1874, June 2; P. L. 271.

The by-laws and usages of an unincorporated company are analogous to the terms of an article of copartnership; and in buying into the partnership, the purchaser of stock is bound to know the rules and regulations which govern it; *Logan v. McNaugher*, 88 Pa. 103, 1878.

The executors of a deceased shareholder are entitled to a proportionate interest in any trade-mark or "goodwill" which the association possesses; *In re Henry Disston & Sons' File Co.*, 8 W. N. C. 58, 1879.

A partner can assign his interest to another, and title passes on delivery of the certificate and power of attorney to transfer; *Tidewater Pipe Co. v. Kitchenman*, 108 Pa. 630, 1885.

A partner can pledge his interest; *Collins's Appeal*, 15 W. N. C. 5, 1883.

The assignee of a grantee who was a member cannot set up a defective statement to bind the partners generally; *Egbert v. Kimberly*, 146 Pa. 96, 1892.

This act was intended only for the control of the interest of partners as between themselves, and was not meant to exempt the real estate of the association from the effect of a lien on the ordinary incumbrance held by an outside person; *Assigned Estate of Fair Hope North Savage Fire Brick Co. Ltd.*, 183 Pa. 103, 1897. Land held by a partnership is considered as realty so far as firm judgments are concerned, and such judgments are liens upon it; but as to the separate interests of partners it is considered as personalty and judgments against the partners individually are not liens upon it, or upon those interests; and the face of the title must govern as to whether land held by members of a partnership shall be regarded as firm property or not; *Ibid*.

This act makes no distinction between a transferee of stock who is a member of the association and one who is not, and therefore a member who purchases additional shares of the association sustains the same relation to such shares as purchasers who are not members, and he cannot vote such shares unless elected to membership upon them; *Carter v. Producers' Oil Co. Ltd.*, 182 Pa. 551, 1897.

Where a person acquires by purchase stock of a limited partnership association and makes a demand for election to membership, his demand is a consent to membership in regard to his entire holding of shares, and the different dates of acquisition of the shares, and the difference of previous owners are irrelevant. The association has the option to elect to membership or not, and can either accept or refuse the demand, but cannot split it up into fractions, and accept part and refuse part. A refusal of part is a refusal altogether, and at once gives the purchaser of the stock the right to an appraisalment and payment for all his shares; *Carter v. Producers' Oil Co. Ltd.*, 200 Pa. 579, 1901.

A preliminary injunction will be granted to restrain the managers from selling the entire business and property of the association without the consent of all the shareholders, at suit of one having a mere equity in the capital; *Carter v. Producers & Refiners' Oil Co. Ltd.*, 164 Pa. 463, 1894.

This act requires the election of anyone succeeding to the interest of a partner, and, therefore, a trustee in bankruptcy of one of the members of such an association who has not been elected to membership, has no right to participate in the management of its business; nor has he standing to invoke the aid of a court of equity to direct the partnership as to how it shall conduct business; *More v. Glew*, 12 D. R. 30, 1902.

See 11 P. & L. Dig. of Dec. 19139, 19140 & 19143.

Sec. 5. Managers—Salaries—Debts—Liabilities. There shall be at least one meeting of the members of the association in each year; at one of the meetings there shall be elected not less than three nor more than five managers of the association, one of whom shall be the chairman, one the treasurer and one the secretary, or the offices of both treasurer and secretary may be filled by one person, who shall hold their respective offices one year, and until their successors are duly installed. The board of managers are authorized to fix the salary and compensation of such officers, and the salary and compensation of other employes, but the president, secretary, and treasurer shall not receive, as salary or compensation, after such association has been in existence for five years, a sum in the aggregate greater than the amount of net earnings actually earned during the year preceding, unless by the consent of two-thirds of all the members of the association; and the salary of the president, secretary, and treasurer shall be fixed for the ensuing year, by a two-thirds vote of the value of interest present at the annual meeting of the association, and after the annual report has been made. No debt shall be contracted or liability incurred for such association, except by one or more of the managers, and no liability greater than five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing and signed by at least two managers. 1889, May 10; P. L. 183, § 1.

This act amends § 5 of the act of 1874, June 2; P. L. 271.

The powers of partnership associations are to be exercised by a board of managers, and strangers are bound by the limitations imposed upon individual members; *Lerch Hardware Co. v. Bank*, 109 Pa. 240, 1885; *Pittsburg Melting Co. v. Reese*, 118 Pa. 355, 1888. The managers may fix salaries and hire for more than one year; *Jennings v. Beale*, 146 Pa. 125, 1892.

No liability can be incurred to exceed five hundred dollars, unless in strict compliance with the act; *Andrews v. Youngstown Coke Co.*, 7 Pa. C. C. 67, 1889; *Tasker v. Brown*, 20 Phila. 191; s. c., 8 Pa. C. C. 390, 1890; *McLaughlin v. Centre Mining Co.*, 10 Pa. C. C. 533, 1891; *Mercantile Bank v. Lauth*, 143 Pa. 53, 1891; *Bank v. Walton*, 1 D. R. 422, 1892. The managers may ratify a contract made by one manager only; *Pittson Engine Co. v. Fuller*, 1 D. R. 299, 1892; *Porter v. Beacon Co.*, 154 Pa. 8, 1893.

Equity will enjoin one who claims to be a manager; *Tidewater Pipe Co. v. Satterfield*, 12 W. N. C. 457, 1883.

Where one manager signs a contract exceeding \$500, the liability does not extend to the other members; *Bernard & Leas Mfg. Co. v. Packard & Calvin*, 64 Fed. Rep. 309, 1894.

A contract signed by the secretary and afterwards indorsed by two managers "within contract approved", is executed by two managers of the association within the meaning of this act; *Phila. Base Ball Club v. Lajoie*, 10 D. R. 309, 1901.

An affidavit of defense that "the notes sued on do not purport on their face to have been signed by two managers of the defendant company", and that "there is no averment that the persons who signed them are or were" such managers, is not sustained where the notes are signed by the "chairman" and the "treasurer" of the defendant; for this act expressly provides that these officers shall be managers; *City Bank of Hartford v. Press Co.*, 56 Fed. Rep. 260; affirmed 58 Fed. Rep. 231, 1893.

An association is estopped from denying the validity of a contract because not signed by at least two managers where it appears that the association took possession, under the contract, of property essential to the prosecution of its business, paid a portion of the purchase money, continued to use the property and never objected to the contract until suit was brought; *Yaryan Co. v. Penna. Glue Co.* 180 Pa. 480, 1897.

Recovery cannot be had against an association on checks issued by the treasurer, where it appears that he had no authority to issue the checks, that his act was not subsequently ratified; that the effect of the issuance of the checks was to create a liability against the company new and different from the contract in pursuance of which the checks were alleged to have been given, and the checks, although indorsed by the payees, had never in fact been delivered to them, but had been returned to the association and destroyed; *Straw v. Murray*, 182 Pa. 642, 1897.

The interest of a member of an association under this act, formed for the purpose of buying real estate, is personal property, and the interest of a member cannot be sold under an execution as real estate; *Pittsburg Wagon Works' Estate*, 204 Pa. 432, 1902.

Two partners, sued by a third for a sum of money due him on his retirement from the association, cannot defeat a recovery by setting up that he was to collect that sum from debts due the partnership, where they by their own acts have prevented the collection; *Moses v. Powers*, 19 Pa. Super. Ct. 393, 1902.

Sec. 6. Dividends. The association may, from time to time, divide the profits of its business in such manner and in such an amount as a majority of its managers may determine, which profits so divided shall not at the time diminish or impair the capital of the said association; and any one consenting to a dividend which shall diminish or impair the capital shall be liable to any person or persons interested or injured thereby, to the amount of such diminution or impairment. 1874, June 2; P. L. 271, § 6.

A contract signed by the secretary of a limited partnership association under this act and afterwards indorsed by two managers "within contract approved" is executed by two managers of the association within the meaning of this act; *Philadelphia Base Ball Club v. Lajoie*, 10 D. R. 309, 1901.

Sec. 7. Loan of credit, name, or capital, prohibited. It shall not be lawful for such association to loan its credit, its name or its capital to any member of said association, and for such loan to any other person or association the consent in writing of a majority in number and value of interest shall be requisite. 1874, June 2; P. L. 271, § 7.

It shall not be lawful to loan its name its credit or its capital to any member; *Liggett Spring Co.'s Appeal*, 111 Pa. 291, 1886; but see *Layng v. A. French Spring Co., Ltd.*, 149 Pa. 308, s. c., 30 W. N. C. 205, 1892.

See 11 P. & L. Dig. of Dec. 19155.

Sec. 8. Dissolution. Such association may be dissolved: I. Whenever the period fixed for the duration of the association expires. II. Whenever, by a vote of a majority in number and value of interest, it shall be so determined, and notice of such winding up shall be given by publication in two newspapers, published in the proper city or county, at least six consecutive times, and immediately upon the commencement of said advertising, said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof. 1874, June 2; P. L. 271, § 8.

After a partnership association has passed a resolution to wind up its business it cannot confess a judgment; *Crowther v. The Upland Industrial Cooperative Association*, 1 Del. Co. 264, 1882.

When the association ends by its own limitation, it is dissolved by the "voluntary act thereof"; *Tindel v. Park*, 154 Pa. 36, 1893.

See *infra*, § 9.

A claim by suit for unliquidated damages, upon which suit has been brought, is sufficient to prevent dissolution; *In re Gautier Steel Co.*, 2 Pa. C. C. 399, 1886.

This act provides the manner for the voluntary dissolution of such associations, and supersedes all others; *Harley v. Lincoln Avenue Pharmacy*, 50 P. L. J. 150, 1902.

See 11 P. & L. Dig. of Dec. 19161 seq.

Sec. 9. Distribution of property. When any such partnership association shall be dissolved by the voluntary action thereof, its property shall be applied and distributed as follows:

I. To the payment of all debts for wages or labor.

II. To the satisfaction of its other liabilities and indebtedness.

III. After payment thereof, the same shall be distributed to and among the members thereof, in proportion to their respective interests, in the following manner. 1874, June 2; P. L. 271, § 9.

There is no reason why the members of such partnership may not agree upon the value of their respective interests for the purpose of voting for liquidating trustees; *In re Imperial Steel Co.*, 2 D. R. 826, 1893.

In case of a failure to elect liquidating trustees, the court has the right to appoint the same under the authority given them to settle the affairs of the association; *In re Imperial Steel Co.*, 2 D. R. 826, 1893.

The partnership association is officially dead when it has passed a resolution to wind up its business, and has commenced to advertise; *Crowther v. The Association*, 1 Del. Co. 264, 1882.

When a partnership association is dissolved by the voluntary action thereof, the winding up of the business, when any partner insists upon it, must be by three trustees, as provided by this act; in such a case a bill in equity, for an account and a receiver, cannot be sustained; when an association ends by its own limitation, it is dissolved "by the voluntary act thereof;" *Tindel v. Park*, 154 Pa. 36, 1893.

Sec. 10. Liquidating trustees. Three liquidating trustees, not more than two of whom shall have been a manager of the association so dissolved and in liquidation, shall be elected by the members of the association, who shall have full power to settle the affairs of the association, and distribute the assets thereof, after the payment of its debts, among the members, under the direction of the court of common pleas of the proper county. 1889, May 10; P. L. 183, § 2.

While the usual method of procedure to call trustees to account is by petition and rule on the trustees to account, yet under certain circumstances a bill in equity may be brought; *McKee v. Smith*, 48 P. L. J. 369, 1901.

A court of equity may appoint a receiver for an insolvent partnership association; *Edwards v. Kroll Furniture Company*, 1 Leh. Co., 235, 1905. This section does not apply where the association is insolvent; *Ibid*.

A receiver may be appointed, on a bill filed by creditors; *Hillborn v. Publishing Co.*, 12 W. N. C. 548, 1883.

A partner can claim against the assigned estate of an association, and receive his pro rata share with other creditors; *Globe Refining Co.'s Estate*, 151 Pa. 558, 1892; and when a partner serves as liquidating trustee, he can recover for services as such; *In re Jennings Co.*, 157 Pa. 630, 1893.

Any special agreement as to voting, if not otherwise stated, applies to the election of liquidating trustees; *In re Imperial Steel Co.*, 2 D. R. 826, 1893.

As between themselves, partners may determine by agreement the value of their respective interests, for the purpose of voting for liquidating trustees, and when there is an inability on the part of the association to agree upon the trustee, the court of common pleas may appoint, by virtue of their power to settle the affairs of the association; *In re Imperial Steel Co.*, 2 D. R. 826, 1893.

See 11 P. & L. Dig. of Dec. 19158 et seq.

Sec. 11. Amendment or repeal of act not to be retroactive. No amendment, modification or repeal of this act shall affect any thing duly done, right acquired, liability incurred, or penalty, forfeiture or other punishment incurred or to be incurred, in respect of any offense against the provisions of this act, before such amendment, modification or repeal comes into operation. 1874, June 2; P. L. 271, § 10.

Sec. 12. Association may adopt and use a common seal. Whenever any association, formed under the act to which this is a supplement, shall have occasion to execute any deed of conveyance, or bonds with or without coupons, and mortgages, to secure, purchase or borrow moneys, such association shall have a right to adopt and use a common seal, and to acknowledge such instruments or writings by their chairman and secretary. 1875, Feb. 18; P. L. 3, § 1.

They are not required to use a common seal, as in the case of a corporation; *Stevens v. Ball Club*, 142 Pa. 52, 1891.

Sec. 13. Act to apply to instruments already executed. The provisions of the foregoing section shall be regarded as applicable to and authorizing the execution of deeds, bonds, and mortgages, heretofore made and delivered by any association formed under the act to which this is a supplement. 1875, Feb. 18; P. L. 3, § 2.

A mortgage is a valid lien on the partnership property mortgaged; *Briar Hill C. & I. Co. v. Atlas Works*, 146 Pa. 290, 1892.

Sec. 14. Contributions to capital may be made in real or personal estate. It shall and may be lawful for any person desiring to form a partnership association, under the act to which this is a supplement, to make contribution to the capital thereof in real or personal estate, mines or other property, at a valuation to be approved by all the members subscribing to the capital of such association: Provided, That in the statement required to be recorded by the first section of the said act, subscriptions to the capital, whether in cash or in property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with the description and valuation of the property so contributed, shall be inserted. 1876, May 1, P. L. 89, § 1.

A statement must be filed, certifying the kind of capital contributed, whether money or other property; *Lafin & Rand Powder Co. v. Steytler*, 146 Pa. 434, 1892. It must show a detailed description and valuation of the property contributed; *Sheble v. Strong*, 128 Pa. 315, 1889. A general or lumping description is not sufficient; *Maloney v. Bruce*, 94 Pa. 249, 1880, reversing *Bruce v. Maloney*, 1 L. T. (N. S.) 197, 1879; *Van Horn v. Corcoran*, 127 Pa. 255, 1889; *Gearing v. Carroll*, 151 Pa. 79, 1892.

The act must be substantially complied with; *Rehfuß v. Moore*, 134 Pa. 462, 1890, affirming 6 Pa. C. C. 245, 1889; *Cock v. Bailey*, 146 Pa. 328, 1892; otherwise there is no payment of the capital; *Haslet v. Kent*, 160 Pa. 85, 1894.

Property described as having been purchased by the partners from another limited company, subject to the payment of the company's debts and liabilities, is not such a contribution of property as the act contemplates; *Haslet v. Kent*, 160 Pa. 85, 1894.

Where a person subscribes a sum of money to be applied to the payment of a mortgage on real estate which he has contributed to the association, and he fails to pay the same, in consequence of which the mortgage is foreclosed and the real estate is bought in by the mortgagee

for his mortgage, the subscriber may be compelled to pay the money by execution issued against him personally on a judgment against the association; *Cox v. Watts*, 157 Pa. 93, 1893.

If goods are contributed the nature and value of the goods must be set forth; *Blumenthal v. Whitaker*, 170 Pa. 309, 1895. But minute details of an existing business are not required; *Robbins Electric Co. v. Weber*, 172 Pa. 635, 1896. See *Bank v. Creveling*, 117 Pa. 270, 1896.

Where the certificate of co-partnership sets forth that all the subscriptions have been paid in cash, it is irregular to permit any other form of payment, but when the evidence shows that material was purchased by a subscriber with the knowledge of the company and at a price approved by them, and was paid for by him, and there is no evidence of fraud or concealment, it is not a fatal error to credit the subscriber on his stock account, with the material thus furnished by him instead of with the cash; *Samuel v. Swanger*, 7 Del. Co. 446, 1899.

See *Chatham National Bank v. Gardner*, 31 Pa. Super. Ct. 135, 1906.

See 11 P. & L. Dig. of Dec. 19124; also, 15 P. & L. Dig. of Dec. 26431.

Sec. 15. Act to apply to associations heretofore organized. All contributions to the capital of such associations, heretofore organized under the act to which this is a supplement, in real or personal estate, mines or other property, at a valuation agreed upon by all the members subscribing to such capital, shall be as complete and effectual as if the same had been made in cash: Provided, A certificate of the same shall be recorded, as required in the first section of this act. 1876, May 1; P. L. 89, § 2.

Sec. 16. Associations may hold real estate, and sue and be sued, in associate name. All real estate owned or purchased by any association heretofore created, or which may be hereafter created, under and by virtue of the act to which this is a supplement, shall be held and owned, and conveyance thereof shall be made, in the association name; that said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association. 1876, May 1; P. L. 89, § 3.

Service on "superintendent and agent" of the company is a good return; a partner can sue the partnership association of which he is a member; *MacGeorge v. Chemical Mfg. Co.* 141 Pa. 575, 1891.

Where defendants are sued as president, secretary, etc., of a joint stock company, a judgment for the plaintiff is a judgment against the defendants personally. The addition of the official titles to the names of the defendants is to be regarded as *descriptio personae*, and rejected as surplusage; *Rockwell v. Tupper*, 7 Pa. Super. Ct. 174, 1898.

Partnership associations are liable for tortious acts which are expressly or impliedly authorized; *Whitney v. Backus*, 149 Pa. 29, 1892; *Whitney v. Short*, 30 W. N. C. 169, 1892.

See *Laffin & Rand Co. v. Steytler*, 146 Pa. 434, 1891.

One partner can confess judgment to bind the firm property; *Lennig v. Penn Morocco Co.*, 16 W. N. C. 114, 1885.

Suits against such associations should conform to the act; *Ladner v. Gibbon*, 5 W. N. C. 127, 1878.

Sec. 17. Service of process. Any partnership association, organized under the said act and the several supplements thereto, may, in addition to the methods already authorized, be served with legal process in any county of this commonwealth where said association shall maintain and keep an office for the transaction of business, by serving such process upon any agent, chief, or any other clerk, or upon any director or manager of such association, and such service shall be good and valid in law, to all intents and purposes, as service upon such association. 1881, June 10; P. L. 115, § 1.

II. Renewal.

Sec. 18. Partnership associations may be renewed. That it shall and may be lawful for a majority in number and value of interest of the members of any partnership association formed under the provisions of the act of assembly to which this is a supplement¹), to renew or continue such partnership association for a period of time not exceeding twenty years beyond the time originally fixed for its duration, under the following conditions and restrictions, to wit: 1895, June 8; P. L. 186, § 1.

1. 1874, June 2; P. L. 271.

Sec. 19. Conditions—meeting—notice—vote—statement—Term of renewal. A meeting of the members of the association shall be called, of the time, place, and object of which meeting due notice shall be given by publication once a week for two successive weeks preceding such meeting in one newspaper published in the

county in which the principal office or place of business shall be established, and by such further notice as shall be prescribed in the by-laws; and at such meeting the resolution for the renewal or continuance of the association shall be considered, and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same; and if a majority in number and value of interest of the members of such association shall be in favor of such renewal or continuance, then a statement in writing shall be signed and acknowledged by three or more members, in which shall be set forth the full names of the members desiring to renew or continue such association, and the contemplated duration or continuance, which shall not in any case exceed twenty years beyond the time originally fixed for the duration of the association. 1895, June 8; P. L. 186, § 1.

Sec. 20. Statement to be filed. Upon the filing of such statement such association shall be renewed and may be continued for the extended time herein mentioned. 1895, June 8; P. L. 186, § 1.

Sec. 21. Rights of dissatisfied members—Appraisal of interest. That if any member of any such partnership association shall be dissatisfied with or object to any such renewal or continuance, then the owner shall be entitled to his interest in the association at a price and upon terms to be mutually agreed upon; and in default of such agreement, the price and terms shall be fixed by an appraiser appointed by the court of common pleas of the proper county, subject to the approval of the said court, and, upon the payment of the interest as aforesaid, the said member shall transfer his interest to said association, to be disposed of by the managers, or be retained by them for the benefit of the remaining members. 1895, June 8; P. L. § 186.

Sec. 22. By-laws—Managers. That all associations organized under the act to which this is a supplement shall have the power, by the vote of a majority in number and interest of its members, to adopt by-laws for the regulation thereof, fixing therein the number of managers, which number shall not be less than three nor more than nine, and designating the principal executive officer either as president or chairman. 1895, June 8; P. L. 186, § 2.

Sec. 23. Managers to be chosen by ballot. The managers of all associations, organized under the act to which this is a supplement, shall be chosen by ballot, in person or by proxy, by a majority in value of interest of the members thereof voting at such election. 1895, June 8; P. L. 186, § 3.

Ohio.

General Code, 1910.

Sec. 8059. When any number of persons, not less than three nor more than twenty-five, desire to form a partnership association for the purpose of conducting any lawful business or occupation within the United States, or elsewhere, except for dealing in real estate or banking, whose principal office or place of business will be established and maintained in this state by subscribing and contributing capital thereto, which capital shall alone be liable for its debts, such persons may sign and acknowledge a statement, in writing, before some officer competent to take the acknowledgment of deeds, in which must be set forth the full names of such persons and the amount of capital subscribed for by each, and the total amount of capital which shall be paid as follows: One-third within thirty days of the filing of their statement with the county recorder, as hereinafter provided, and two-thirds, within twelve months thereafter; the character of the business to be conducted, and its location; the name of the association, with the word "Limited" added thereto, as part of it; the contemplated duration of the association, which in no case shall exceed twenty years, and the names of the officers of the association, selected in conformity with the provisions of this chapter. Any amendment of such statement shall be made only in like manner, which statement and amendments must be recorded in the office of the recorder of deeds of the proper county.

Sec. 8060. Such association shall keep a register of debts and liabilities, in which must be entered the nature and amount of all debts, and liabilities contracted by it, with the date thereof, together with any payments or credits thereon, which

register shall be made not to exceed ten days after such debt or liability was contracted. Such register shall be open to the inspection of all persons interested in any manner in the business or financial standing of the association during all business hours.

Sec. 8061. In case such association fails or neglects to cause to be entered on such register, within ten days, any debt or liability after it has been contracted, or makes or suffers to be made any false entry thereon, the members thereof shall be individually responsible for the debts and liabilities contracted during such neglect or failure to those thereby damnified.

Sec. 8062. The members of such a partnership association shall not be liable under any judgement, decree, or order obtained against the association, or for any debts, or engagement of such company further or otherwise, than is in hereinafter provided.

Sec. 8063. If an execution or other process in the nature of an execution, either at law or in equity, has been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy or enforce such process, then such execution or process may be issued against any of the members to the extent of the portions of their subscriptions, respectively, in the capital of the association, not then paid up. But no such execution shall issue against any member except upon an order of court, or of a judge of the court in which the action, suit, or other proceeding was brought or instituted. Such court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions, and from them or other sources of information, ascertain the truth in regard thereto, and order execution to issue accordingly. The association is hereby required to keep a subscription-list book for that purpose, and it shall be open to inspection by the creditors and members thereof at all reasonable times.

Sec. 8064. The word "Limited" shall be the last word of the name of every partnership association formed under the provisions of this subdivision of this chapter. Every such association must paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible, and have its full name mentioned in legible characters in all notices, advertisements, and other of its official publications, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, and other writings used in the transaction of its business.

Sec. 8065. The omission of the word "limited", in the use of the name of the partnership association, shall render each and every person participant in such omission, or knowingly acquiescing therein liable for any indebtedness, damages, or liabilities arising therefrom.

Sec. 8066. Interest in such association shall be personal estate and may be transferred under the rules and regulations prescribed by the association. Such transfer shall take effect when it is delivered for record, including the name of the parties thereto and the amount of the interest so transferred, in the office of the county recorder, who shall enter it, for which he shall receive the same fees as in other cases.

Sec. 8067. No transferee of an interest, or the representatives of a decedent, or an insolvent, shall be entitled thereafter to any participation in the subsequent business of the association, unless he be elected thereto by a vote of a majority of the members in number and value of their interests. Any change of ownership, whether by sale, death, bankruptcy, or otherwise, which is not followed by election to the association, shall entitle the owner only to his interest therein, at a price, and upon terms to be mutually agreed upon. In default of such agreement the price and terms shall be fixed by an appraiser appointed by the common pleas court of the proper county, subject to its approval.

Sec. 8068. There shall be at least one meeting of the members of the association in each year, at one of which not less than three nor more than five managers must be elected, one of whom shall be the chairman, one the treasurer, and one the secretary, or one may be both treasurer and secretary, who shall hold their respective offices for one year, and until their successors are duly installed.

Sec. 8069. No debt shall be contracted, or liability incurred for the association, except by one or more of such managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing, and signed by at least two managers.

Sec. 8070. The association from time to time may divide the profits of the business as a majority of its managers determine. The profits, so divided, shall not, at any time, diminish or impair the capital of the association. Anyone consenting to a dividend which diminishes or impairs the capital, shall be liable to any person or persons interested or injured thereby, to the amount of such diminution or impairment.

Sec. 8071. Such association shall not loan its credit, its name, or its capital to any person or corporation.

Sec. 8072. Such association may be dissolved: 1. When the period fixed for its duration expires; — 2. When by a vote of a majority in value of interest and number it is so determined.

Sec. 8073. Notice of such winding up shall be given by publication in two newspapers, published in the proper city or county, at least six consecutive times. Immediately upon the commencement of such advertising, the association shall cease to carry on its business, except so far as may be required for its beneficial winding up.

Sec. 8074. When such a partnership association is dissolved by the voluntary action thereof, its property shall be applied and distributed as follows: 1. To the payment of all debts for work and labor, and to secure which, in case its property is insufficient, the separate estate of each partner shall be liable without limitation or exemption, except as provided by law. 2. To the satisfaction of its other liabilities and indebtedness. 3. After payment thereof, any residue shall be distributed to and among the members, in proportion to their respective interests, in the following manner: Three liquidating trustees must be elected by the members of the association, who may wind up the concern and distribute the net assets thereof among the members under the direction of the common pleas court of the proper county.

Sec. 8075. Persons desiring to form a limited partnership association may make contribution to the capital thereof in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to its capital, except that one-half of the capital must be paid in cash. In the statement hereinbefore required to be recorded, subscriptions to the capital whether in cash or property, must be certified in this respect according to the fact; and when property has been contributed as a part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property contributed, shall be inserted.

Sec. 8076. All contributions to the capital of such association so organized, in real or personal estate, mines, or other property, at a valuation agreed upon by all the members subscribing to such capital, shall be as complete and effectual as if they had been made in cash; if a certificate thereof is recorded as above required.

Sec. 8077. All real estate owned or purchased by an association so created, shall be held and owned, and conveyance thereof made, in the association name. The association shall sue and be sued in the association name, and when suit is brought against it, service shall be made upon the chairman, secretary, or treasurer thereof, and be as complete and effective as if made upon each member of the association.

Sec. 8078. When such an association has occasion to execute any deed of conveyance or bonds with or without coupons, and mortgages to secure purchase or borrowed moneys, it may acknowledge such instrument by its chairman and secretary.

New Jersey.

Act of March 12, 1880 as amended March 23, 1883, General Statutes of New Jersey (1895) p. 2440.

28. Sec. 1. That when any three or more persons may desire to form a partnership association, for the purpose of conducting any lawful business or occupation within the United States or elsewhere, whose principal place of business shall be established and maintained within this state, by subscribing and contributing capital thereto, either in money or in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association, which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge, before some officer competent to take the acknowledgment of deeds, a statement in writing, in which shall be set forth the full names of such persons and the amount of capital of said association subscribed for by each, the character of the subscription, and if in property other than cash the description and valuation of said property, the total amount of capital, and when and how to be paid, the character of the business to be conducted and the location of the same; the name of the association with the word "limited" added thereto as part of the same, the contemplated duration of said association, which shall not, in any case, exceed twenty years, and the names of the officers of said association, selected in conformity with the provisions of this act; and any amendment of said statement shall be made only in like manner, which said statement and amendment shall be recorded in the office of the clerk or recorder of deeds in the proper county.

29. Sec. 2. That the members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against any such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided; that is to say, if any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy and enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the members to the extent of the portions of their subscriptions respectively, in the capital of the association, not then paid up; *provided always*, that no such execution shall issue against any member, except upon an order of court or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions, and from them, or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times.

30. Sec. 3. That the word "limited" shall be the last word of the name of every partnership association formed under the provision of this act; and every such association shall paint or affix, and shall keep painted or affixed its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position, in letters easily legible, and shall have its full name, mentioned in legible characters in all notices, advertisements, and other official publications of such association, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, and other writings used in the transaction of the business of the partnership association: provided that the omission of the word "limited" in the use of the name of the partnership association shall render each and every person participant in such omission or knowingly acquiescing therein, liable for any indebtedness, damage, or liability arising therefrom.

31. Sec. 4. That interests in said association shall be personal estate, and may be transferred under such rules and regulations as the association may prescribe, but no transferee of any interest, or the representatives of any decedent, or of any

insolvent shall be entitled thereafter to any participation in the subsequent business of said association, unless he or she be elected thereto by a vote of the majority of the members in number and value of their interests; and any change of ownership, whether by sale, death, bankruptcy, or otherwise, which shall not be followed by election to the association, shall entitle the owner only to his interest in the association at a price and upon terms to be mutually agreed upon, and in default of such agreement the price and terms shall be fixed by an appraiser appointed by the court of common pleas of the proper country, subject to the approval or said court.

32. Sec. 5. That there shall be at least one meeting of the members of the association in each year, at one of which shall be elected not less than three nor more than five managers of said association, one of whom shall be the chairman, one the treasurer and one the secretary, or one may be both treasurer and secretary, who shall hold their respective offices for one year and until their successors are duly installed; and no debt shall be contracted or liability incurred for said association, except by one or more of the said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers.

33. Sec. 6. That the association may, from time to time, divide the profits of the business in such manner and in such an amount as a majority of its managers may determine, which profits so divided shall not at the time diminish or impair the capital of the said association, and any one consenting to a dividend which shall diminish or impair the capital, shall be liable to any person or persons interested or injured thereby to the amount of such diminution or impairment.

34. Sec. 7. That it shall not be lawful for such association to loan its credit, its name, or its capital to any member of said association, and for such loan to any other person or association, the consent in writing of a majority in number and value of interest shall be requisite.

35. Sec. 8. That such association may be dissolved: a) Whenever the period fixed for the duration of such association expires; b) Whenever by a vote of a majority in number and value of interest it shall be so determined; and notice of such winding up shall be given by publication in two newspapers published in the proper city or county at least six consecutive times, and immediately upon the commencement of said advertising, said association shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof.

36. Sec. 9. That said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association.

37. Sec. 10. That whenever any association formed under the act to which this is a supplement shall have occasion to execute any deed of conveyance, or bonds with or without coupons, and mortgages, to secure, purchase, or borrow moneys, such association shall have a right to adopt and use a common seal, and to acknowledge such instruments or writings by their chairman and secretary.

Supplement.

38. Sec. 1. That any partnership association formed or to be formed under the act to which this is a supplement, shall have power to purchase and hold real estate and dispose of the same in fee simple, or for a less estate, the title thereof to be in the name adopted by such association, and shall be as valid and effectual in law or equity as if same were held in the individual names of the partners of said association, and every deed or conveyance of the same and every mortgage for purchase, or borrowed moneys, shall be made in the name adopted by said association and executed in the same manner as set forth in section ten of the act to which this is a supplement.

39. Sec. 2. That any association heretofore formed under the act to which this is a supplement, now holding any real estate in their association name, either

by purchase or subscription, the title thereof shall be as good and effectual in law or equity as if the same were acquired after the passage of this act.

See also Michigan Act of 1888, pp. 6079—6089 as amended by Act of 1903 pp. 398, 401, 403, and Act of 1905 pp. 87, 150 and 278.

Registered Partnerships.

Pennsylvania.

P. & L. Dig. Laws, 1911, Col. 4636—4642.¹⁾

I. Formation.

Sec. 39. Formation of partnerships with limited liability—Purposes—Exceptions.

Where two or more persons may desire to associate themselves in partnership for the purpose of conducting any kind or kinds of business, trade, or occupation, except the construction and operation of electric light and power companies, banking or trust companies¹⁾, artificial or natural gas companies, water companies, railroad, street passenger railway or traction companies, within this state or any portion of the United States or elsewhere, whose principal office or place of business shall be specified in the way and manner hereinafter set forth as being intended to be established and maintained within this state, and may desire to limit the liability of one or more or all of the partners for the debts of the partnership to the amount of capital subscribed by such partner or partners, respectively, it shall and may be lawful to do so in the manner following, to wit: 1901, July 9; P. L. 625, § 1.

1. This act amends § 1 of the act of 1899, May 9; P. L. 261.

Sec. 40. Articles of partnership—Acknowledgment and recording—Amendments—Certified copy to be filed. Said partners, so desiring to associate themselves, shall subscribe to articles of partnership wherein shall be stated the name and style of the partnership, its purposes and duration, the county wherein its principal office or place of business is to be located, the names of the several partners, and the amount of the capital subscribed by each partner and when and how the same is to be paid, and the names of the partners, one or more or all, whose liability is to be limited to the amount subscribed by each to the capital. Such articles of partnership shall be acknowledged before some officer competent to take the acknowledgment of deeds, and shall be recorded in the office of the recorder of deeds of the county in which is located the place designated as the principal office or place of business. Amendments of said articles of partnership shall be made in like manner, and shall be effective only when recorded in the office of the said recorder of deeds. A copy of said articles of partnership, and of all amendments thereto, duly certified by the recorder of deeds, shall also be filed, within thirty days after the recording of said articles or amendments in said recorder's office, in the office of the secretary of the commonwealth. 1901, July 9; P. L. 625, § 1.

41. When business may be begun. The business of the partnership may be commenced after the articles of partnership have been left for record in the office of the recorder of deeds. 1901, July 9; P. L. 625, § 1.

This amends § 1 of the act of 1899, May 9, P. L. 261.

Sec. 42. Notice of formation of partnership. Notice of the formation of the partnership shall be published in a newspaper of general circulation in the county wherein is located the place designated as the principal office or place of business. This notice shall be published once a week for three weeks. The first publication shall appear not later than the day following the filing of the articles of partnership in the office of the recorder of deeds. This notice shall state the name, style, and general purpose of the partnership, the names of the partners, the amount of capital subscribed for by each partner, and when and how the amount of each subscription is to be paid. It shall also state the fact that the liability of one or more or all of the partners is limited in accordance with this statute, and that the articles of partnership have been left for record in the office of the recorder of deeds.

¹⁾ By permission of T. & J. W. Johnson, Pub. Co.

If a time be fixed in the articles of partnership for its duration, such time shall also be stated in the said notice. 1899, May 9; P. L. 261, § 2.

Sec. 43. Name of partnership. No name or style of partnership shall be adopted which will include the name of any partner whose liability is intended to be limited, unless there shall be added the word "Registered." 1899, May 9; P. L. 261, § 2.

2. Management.

Sec. 44. By-laws—Officers. It shall be lawful for said partnership to adopt such by-laws, rules, and regulations as a majority of the number in interest of the partners from time to time may prescribe for the regulation of the affairs of the partnership. Official positions for the transaction of the business of the partnership may be constituted by such by-laws, rules, and regulations, and the powers and duties of the respective officers prescribed therein. 1899, May 9; P. L. 261, § 4.

Sec. 45. Management of business—Statement. The partners may provide that certain only of the members shall have active charge of the business and be authorized to enter into contracts, undertakings, or engagements whereby the partnership shall be held liable, and may change the same as they see fit. It shall be optional with the partnership, whether such provision shall or shall not be made it shall also be optional with the partnership if such provision be made to state the same in the original articles of partnership, or in amendments thereto, or in any statement subscribed by the partners. If the partners shall desire, any such statement may be acknowledged, and may be recorded in the office of the said recorder of deeds. 1899, May 9; P. L. 261, § 4.

Sec. 46. Common seal. The partnership may at its option adopt and use a common seal. 1899, May 9; P. L. 261, § 4.

Sec. 47. List of partners, etc., to be posted in principal office. It shall be the duty of said partnership to keep posted in the place designated as its principal office, or place of business, in some place therein accessible to the public during business hours, a plainly written or printed list of the partners with the amount of capital subscribed by each, the amount paid in by each partner, and in the case of any partner whose liability is limited the words "Limited Liability" shall be added to his name where it appears in such list. This notice shall also state the volume and page of the record of the articles of partnership in the office of the recorder of deeds. 1899, May 9; P. L. 261, § 5.

Sec. 48. Addition to names of limited partners on notes, bill-heads, etc. If on the signs used by the partnership, or if on any bill-heads, letter-heads, or other publications of the partnership, the names of the several partners should be stated, the words "Limited Liability" shall be added to the name of the partner whose liability is limited in the way herein provided. 1899, May 9; P. L. 261, § 5.

Sec. 49. Violation of section a misdemeanor—Liability of partners—Penalty. A violation of any of the provisions of this section¹) shall be a misdemeanor. Each member of the partnership who shall participate in such violation shall be liable to prosecution for such misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than one hundred dollars, and not more than five hundred dollars, for each violation of the provisions of said section. 1899, May 9; P. L. 261, § 5.

1. Supra, 47, 48.

Sec. 50. False statement as to general partnership a misdemeanor—Penalty. If any partner whose liability is limited in the manner herein provided shall obtain credit, money, goods, or other valuable thing by a false statement to the effect that he is a general partner, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not less than one hundred dollars, and not more than five hundred dollars. 1899, May 9; P. L. 261, § 6.

Sec. 51. Liability of members of partnership—Power of partners to deal with or for partnership. No member of any such partnership thus formed, recorded, and published, whose liability is stated as intended to be limited in the manner hereinbefore set forth, shall be liable for its debts under any circumstances saving to the extent of the amount of his or her subscription, with interest on unpaid subscriptions from the date or dates at which the same became actually due and payable. Payment of the amount of the subscription of such member of the partnership, with interest as aforesaid, shall exonerate such partner from all further liability. A partner or partners whose liability is thus limited shall not be precluded from transacting business with or for the partnership. 1899, May 9; P. L. 261, § 3.

Sec. 52. Powers as to real estate. The partnership may take, hold, mortgage, encumber, lease, or convey, in fee simple, or for any less estate, real estate, or interests therein, in the firm name. The place of record of the articles of partnership shall be stated in all instruments of writing relating to real estate, but failure so to state shall not invalidate the instrument. Any instrument relating to real estate may be signed or sealed by one or more of the partners, for the partnership and in the partnership name, if the by-laws, rules, or regulations shall so provide, but in case less than all the partners are vested with this power the fact shall be stated in the original articles of partnership, or in amendments thereto, or in a statement duly signed and acknowledged by the partners and recorded in the office of the said recorder of deeds. 1899, May 9; P. L. 261, § 9.

Sec. 53. Actions by and against partnership—Service of writs. The partnership shall sue and be sued in the partnership name, and not by or in the individual names of the partners. Service in case of suit may be had upon any partner in the county designated as that in which the principal office, or place of business, of the partnership may be located. If no partner can be served in such county, service may be made upon any one or more of the partners in any county of the commonwealth in which service can be had¹). 1899, May 9; P. L. 261, § 11.

1. See the act of 1901, July 9; P. L. 614; *infra*, Practice

Sec. 54. Interest in partnership to be personal estate—Transfer. Interest in said partnership shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned, under such rules and regulations as may, from time to time, be prescribed by a vote of the majority in number and interest of the partners; but, in the absence of such rules and regulations, the transferee of any such interest shall not be entitled to participation in the subsequent business of the partnership unless elected as a partner therein by a vote of the majority in number and interest of the remaining partners. 1899, May 9; P. L. 261, § 7.

Sec. 55. Effect of change of ownership. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which shall occur in the absence of such rules and regulations, and which shall not be followed by election to membership, shall entitle the owner or transferee to the book value of the interest so acquired, as ascertained and fixed, as hereinafter provided, at the last period preceding the date at which the member parted with or lost his interest, with interest from such date. 1899, May 9; P. L. 261, § 7.

Sec. 56. Settlement of book value of interest. It shall be the duty of the partnership at the close of each calendar year to ascertain and fix the book value of the several interests, a copy of which statement shall be delivered to each partner, and this settlement shall be conclusive and final upon all members of the said partnership, and upon all subsequent owners or transferees of any interest. 1899, May 9; P. L. 261, § 7.

3. Dissolution. Renewal.

Sec. 57. Transfer not to dissolve partnership—Change in membership need not be published. The transfer of any interest, however occurring, shall not dissolve the partnership, nor shall said partnership be dissolved by reason of the death of one or more of the partners, unless the articles of association shall prescribe to the contrary. In case of a change in the members of the partnership by reason of death, transfer, or otherwise, it shall not be necessary to make any publication of the fact thereof. 1899, May 9; P. L. 261, § 7.

Sec. 58. Dissolution—Notice—Liquidating partners. Partnerships may be dissolved at any time by a vote of the majority in number and interest of those who at such time shall constitute the partnership, unless the articles of association shall provide to the contrary. In case of dissolution for any cause, whether by expiration of the period fixed for the partnership or otherwise, notice thereof shall be published in one newspaper published in the county designated as the place wherein the principal office or place of business is located, for six consecutive issues, and immediately upon the commencement of said advertising said partnership shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof. In case of dissolution, one or more liquidating partners shall be elected by a vote of the majority in interest of the partners, who shall have full power, and be charged with the duty of settling the affairs of the partnership and distri-

bution of the assets thereof after payment of its debts among the partners in proportion to their interest. 1899, May 9; P. L. 261, § 10.

Sec. 59. Expiration of partnership—Renewal. If at the expiration of the time fixed for the duration of the partnership, if any time be so fixed, the persons then constituting the partnership shall desire to renew the same, they may do so by articles specifying the fact of such renewal and the length of time fixed for the duration of the new partnership. Such agreement of renewal shall be recorded and published in the way and manner hereinbefore provided in the case of an original partnership. 1899, May 9; P. L. 261, § 8.

Sec. 60. Repealing clause—Limitation. All laws or parts of laws inconsistent herewith are hereby repealed. Nothing herein contained, however, shall prevent the formation of limited partnerships under the act approved the twenty-first day of March, one thousand eight hundred and thirty-six, and the supplements thereto, or the formation of joint stock companies under the provisions of the act approved the second day of June, one thousand eight hundred and seventy-four, and the supplements thereto. 1899, May 9; P. L. 261, § 12.

Index.

A

ABANDONMENT:

marine insurance, 580.

ACCEPTANCE:

for honor, 190—192, 218, 219.

of bill of exchange, 188—190, 215, 216.

of goods by buyer, 377, 378.

effect on right to sue for damages, 378—380.

for purposes of the Statute of Frauds, 353, 354.

of offer, 76—79.

Uniform Sales Act, 407.

ACCOMMODATION PARTY, 198, 205.

ACCORD AND SATISFACTION, 96.

ACT OF BANKRUPTCY, 252—255, 300.

ACT OF GOD, 488, 489.

ACTIONS:

by and against partnerships, 610, 611.

on bills of exchange, 199, 200.

ADMIRALTY:

jurisdiction in Federal Courts, 8.

procedure in, 58, 59.

AFFREIGHTMENT: *see* BILL OF LADING; CARRIER:

bill of lading as a contract of, 486, 487.

charter party as a contract of, 118.

lien for freight, 118, 501.

relation of bill of lading to charter party, 118, 119.

AGENT: *see* AUCTIONEER; BROKER; FACTOR:

appointment of, 455.

by estoppel, 458.

capacity to act as, 455.

contracts of, 115, 116.

liability and right of principal to sue on, 466.

definitions, 454, 455.

del credere, 463.

Factors Acts, 469 *et seq.*: *see* FACTOR.

of seller, payment to, 382.

revocation of authority, 467.

right of, to sue third persons, 465.

right of principal to follow goods into hands of third persons, 466, 467.

signature by, of negotiable instrument, 181, 204, 209.

to satisfy the Statute of Frauds, 355, 356.

termination of authority, 467.

warranty of authority, 465.

ALABAMA:

conditional sales, 433, 434.

ALIENS:

bankruptcy of, 250, 251.

property rights of, under Treaties, 56.

right of, to sue, 55.

APPEALS:

action for injunction, 60.

Admiralty cases, 59.

bankruptcy, 248, 306, 324.

from Commerce Court, 64.

jurisdiction of Federal Courts, 62.

ASSIGNMENT:

bank deposit, 129.

choses in action, 113, 114.

marine insurance policy, 569.

AUCTION, SALE BY:

California, 416, 417.

Louisiana, 431, 432.

Uniform Sales Act, 402.

AUCTIONEER:

- authority, 468.
- definition, 455.
- rights and duties generally, 468.

AWARD:

- of foreign consul or commercial agent, enforcement of, 67.

B**BANKER; BANKING:**

- authority to commence business, 148.
- additional circulation on bonds other than U. S. bonds, 154, 155.
- assignment of deposit, 129.
- bankruptcy, 252.
- bank of deposit, obligations of, 133—135.
- bank notes, 135, 136.
- bibliography, 36.
- branches of State banks, 144.
- bonds forfeited if circulation dishonored, 167.
- certificate of deposit, 180.
- checks, 180.
- calls, 162.
- classes of banks, 124.
- collateral security, deposits of, 128.
- collections, 132—135.
- correspondent, collections through, 134, 135.
- certificate of organization of national banking association, 136.
- corporate powers of national banking association, 137.
- change of name or location, 137, 138.
- capital of national bank, amount of, 140.
- conversion of State bank into national bank, 144.
- circulating notes, 144—157.
- definitions, 123, 124.
- deposits, 126—130.
- discounting, 131.
- deposit for collection, 132, 133.
- directors of national banks, 142.
- deposits of bonds before issuing notes, 144, 145.
- delivery of circulating notes, 148 149.
- destruction of worn out and mutilated notes, 151.
- dividends, 161.
- dissolution and receivership, 140, 167—173.
- distribution of assets of insolvent bank, 169.
- examiners, appointment of, 172.
- equities against depositor, when available against bank, 129, 130.
- extension of corporate existence of national bank, 138—140.
- formation of national banking associations, 136.
- form of circulating notes, 149, 150.
- gold certificates, issue of, 162.
- Government regulation and control, 125, 126.
- general and special deposits distinguished, 126, 127.
- general deposits, 128—130.
- gold notes, issue of, 151.
- increase of capital by national bank, 141.
- imitation &c of notes, 152.
- insolvent bank, notice to creditors to present claims, 169.
- illegal preferences of creditors, 172.
- lien of banker, 129.
- loans and overdrafts, 130, 131.
- liability of shareholders of national bank, 142, 143.
- loan on or purchase of own stock, 161.
- list of shareholders, 163.
- national currency associations, 152—154.
- national banks, domicile of, 138.
- notes, redemption of, 158—160.
- national banking laws apply to Porto Rico and Hawaii, 173.
- offences, 163.
- purchases, 131, 132.
- power of national bank to hold real property, 140.
- public deposits, 143.
- place of business, 157.

BANKER; BANKING—continued.

- penalty for taking unlawful interest, 160.
- for falsely certifying checks, 163.
- political contributions, 163.
- protest of bank circulation, 167.
- receivers, appointment and duties, 168—172.
- reserve, 157—160.
- redemption of circulation, 158, 159.
- rate of interest, limitation on, 160.
- restriction on indebtedness, 161.
- reports of currency &c, 164, 165.
- reduction of capital by national bank, 141.
- redemption of circulating notes, 156.
- regulation of banking business, 157—166.
- special deposits, 127, 128.
- shares in capital stock of national bank, 140, 141.
- State taxation, 166.
- suspension of business after default, 167.
- sale of bonds on default, 168.
- taxes payable to the United States, 164, 165.
- transfers of bonds, 145, 146.
- tender of national bank notes, 150.
- uncurrent notes, 162.
- usury, 131, 132.
- use of the title "national", 173.
- voting of shareholders of national bank, 141, 142.
- who may be bankers, 124.
- withdrawal of circulating notes, 147.

BANKRUPTCY:

- analysis, 240.
- appellate jurisdiction, 248, 306.
- aliens, 250, 251.
- acts of bankruptcy, 252—255, 300.
- admission of inability to pay debts, 255.
- adjudication on petition, 256.
- amendment of schedules, 261, 320.
- attendance of bankrupt at meetings &c, 262, 301, 302.
- appearance of creditors at meetings, 264.
- adjournments of first meeting of creditors, 264.
- appointment of trustees, 266, 309.
- administration of estate, 269—271.
- appraisal of property of bankrupt, 270.
- arbitration of controversies, 270, 306, 323.
- allowances to attorneys, 271.
- agent, proof of debts by, 272, 273.
- assigned claims, proof of 275, 321.
- amendment of proof of claim, 275.
- allowance of claims, 275, 313.
- alimony, claim for, 277.
- acceptance of composition, 283, 303.
- appeal from order refusing confirmation of composition, 285.
- appeals generally, 306, 324.
- attorney-general, duties of, 312.
- bankrupts, who may be, 250—252, 301.
- banks and bankers, 252.
- bond of trustee, 266, 267, 311.
- of petitioning creditor, 300.
- Congress and State legislatures, power of, 7, 244.
- construction of Bankruptcy Acts, 244.
- consolidation of proceedings in different Courts, 247.
- corporations, 250, 251, 255.
- conveyance or assignment for benefit of creditors, when an act of bankruptcy, 253—255.
- compromise of controversies, 271, 306.
- compounding claims, 271, 306, 322.
- contingent claims, 276, 322.
- counterclaims, 278, 317.
- compositions, 283—286, 303.
- confirmation of composition, 284, 285, 303.
- closing and reopening estate, 286.
- co-debtors not affected by discharge, 291, 304.

BANKRUPTCY—*continued.*

- computation of time, 296, 307.
- certified copies as evidence, 297, 305.
- contempts before referees, 308, 309.
- clerks, duties of, 311.
- compensation of clerks and marshals, 311, 323.
- conduct of proceedings, 319.
- costs in contested adjudications, 323.
- definitions, 298.
- dismissal of petition, 259, 301.
- duties of bankrupt, 262, 263, 301, 302.
 - of trustee, 267, 309, 310, 320, 321.
- disclaimer of onerous property, 268.
- depositories of money of bankrupt estate, 269, 270, 315, 323.
- debts, proof of, 271—275, 212, 313.
- debts and claims provable, 276—278, 315.
- debts having priority, 278, 279, 315.
- dividends, declaration and payment of, 279, 280, 315, 316.
- deposit to secure composition, 284.
- detention of bankrupt, 287, 302.
- discharge of bankrupt*, 287—293, 303, 323.
 - application for, 287, 288, 303.
 - commission of offense punishable by imprisonment, 288.
 - co-debtors not released by, 291, 304.
 - debts and obligations not affected by, 292, 304.
 - destruction or concealment of, or failure to keep, books, 289.
 - effect of, 85, 97, 291, 292, 295.
 - fraudulent transfer &c of property, 290.
 - liens not affected by, 292.
 - obtaining property on credit by false statement, 289.
 - previous discharge within six years, 290.
 - reasons for refusal of, 288—290, 303.
 - refusal to obey order of Court &c, 290.
 - revocation of, 292, 303.
- death of bankrupt, effect of, 295, 302.
- depositions, 296, 305, 322.
- exemptions of bankrupt, 261, 262, 301.
- examination of bankrupt, 262, 263, 302.
- examination of and report on claims by bankrupt, 263.
- expenses of administration, 271, 315.
- effect of composition, 284.
- exemption of bankrupt from arrest, 286, 302.
- extradition of bankrupt, 302.
- evidence, 296, 305, 322.
- form of schedules, 260, 261.
- first meeting of creditors, 264, 312.
- final meeting, 264.
- final report and account of trustee, 267.
- filing claims, 275, 312, 313.
- fraudulent transfers, mortgages and liens, 281, 282, 316.
- General Orders, 244, 318—324.
- infants, 250, 251.
- insolvency, what is, 252.
- insanity of bankrupt, effect of, 295, 302.
- imprisoned debtor, 323.
- jurisdiction of Bankruptcy Courts, 245—248, 299, 300, 305.
- jury trials, 304.
- legislation as to, 244.
- law of, generally, 18, 19.
- lunatics, 250, 251.
- letter of attorney to represent creditor at meeting, 265, 266.
- liens and mortgages, 280—282, 316, 317.
- limitation of prosecutions for offenses, 297.
- married women, 250, 251.
- meetings of creditors, 263—266, 312, 322.
- mutual dealings, 278, 317.
- notice of meetings, 263, 264.
- notices to creditors generally, 295, 296, 313.
- oaths and affirmations, 296, 305.
- offenses, 297, 306, 307.

BANKRUPTCY—continued.

- partnership*, 251, 252, 293—295, 301, 319.
 - administration of estate, 294, 295, 301.
 - apportionment of expenses, 295.
 - effect of discharge, 295.
 - individual and partnership debts, 294, 301, 607—609.
 - proof of claims, 294, 301.
 - what Courts have jurisdiction, 293.
- powers of Courts of Bankruptcy**, 245, 246, 299, 300.
- preferential transfers &c as acts of bankruptcy**, 253, 254, 314.
- petition*, amendment of, 258, 320.
 - adjudication on, 256.
 - appearances, 258, 300.
 - by preferred creditors, 257.
 - dismissal of, 259.
 - filing, 257, 258, 314.
 - form and contents, 257.
 - pleadings on, 256.
 - service of, 255, 256.
 - subpoena to bankrupt, 258.
 - time for, 252, 300.
 - who may file, 256, 313, 314.
- preferred creditors, proof by**, 257.
- property exemptions of bankrupt**, 261, 262.
- production by bankrupt, of books, papers &c**, 262, 263, 301.
- proxies at meetings**, 265, 266.
- property vesting in trustee**, 268, 317, 318.
- policies of insurance**, 268, 318.
- proof of claims*, 271—275, 312, 313, 321.
 - by partnership, 273.
 - by corporation, 274.
 - founded on written instrument, 274.
 - time for, 274, 313.
- provable debts**, 276—278, 315.
- preferential debts**, 278, 279, 315.
- publication of notices**, 295, 296, 306.
- procedure**, 59, 304—307, 318—324.
- process and pleadings**, 304.
- petitions in different districts**, 319.
- priority of petitions**, 319.
- Philippines**, 324—343: *see* PHILIPPINES.
- referees*, 248—250, 307, 320.
 - accounts, 322.
 - appointment, 248.
 - bond, 249, 311.
 - compensation, 250, 308, 323.
 - duties, 249, 308, 320.
 - oath, 249, 307.
 - powers, 249, 308.
 - qualification, 307.
 - removal, 248.
- receivers**, 259.
- removal of trustees**, 266.
- redemption of mortgages &c by trustee**, 270, 322.
- reconsideration of claims**, 274, 313, 322.
- rent, claim for**, 277.
- revocation of discharge**, 292.
- records of referees**, 309.
- State Courts, jurisdiction of**, 246, 247, 305.
- stay of proceedings in other Courts**, 247.
- seizure of property while petition pending**, 258, 317.
- schedules**, 259—261, 263, 320.
- statement of affairs**, 259—261.
- sales of property of bankrupt**, 270, 321.
- secured debts, proof of**, 272, 273, 313.
- secured creditors**, 277, 313.
- set-off**, 278, 317.
- setting aside composition**, 285, 303.
- statistics**, 312.

BANKRUPTCY—continued.

- transfer of causes, 247, 307.
- time for petition, 252, 300.
 - for filing schedules, 261.
 - for offering composition, 283, 303.
 - computation of, 296, 307.
- trustee*, appointment and removal, 266, 309, 320.
 - avoidance of transfers, 269.
 - bond, 266, 267, 311.
 - continuance of actions to which bankrupt a party, 269, 302.
 - compensation, 269, 310, 323.
 - death of, 309.
 - duties, 267, 309, 310, 320, 321.
 - failure to file report &c, 267, 268.
 - limitation of actions by or against, 269, 302.
 - offenses by, 297.
 - qualification, 309.
 - subrogation of, to rights of creditor, 269.
 - title of, to property of bankrupt, 268, 317, 318.
- unincorporated companies, 251.
- unliquidated claims, 276.
- unclaimed dividends, 316.
- undue preference, 282, 283, 314, 316, 317.
- Uniform Bankruptcy Act*, 298—318.
 - bankrupts, 300—304.
 - Courts and procedure, 304—307.
 - creation of Courts of Bankruptcy and their jurisdiction, 299, 300.
 - creditors, 312—314.
 - definitions, 298.
 - estates, 315—318.
 - interpretation of terms, 298.
 - officers, 307—312.
 - voting at meetings, 264—266, 312.
 - voidable preferences, 282, 283, 314, 316, 317.
 - wage-earners and persons engaged in farming, 251.
 - witnesses, attendance and examination, 296, 305.
 - writs of error, 306.

BARRATRY, 574.**BARTER:**

- California, 417.
- Louisiana, 433.

BIBLIOGRAPHY:

- agents, 35.
- banking, 36.
- bankruptcy and insolvency, 39.
- contracts, 32.
- corporations, 33, 34.
- carriers, railways, telegraphs, warehousemen, 37, 38.
- consular law, 39.
- dictionaries and encyclopædias, 31.
- handbooks and treatises on commercial law, 33.
- insurance, 36, 37.
- journals, 30, 31.
- jurisdiction, 31, 32.
- legal bibliography, 22.
- limitation, 32.
- merchants, ledgers, goodwill, restraint of trade, 33.
- maritime law, 38, 39.
- negotiable instruments, 35, 36.
- partnership, 33.
- sale of goods, 34, 35.
- stock exchange, 36.
- statutes, collections of, 22, 23.
- selected cases, 29, 30.
- States reports, 24—29.
- suretyship, 32, 33.
- systematic views and introductions, 31.
- treaties, 22.
- United States reports, 23, 24.

BILL OF EXCHANGE: see NEGOTIABLE INSTRUMENT:

- agent, signature by, 181, 204, 209.
- acceptance, 188—190, 215, 216.
- acceptance for honor, 190, 192, 197.
- acceptor, liability of, 196, 197, 209.
- accommodation parties, 198.
- alteration, 200.
- California, 226—229; *see* CALIFORNIA.
- capacity of parties, 199, 200.
- collateral and additional agreements, 182.
- certainty as to amount, 183.
- consideration, 184, 185, 205.
- definitions, 180, 181, 215, 220.
- does not operate as an assignment of funds, 180, 215.
- date, 184, 203.
- delivery, 185, 203, 204.
 - discharge, 187, 188, 198, 214, 215.
- days of grace, 188.
- delay in presentment for payment, 192.
- drawer, liability of, 196.
- defenses to action on, 199, 200.
- effect of dishonor, 191, 192.
- fictitious drawee, 180, 215.
- forged signature, 182, 200, 204, 205, 209.
- Georgia, 231—235: *see* GEORGIA.
- holder in due course, 198, 207.
- inland and foreign, 180.
- illegal consideration, 184.
- indorsement, 186, 187, 205—207.
- incomplete or dishonored bill, acceptance of, 189.
- indorsers, liability of, 197, 209.
- illegality of consideration, 200.
- liability of parties, 196—198, 208—210.
- maturity, 188.
- must be unconditional, 182.
- negotiation, 186, 187.
- notice of dishonor, 192—195, 211—213.
- non-acceptance, effect of, 191.
- negotiation by delivery, 209.
- partners, authority of, 600.
- payment, 187, 188.
- payer, 182.
- presentment for acceptance, 190, 191, 216, 217.
 - for payment, 191, 192, 210, 211.
- protest, 195, 196.
- payment for honor supra protest, 196, 219.
- qualified acceptance, 189, 216.
- referee in case of need, 215.
- rights of holder, 198, 207, 208.
- signature, 181.
- two or more drawees, 180, 215.
- time for payment, 183.
- transfer by delivery, 197.
- table of days of grace, interest, and limitation, 237, 238.
- Texas, 235—237.
- Uniform Negotiable Instruments Law*, 215—220.
 - acceptance, 215, 216.
 - acceptance for honor, 218, 219.
 - bills in a set, 219, 220.
 - form and interpretation, 215.
 - incomplete bill, acceptance of, 216.
 - payment for honor, 219.
 - presentment for acceptance, 216, 217.
 - protest, 217, 218.
 - qualified acceptance, 216.
- waiver of notice of dishonor, 195.

BILL OF LADING:

- authority to issue, 484.
- as a contract, 486, 487.
- as a receipt, 484, 485.

BILL OF LADING—continued.

- as a muniment of title, 485, 486.
- alteration of, 486.
- admissibility of parol evidence to vary or explain, 486, 487.
- California, 540, 541.
- "clean", 483, 487.
- definition, 483.
- duty of carrier to issue, 520.
- effect of Uniform Sales Act, 486.
- fraudulent issue of, 485.
- general effect of Uniform Bills of Lading Act, 486.
- Georgia, 545.
- how far consignor bound by, 487.
- implied terms, 487.
- in sets, 484.
- negotiability of, 485, 486.
- negotiation of, by buyer, 386—388.
- "order" bill and "straight" bill, 485.
- relation of, to charter party, 118, 119.
- stipulations void under Harter Act, 493, 494.
- threefold character, 484.
- Uniform Bills of Lading Act*, 528—539.
 - altered bills, 531.
 - bills governed by Act, 528.
 - cancellation of negotiable bills on delivery, 531.
 - carrier's lien in case of negotiable bills, 533, 534.
 - criminal offenses, 537, 538.
 - definitions, 529, 539.
 - delivery of goods, 530, 531.
 - duplicate bills, 529, 532.
 - estoppel by acceptance of bill, 530.
 - of carrier by, 532.
 - execution against goods for which negotiable bill issued, 533.
 - form of bills, 528—530.
 - as indicating rights of buyer and seller, 536, 537.
 - general effect of, 486.
 - in what States adopted, 528.
 - issue of bills, 528—530.
 - interpleader between adverse claimants, 532.
 - interpretation, 538, 539.
 - lost or destroyed bills, 531.
 - misdelivery, 530.
 - negotiation and transfer of bills, 534—537.
 - non-receipt or misdescription of goods, 532, 533.
 - obligations and rights of carriers on bills, 530—534.
 - vendor's lien defeated by negotiation of, 537.
 - warranties on sale of bill, 535.

BLANK INDORSEMENT, 186.

BOTTOMRY, 119, 120.

BRANCH RAILROADS, 506.

BROKER:

- definition, 454.
- distinguished from factor, 454, 455, 467, 468.
- lien, 468.
- rights and duties generally, 467, 468.
- signature by, to satisfy Statute of Frauds, 468.

BUCKET SHOP, 102.

C**CALIFORNIA (STATUTES):**

- bill of exchange*: see **BILL OF EXCHANGE**.
- acceptance, 227.
- acceptance or payment for honor, 227, 228.
- days of grace not allowed, 227.
- excuse for presentment and notice of dishonor, 228.
- form and interpretation, 226.
- foreign bills, 228, 229.
- presentment for acceptance, 227.
 - for payment, 228.
- protest, 228, 229.

CALIFORNIA (STATUTES)—*continued*.

- bills of lading, 540, 541.
- carriers, 539—543.
- checks, 230.
- common carrier, obligations of, 542, 543.
- factors and commission agents, 469.
- general average, 541, 542.
- lien of carrier, 541.
- negotiable instruments*:
 - dishonor, 225, 226.
 - excuse of presentment and notice, 226.
 - extinction of, 226.
 - general definitions, 222, 223.
 - indorsement, 223, 224.
 - interpretation, 223.
 - notice of dishonor, 225, 226.
 - presentment for payment, 224, 225.
- partnership*, 647—652.
 - actions against, 651, 652.
 - definition, 647, 648.
 - dissolution, 649.
 - death of partner, duties of surviving partners, 652.
 - fictitious name, 649, 650.
 - foreign, 650.
 - formation, 647.
 - liability of partners, 648.
 - liquidation, 649.
 - mutual obligations of partners, 647, 648.
 - partnership property, 647.
 - powers and authority of partners, 648.
 - receiver, 652.
 - sale by executor of share in partnership, 652.
- “perils of the sea”, 543.
- proceedings against joint debtors, 651, 652.
- promissory notes, 229.
- sale of goods*, 414—418.
 - damages for breach, 417, 418.
 - delivery, 415.
 - exchange, 417.
 - form of contract, 415.
 - rights and obligations of buyer, 416.
 - of seller, 415, 416.
 - sale by auction, 416, 417.
 - sale and agreement for sale, 414.
 - stoppage in transit, 417.
 - warranties, 415, 416.
- sales in bulk, 445.
- special (limited) partnerships*, 677—679.
 - alteration and dissolution, 679.
 - formation, 677, 678.
 - liability of partners, 679.
 - powers, rights and duties of partners, 678.
 - preferential transfers, 678.
 - renewal, 678.
- valuables, carriage of, 543.

CARRIER:

- bills of lading: *see* BILL OF LADING.
- branch line connections, 506.
- California (statutes), 539—543: *see* CALIFORNIA.
- carrier prohibited from disclosing information as to property for interstate carriage, 516.
- compensation, 501.
- charges must be reasonable, 66, 67, 505.
- change in rates or charges, 508.
- continuous carriage, 509.
- definition of common carrier, 481, 504.
- different kinds of carriers, 481.
- duration of liability, 487, 488.
- duties of common carrier, 481—483.
 - depend on extent of holding out, 481, 482.
 - as warehouseman, 502.

CARRIER—*continued.*

- to publish names of station agents, 509.
- to report to Interstate Commerce Commission, 518, 519.
- to keep accounts, records &c, 519.
- to issue bill of lading or receipt, 520.
- dangerous goods, 482, 499, 524, 525, 527.
- deviation, 489.
- delivery of the goods, 500.
- damages for breach of contract, 509, 510.
- excursion and commutation tickets, 520, 521.
- explosives &c, interstate transportation of, 524—526.
- estoppel of carrier by bill of lading, 532.
- freight bill, 483.
- free passes and free transportation, 505, 506, 520.
- freight, 501.
- Georgia, 544—546.
- injury to vessel on voyage, 501.
- interstate commerce commission (q. v.), 66, 67, 511—523.
- intrastate carriage governed by State laws, 503.
- joint tariffs, 508.
- liability of common carrier:*
 - at Common Law, 487, 488.
 - "Act of God", 488, 489.
 - acts of public enemy and public authority, 489.
 - exceptions to Common Law liability, 488.
 - Harter Act*, 493—497, 527, 528.
 - carriers of passengers not within exemptions, 498.
 - clauses in bills of lading void under, 493—495.
 - "due diligence" to render ship seaworthy &c, 496, 497.
 - errors and faults in navigation, 497.
 - exemptions from liability, 494—496.
 - foreign ships, 493, 495, 496.
 - generally, 493, 494.
 - liability for collision not affected by, 496.
 - purposes and interpretation, 494.
 - seaworthiness, equipment and manning, 496, 497.
 - improper packing, 489.
 - inherent vice, 490.
 - limitation of liability by contract*, 497—500.
 - conflict of laws, 499, 500.
 - generally, 497—499.
 - limitation of amount of liability, 499.
 - negligence of carrier or servants, 498.
 - loss caused by act of owner of goods, 489.
 - statutory limitations on liability*, 490 *et seq.*
 - fire (carriers by water), 490, 526.
 - limitation of shipowner's liability to value of ship and freight, 490—493, 526, 527.
 - action for limitation of liability, 492, 493.
 - cases to which limitation applies, 492.
 - conflict of laws, 492.
 - foreign ships and owners, 491, 492.
 - "freight pending", 493.
 - general average of losses, 526.
 - remedies for limitation of liability, 492, 493.
 - value of ship, how ascertained, 493.
 - who entitled to benefit of limitation, 491, 527.
 - valuables (carriers by water), 490, 526.
 - termination of liability, 500, 501.
 - where consignee cannot be found or refuses delivery, 488.
- liability for freight, 501.
- lien of carrier, 118, 501.
 - in case of negotiable bills of lading, 533, 534.
- long and short haul provision, 507.
- marking of packages of explosives, 525, 526.
- mandamus commanding facilities for interstate traffic, 521.
- obligations and rights of carriers on their bills of lading, 530—534.
- obligation to accept goods for transport, 482.
- penalties for statutory offenses, 510, 511, 522, 523.
- pooling of freights, 67, 507.
- publication of rates, fares and charges, 507—509.

CARRIER—*continued*.

prohibition of railroad companies from transporting goods in which they are interested, 506.
proceedings to enjoin or restrain departures from published rates or undue preferences, 523, 524.

reasonable facilities, duty to provide, 483, 505, 506, 521.

reduced rates and fares, 520, 521.

transportation of troops &c in time of war, 509.

through rates, 508, 514, 515.

undue preference, 483, 506, 507, 523, 524.

warehouse receipts: *see* WAREHOUSE RECEIPTS.

Washington (statutes), 546—551: *see* WASHINGTON.

CAVEAT EMPTOR, 354, 375.

CERTIFIED CHECK, 180, 220.

CHARTER PARTY, 118, 119, 482.

CHECK, 180, 220: *see* BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT:
California, 230.

CHOSSES IN ACTION:

assignment of, 113, 114.

CIRCUIT COURTS, 44—46.

CIRCULATING NOTES, 144—157: *see* BANKER.

CIVIL LAW:

Louisiana, 10, 11.

Philippines, Porto Rico, Canal Zone, 11.

CLAIMS, COURT OF, 64, 65.

CLEAN BILL OF LADING, 483, 487.

CODIFICATION, 19, 20.

COLLISIONS AT SEA:

conflict of laws as to limitation of liability, 492.

limitation of liability, 490—493.

marine insurance, 573, 574.

COLUMBIA:

conditional sales, 435.

COMMERCE COURT, 63, 64.

COMMERCIAL AGENT, 454 *et seq.*—*see* AUCTIONEER; BROKER; FACTOR.

COMMERCIAL PAPERS: *see* BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT.

acceptance, 188—190.

actions and defenses, 199, 200.

California, 222—230; *see* CALIFORNIA.

consideration, 184, 185.

construction of instrument, 185.

definitions, 179—181.

delivery, 185.

essentials of a negotiable instrument, 181—184.

Georgia, 230—235: *see* GEORGIA.

history and sources of law, 179.

indorsement and transfer, 186, 187.

liability of parties, 196—198.

negotiable and non-negotiable instruments distinguished, 181.

negotiation, 186, 187.

notice of dishonor, 192—195.

payment and discharge, 187, 188.

presentment for acceptance, 190, 191.

for payment, 191, 192.

protest, 195, 196.

rights of holder, 198.

Statutes, 201 *et seq.*

Texas, 235—237.

table of days of grace, interest, and limitations, 237, 238.

COMMISSION AGENT: *see* FACTOR.

COMMON CARRIER: *see* CARRIER.

COMPETITION:

contracts in restraint of, 102, 103.

COMPOSITIONS, 283—286, 303.

CONDITIONAL INDORSEMENT, 187.

CONDITIONAL SALES: *see* SALE OF GOODS.

CONFLICT OF LAWS:

capacity to contract, 109, 110.

contractual duties, 85, 86.

discharge of contract, 95.

CONFLICT OF LAWS—continued.

- limitation of carrier's liability by contract, 499, 500.
- of shipowner's liability, 492.
- remedies for enforcement of contract, 97.
- Statute of Frauds, 365.
- suretyship, 116.
- validity of contracts, 75, 100.

CONNECTICUT (STATUTES):

- conditional sales, 434, 435.
- sales in bulk, 446.

CONSIDERATION:

- contract, 81—85.
- negotiable instrument, 184, 185, 205.

CONSIGNEE: see FACTOR.**CONSTITUTION, THE, 12.****CONSTRUCTION:**

- contract, 86, 87.
- joint and several obligations, 110, 111.

CONSTRUCTIVE TOTAL LOSS, 579, 580.**CONSUL, enforcement of award of, 67.****CONTRACT:**

- analysis, 70—74.
- acceptance, when complete, 78, 79.
- accord and satisfaction, 96.
- anticipatory breach, 98.
- assignment, 113—115.
- by correspondence, 78.
- breach of, by one party, as an excuse for non-performance, 91, 92.
- bankruptcy, discharge by, 97.
- capacity, 108—110.
- common law of, 74, 75.
- certainty and completeness, 77.
- consideration, 81—85.
- completion of contract with third person as consideration, 83.
- contractual duties, by what law governed, 85, 86.
- construction, rules of, 86, 87.
- contribution between joint obligors, 111.
- definition, 75, 76.
- destruction of subject matter, 89.
- dependency of duties on reciprocal performance, 91—94.
- divisible and entire contracts, 92.
- discharge of, by what law governed, 95.
- duress and undue influence, 107, 108.
- drunken persons, 109.
- English law the basis of the law of, 75.
- enforcement, grounds of, 80—85.
- express, tacit and quasi contracts, 76.
- excuses for non-performance, 88—90.
- earnest, 100.
- error, 104—106.
- factor, of, rights and liabilities of principal and factor on, 465, 466.
- formation of, 75—80.
- forbearance and compromise as consideration, 82.
- failure of means of performance, 90.
- failure of consideration, 93, 94.
- gaming and wagering, 101, 102.
- infants, 108.
- insanity, 108, 109.
- impossibility of performance, 87—91, 104.
- independent duties, 94.
- illegality, 101—104.
- invalid contracts, 100—110.
- joint and several contracts, 110—112.
- law of, principally unwritten, 74.
- lapse of offer, 77, 78.
- mutual promises as consideration, 82.
- mutuality of obligation, 83, 84.
- moral obligation as the basis of, 84, 85.
- measure of damages, 97, 98.
- merger, 97.

CONTRACT—continued.

mistake, 104—106.
 misrepresentation and fraud, 106, 107.
 married women, 109, 110.
 novation, 96, 114, 115.
 offer and acceptance, 76—78.
 preliminary negotiations, 76.
 parol evidence in case of written contract, 80, 87.
 personal service, for, physical incapacity, 90.
 prospective inability to perform, 93.
 prevention of performance, 94.
 performance, 95, 96.
 public policy, contravention of, 101.
 principal and agent, 115, 116.
 quasi, 76.
 revocation of offer, 77, 78.
 repudiation, 92, 93.
 refusal to accept performance, 94.
 rescission, 97, 99, 100.
 remedies for enforcement, 97—100.
 release, 96.
 restraint of trade or competition, 102, 103.
 scope of the law of, 74.
 specialties and covenants, 80, 84.
 subscriptions to charitable objects, 81.
 sufficiency of consideration, 82, 83.
 supervening illegality, 89, 90.
 Statutes of Limitation, discharge by, 97.
 specific performance, 98, 99.
 Sunday, 103.
 Statute of Frauds, 110.
 suretyship, 116—118; *see* SURETYSHIP.
 third persons, contracts for benefit of, 112, 113.
 time of performance, 96.
 unfairness, 104.
 usury, 103.
 validity, by what law governed, 75, 100.
 writing, when necessary, 77, 79.
 written contracts, 79, 80.

CONTRIBUTION:

between joint contractors, 111, 112.

CORPORATIONS:

bankruptcy of, 250, 251, 255: *see* BANKRUPTCY.
 law of, generally, 15—17.

CORRESPONDENCE:

contract by, 78.

COURT OF CLAIMS, 64, 65.**COURT OF CUSTOMS APPEALS, 65.****COURTS:**

Federal, 42, 43: *see* FEDERAL COURTS.
 State, 43, 44.

D**DAMAGES:**

breach of contract generally, 97, 98.
 of sale (California Civil Code), 417, 418.
 breach of warranty on sale, 392.
 non-acceptance of goods by buyer, 389.
 non-delivery of goods by seller, 390.

DANGEROUS GOODS:

carriage of, 482, 499, 524, 525, 527.

DAYS OF GRACE, 237, 238.**DEL CREDERE AGENT, 454, 463.****DEPOSIT, BANKING, 126—130.****DEVIATION:**

by carrier, 489.
 marine insurance, 577.

DISCHARGE:

- of bankrupt, 287—293, 303, 323: *see* BANKRUPTCY.
- of contract: *see* CONTRACT.
- of negotiable instrument, 187, 188, 214, 215.

DISCLAIMER:

- in bankruptcy, 268.

DISSOLUTION:

- banks, 140, 167—173.
- limited partnership, 639.
- partnership, 616—629: *see* PARTNERSHIP.

DISTRICT COURTS, 46—49.**DIVISIBLE CONTRACTS, 92.****DOCUMENTS OF TITLE: *see* BILL OF LADING; WAREHOUSE RECEIPT:**

- negotiation of, by buyer, 386—388.
- transfer to buyer on sale, 383.
- Uniform Sales Act, 403—405.

DURESS, 107, 108.**E****EARNEST, 100.**

- sale of goods, 354.

ENGLISH LAW, 9, 10.**EQUITY:**

- distinction between procedure at Common Law and in, 56.
- procedure in, 57, 58.

ERROR:

- contracts, 104—106.
- writs of, to State Courts, 62, 63.

ESTOPPEL:

- by acceptance of bill of lading, 530.
- of carrier by bill of lading, 532.
- partnership by, 590, 591, 603—606.
- pledge by factor, 458, 459.
- warehouse receipt, 555.

EVICITION:

- warranty against (Louisiana), 425—427.

EVIDENCE:

- admiralty actions, 59.
- common law actions, 57.
- equity suits, 58.

EXCHANGE:

- California Civil Code, 417.
- Louisiana, 433.

EXECUTION:

- against goods represented by warehouse receipt, 556.
- limited partnership, 637.
- share of partner, 615, 616.

EXPLOSIVES:

- carriage of, generally, 482, 499, 524, 525, 527.
- interstate transportation of, 524—526.
- marking of packages, 525, 526.

F**FACTOR: *see* AGENT:**

- appointment, 455.
- authority to pledge, 456—458.
- authority coupled with interest, 462.
- capacity to act as, 455.
- contracts of, rights and liabilities of principal on, 466.
- definition, 454.
- del credere, 454, 463.
- distinguished from broker, 454, 455, 467, 468.
- duty to act in good faith, 459, 460.
 - to keep principal informed, 460.
 - to exercise diligence and prudence, 460.
 - to render accounts, 460.
 - to obey instructions, 461—463.
 - to insure, 461.
 - to keep principal's funds separate from own, 461.

FACTOR—*continued*.

- disobedience to instructions, when justified, 462.
- extent of authority, 455—459.
- estoppel from denying title of principal, 460.
- endorsement of negotiable instruments by, 461.
- Factors Acts, pledges under, 458, 459.
- goods entrusted to, right of principal to follow, 466, 467.
- indemnity, right to, 464.
- intermixing goods of various principals, 461.
- implied authority, 455—459.
- liability to third persons, 465.
- lien of, 464, 465.
- married woman as, 455.
- may not buy goods on own account, 459, 460.
- remittances by, to principal, 461.
- remuneration of, 463.
- reimbursement of, 463.
- rights against principal, 463, 464.
 - against third persons, 465, 466.
- revocation of authority, 467.
- secret profits, 459, 460.
- sale by, to satisfy lien, 464, 465.
- set-off against in action by principal, 466.
- Statutes:*
 - California, 469.
 - Georgia, 468, 470.
 - Maine, 470.
 - Maryland, 470—473.
 - Massachusetts, 473.
 - New York, 474.
 - Ohio, 474, 475.
 - Pennsylvania, 475, 476.
 - Rhode Island, 476, 477.
 - Wisconsin, 477.
- termination of authority, 467.
- unauthorised pledge by, remedies of principal, 457, 458.
- usage, authority to act according to, 456.
- waiver of lien by, 465.
- warranty of authority, 465.

FAILURE OF CONSIDERATION, 93, 94.**FEDERAL COURTS:**

- appellate jurisdiction, 62.
- establishment of, 43.
- jurisdiction of*, 44—55.
 - amount in controversy, 54.
 - basis of federal jurisdiction, 49, 50.
 - Circuit Courts, 44—46.
 - concurrent jurisdiction with State Courts, 51.
 - District Courts, 46—49.
 - exclusive jurisdiction, 51.
 - Judiciary Act of 1911, 54, 55.
 - local jurisdiction, 50, 51.
 - removal of causes to, 51—54.
 - Supreme Court, 44.
- procedure in*, 56—62.
 - at Common Law, 56, 57.
 - bankruptcy proceedings, 59.
 - contempts, 61.
 - distinction between procedure at Common Law and in Equity, 56.
 - in Admiralty, 58, 59.
 - in Equity, 57, 58.
 - qualification of jurors, 61, 62.
 - trial by jury, 57.
 - writ of habeas corpus, 60, 61.
 - injunction, 59, 60.
 - writs of error to State Courts, 62, 63.

FEDERAL GOVERNMENT:

- admiralty and maritime jurisdiction, 8.
- bankruptcy, 7.

FEDERAL GOVERNMENT—continued.

- foreign, interstate and Indian commerce, 6, 7.
- patents and trade marks, 8.
- powers of, 6—9.

FICTITIOUS DRAWEE, 180.**FIRM; FIRM NAME; see LIMITED PARTNERSHIP; PARTNERSHIP.****F. O. B., 362.****FOREIGN COMMERCE:**

- powers of Federal Government, 6, 7.

FOREIGNERS:

- property rights under Treaties, 56.
- right to sue, 55.

FORGED SIGNATURE, 182.**FRAUD:**

- contracts, 106, 107.
- partnerships, 589, 590, 624.
- sale of goods, 393—395.

FREIGHT, 501: see CARRIER.

- liability for, 501.

- lien for, 118, 501.

FREIGHT BILL: see BILL OF LADING.**G****GAMING CONTRACTS, 101, 102.****GENERAL AVERAGE:**

- California, 541, 542.
- marine insurance, 578.

GEORGIA (STATUTES):

- actions on commercial paper, 234, 235.
- bill of exchange, 231.
- bill of lading, 545.
- blank indorsements of commercial paper, 235.
- bonâ fide* holder of bill or note, 232, 233.
- carriers, 544—546.
- conditional sales, 435.
- commercial paper, 230—235.
- damages on foreign bills, 232.
- execution on commercial paper, 234, 235.
- factors, 469, 470.
- gaming contracts, 231.
- holidays, 232.
- joint contractors, actions against, 674.
- lien of carrier, 544.
- limited partnerships*, 692—694.
 - alteration, 693.
 - certificate and affidavit, 692.
 - dissolution, 694.
 - fraud, 694.
 - insolvency, 694.
 - name, 693.
 - purposes and formation, 692.
 - publication of terms of partnership, 693.
 - renewal, 693.
 - special partners, 693, 694.
 - suits, 693.
 - undue preference, 694.
- lost paper, 234.
- negotiable instruments, 231—235.
- partnership*:
 - actions by and against, 672, 674.
 - dissolution, 671.
 - firm name, 671.
 - formation, 671.
 - rights and liabilities of partners *inter se*, 672.
 - to third persons, 673, 674.
 - what constitutes, 671.
- promissory notes, 231.
- protest and notice, 232.
- sale of goods, 418—420.
- sales in bulk, 446, 447.

GEORGIA (STATUTES)—*continued*.
 stoppage in transit, 544.
 unjust discrimination by carrier, 545.
 GUARANTY: *see* SURETYSHIP.

H

HABEAS CORPUS, 60, 61.
 HARTER ACT, 493—497, 527, 528: *see* CARRIER.
 HAWAII:
 national banking laws applicable to, 173.
 HOLDER IN DUE COURSE, 198, 207.
 HOLDING OUT, 603—606.

I

ILLEGALITY:
 contracts, 101—104.
 negotiable instrument, 184.
 sale of goods, 395, 396.
 supervening, as an excuse for non-performance of contract, 89, 90.
 ILLINOIS:
 conditional sales, 436.
 IMPOSSIBILITY, 87—91, 104.
 INDIANA:
 conditional sales, 436.
 INDORSEMENT, 186, 187, 205—207.
 INFANT:
 bankruptcy, 250, 251.
 capacity to contract, 108.
 sale of goods, 349.
 INHERENT VICE, 490.
 INJUNCTION:
 procedure in action for, 59, 60.
 INSOLVENCY: *see* BANKRUPTCY.
 limited partnership, 636—638.
 of buyer at time of contract, 393, 394.
 before delivery, 383, 384.
 Philippines, 324—343: *see* PHILIPPINES.
 INSURANCE:
 by factor, 461.
 marine: *see* MARINE INSURANCE.
 INTEREST:
 commercial papers, 237, 238.
 INTERPLEADER:
 goods represented by bill of lading, 532.
 by warehouse receipt, 555.
 INTERPRETATION:
 of contract, 86, 87.
 of joint and several obligations, 110, 111.
 INTERSTATE COMMERCE COMMISSION, 66, 67, 511—525.
 attendance of witnesses and production of documents, 512.
 award of damages by, 516.
 annual reports to Congress, 520.
 complaints to, 512, 513.
 depositions of witnesses, 512.
 enforcing orders of, 516, 517, 520.
 employment of attorneys by, 517.
 form of procedure, 517.
 how appointed, 511.
 number and qualifications of commissioners, 521.
 parties to proceedings, 523.
 power to fix maximum rates &c, 513, 514, 516.
 as to new rates &c, 514.
 to establish through rates, 514, 515.
 to prescribe form of accounts, records &c of carriers, 519.
 to employ special agents and examiners, 520.
 preservation of documents filed with, 517.
 principal office, 518.
 rehearings, 517.
 reports of investigations, 513.
 regulations by, for carriage of explosives, 525.

INTERSTATE COMMERCE COMMISSION—*continued*.
 salaries and expenses, 518, 521.
 special sessions, 518.

J

JOINT CONTRACTORS, 110—112.

JUDICIARY:

Act of 1911.. 54, 55.
 organization of, 42—44.

JURISDICTION: *see* COURTS; FEDERAL COURTS.

Commerce Court, 63—65.
 Court of Customs Appeals, 65.
 Interstate Commerce Commission, 66, 67.

JURY:

qualification of jurors, 61, 62.
 trial by, 57.

JUS DISPONENDI, 362—364, 401.

L

LEGAL TENDER:

bank notes, 136.

LIEN:

banker, 129.
 bankruptcy, 280—282, 316, 317.
 broker, 468.
 carrier, 118, 501.
 California, 541.
 Georgia, 544.
 in case of negotiable bill of lading, 533, 534.
 factor, 464, 465.
 maritime, 119, 120.
 on negotiable instrument, 199.
 partners, 608, 609, 623.
 unpaid seller, 382—384.
 Uniform Sales Act, 408.
 waiver, 384.
 warehouseman, 503, 556—558.

LIMITATION:

acknowledgment, 85.
 action by partner for account, 628, 629.
 by or against trustee in bankruptcy, 269, 302.
 commercial papers, 237, 238.
 discharge of contract by, 97.
 promise to pay debt barred by, 85.

LIMITATION OF LIABILITY:

by contract (carriers), 497—500.
 carriers of passengers, 496.
 conflict of laws, 492, 499, 500.
 foreign shipowners, 491, 492.
 Harter Act, 493—497, 527, 528.
 foreign ships, 493, 495, 496.
 shipowners, 490—493, 526, 527.

LIMITED PARTNERSHIP:

alteration in business or membership, 634.
 application of assets, 637, 638.
 actions by and against, 638.
 assignment of share of partner, 638.
 authority of partners after dissolution, 639.
 activities of special partners in the business, 635, 636.
 construction of statutes, 629.
 certificate, 630.
 continuance or renewal, 632.
 California, 677—679; *see* CALIFORNIA.
 duration, 632.
 dissolution, 639.
 death of partner, 638, 639.
 effect of non-observance of formalities, 631—633.
 estoppel of partners and third persons, 634.
 execution against property of, 637.
 formation, 630—632.

LIMITED PARTNERSHIP—continued.

- formalities, 631.
- firm name and sign, 631.
- generally, 629.
- Georgia, 692—694: *see* GEORGIA.
- insolvency, 636—638.
- liability of partners, 630.
- Louisiana, 680, 681.
- Massachusetts, 683, 684.
- Montana, 679, 680.
- New York, 675—677: *see* NEW YORK.
- North Dakota, 679, 680.
- Ohio, 681—683.
- Oklahoma, 679, 680.
- Pennsylvania, 684—691: *see* PENNSYLVANIA.
- purposes, 630.
- rights and duties of partners *inter se*, 633.
- rights and liabilities of partners as to third persons, 633—638.
- South Dakota, 679, 680.
- Statutes, 679 *et seq.*
- undue preference, 636, 637.
- withdrawal of contribution by special partner, 634.

LOUISIANA:

- Civil Law in, 10, 11.
- partnership*, 654—659.
 - classification, 655.
 - commercial, 656.
 - dissolution, 658, 659.
 - general provisions, 654, 655.
 - in commendam*, 680, 681.
 - obligations of partners *inter se*, 656—658.
 - towards third persons, 658.
 - particular partnerships, 656.
 - universal, 655, 656.
- sale of goods: *see* SALE OF GOODS.
- sales in bulk, 447.

M**MAINE:**

- factors, 470.

MANDAMUS:

- facilities for interstate traffic, 521.

MARINE INSURANCE:

- analysis, 566.
- assignment of policy, 569.
- apportionment of loss, 573.
- arrests, restraints and captures, 574.
- abandonment, 580.
- beginning and end of risk, 571, 572.
- barratry, 574.
- construction of contract, 569.
- collision, 573, 574.
- concealments, 575.
- constructive total loss, 579, 580.
- definitions, 568.
- deviation, 577.
- excepted risks, 575.
- express warranties, 575.
- foreign corporations, 568.
- form of contract, 568, 569.
- "freight", 571.
- "goods and merchandise", 570.
- goods stowed on deck, 571.
- general average losses, 578.
- illegality, 577, 578.
- implied warranties*, 576—578.
 - deviation, 577.
 - generally, 576.
 - legality, 577, 578.
 - seaworthiness, 576, 577.

MARINE INSURANCE—continued.

- insurable interest, 569, 570.
- incidental expenses, 573.
- "lost or not lost" policies, 570.
- loss after expiration of policy from previous injury, 572.
- measure of insurer's liability, 578—581.
- necessity of good faith, 569.
- non-disclosure of material facts, 575.
- open policy, 578.
- one-third off new for old, 578.
- partial losses, 578, 579.
- particular average losses, 578.
- "perils of the sea", 573.
- property interests covered, 570, 571.
- profits, 571.
- proximate cause of loss, 572, 573.
- risks assumed, 572—575.
- representations, 575.
- scope of Article, 567.
- sources of American law of, 567.
- statutory regulations, 567, 568.
- smuggling, 577, 578.
- sue and labor clause, 580, 581.
- subrogation, 580.
- time policies, 571.
- theft, 574.
- total loss, 579, 580.
- unreasonable delay in voyage, 577.
- valued policies, 579.
- voyage policies, 571, 572.
- wager policies, 569.
- "warranted free of particular average", 578.
- warranties, 575—578.

MARITIME JURISDICTION, 8.**MARITIME LIEN, 119, 120.****MARRIED WOMAN:**

- as commercial agent, 455.
- bankruptcy, 250, 251.
- capacity to contract, 109, 110.
- sale of goods, 350.

MARYLAND (STATUTES):

- consignments of agricultural products, 472.
- contracts with and payments to factors, 471.
- dispositions by person in possession of documents of title, 471.
- insolvency of factor, rights of principal on, 471, 472.
- lien of consignee, 470—472.
- pledges by factors &c, 471, 472.
- set-off of debt due by agent in action by principal, 471, 472.

MASSACHUSETTS (STATUTES):

- conditional sales, 436, 437.
- consignees and factors, 473.
- equitable attachment of partner's share, 665.
- insolvency of partners, 666.
- limited partnership, 683, 684.
- names of corporations, 665.
- partnership, 665, 666.
- sales in bulk, 447.
- set-off in case of dormant partners, 665.

MATURITY:

- bill of exchange, 188.

MEASURE OF DAMAGES: see DAMAGES.**MEMORANDUM to satisfy Statute of Frauds, 355, 356.****MEMORANDUM CHECK, 180.****MICHIGAN:**

- sales in bulk, 448.

MINNESOTA:

- conditional sales, 438.

MISREPRESENTATION:

- contracts generally, 106, 107.
- sale of goods, 393, 394.

MISTAKE, 104—106.

MONTANA (STATUTES):

- limited partnerships, 679, 680.
- partnership generally, 652, 653.

MORAL OBLIGATION:

- as a basis of contract, 84, 85.

MORTGAGE ASSOCIATIONS (NEW YORK), 641—643.

MUTUALITY OF OBLIGATION, 83, 84.

N

NATIONAL BANKS: *see* BANKER.

NECESSARIES:

- infants, 108.

NEGOTIABILITY:

- bills of lading, 485, 486: *see* BILL OF LADING.
- warehouse receipts: *see* WAREHOUSE RECEIPT.

NEGOTIABLE INSTRUMENT: *see* BILL OF EXCHANGE; CHECK; PROMISSORY NOTE.

acceptance, 188—190.

accommodation parties, liability of, 198, 205.

actions, 199.

alteration, 200, 214, 215.

blanks, filling, 203.

collateral and additional agreements, 182.

consideration, 184, 185, 205.

construction, 185, 204.

capacity, 199, 200.

California, 222—230: *see* CALIFORNIA.

definitions, 179—181.

distinguished from non-negotiable instrument, 181.

date, place of payment, seal, 184, 203.

delivery, 185, 203, 204.

defenses, 199, 200.

essentials of, 181—184.

certainty as to amount, 183, 201.

how payable, 182.

must be unconditional, 182, 201.

promise or order, 182, 201.

time for payment, 182, 201.

writing and signature, 181.

forgery, 200, 204, 205.

for patent rights and speculative consideration, 221, 222.

Georgia, 230—235: *see* GEORGIA.

holder in due course, 198, 207.

illegality, 200.

incomplete instrument, 203.

indorsement, 186, 187, 205—207.

by factor, 461.

lien on, 199.

liability of parties, 196—198.

law relating to, generally, 17, 18.

New York, 221, 222.

negotiation, 186, 187, 205—207.

notice of dishonor, 192—195.

payment and discharge, 187, 188.

presentment for acceptance, 190, 191.

for payment, 191, 192.

protest, 195, 196.

rights of holder, 198.

table of days of grace, interest and limitations, 237, 238.

Texas, 235—237.

transfer without indorsement, 187.

Uniform Negotiable Instruments Law, 201—221.

alteration, 214, 215.

bills of exchange, 215—220: *see* BILL OF EXCHANGE.

computation of time, 221.

consideration, 205.

definitions, 220, 221.

discharge, 214, 215.

form and interpretation, 201—205.

liability of parties, 208—210.

NEGOTIABLE INSTRUMENT—*continued*.

- negotiation, 205—207.
- notice of dishonor, 211—213.
- presentment for payment, 210, 211.
- promissory notes and checks, 220.
- rights of holder, 207, 208.
- States in force, 179.

usury, 200.

waiver of notice of dishonor, 195.

NEW HAMPSHIRE:

- conditional sales, 438, 439.

NEW JERSEY:

- conditional sales, 439.
- partnership associations, 706—708.
- sales in bulk, 448, 449.

NEW YORK (STATUTES):

- conditional sales, 439—442.

factors, 474.

limited partnerships, 675—677.

- actions by and against, 676.

- dissolution, 677.

- formation, 675.

- fraudulent preference, 676.

- liability of partners, 676.

- powers of partners, 676.

- renewal or continuance, 675.

negotiable instruments for patent rights or speculative consideration, 221, 222.

partnership, 640—647.

- authority and liability of general partner, 640.

- assignments for benefit of creditors, 643, 644.

- banking companies, notes of, 641.

- compositions, 644.

- continuance of partnership or business name, 640, 641.

- of business pending action for account or dissolution, 646.

- definition, 640.

- engaged in transport, action against, 645.

- execution against, 646.

- fictitious firm names prohibited, 641.

- firm name, 640, 641.

- judgment against joint debtors, 644, 645.

- mortgage &c, associations, 641—643.

- newspaper associations, 643,

- receiver, payment of wages by, 644.

- revocation of licence of mortgage &c association, 643.

- service of process, 644.

- when partner not sued remains liable, 646.

sales in bulk, 449.

NORTH DAKOTA (STATUTES):

- limited partnership, 679, 680.

partnership, 653.

NOTICE OF DISHONOR, 192—195, 211—213.**NOVATION**, 96, 114, 115.

- on change in firm, 621.

O**OBLIGATION:** *see* **CONTRACT**.**OFFER AND ACCEPTANCE**, 76—78.**OHIO (STATUTES):**

- conditional sales, 442.

consignees and factors, 474, 475.

discharge of joint debts, 659, 660.

judgment on joint contract or instrument, 662, 663.

limited partnerships, 681—683.

partnership:

- actions by and against, 662, 664.

- compositions by partners, 659, 660.

- death of partner, duties and rights of surviving partners, 660, 661.

- execution on judgment against the firm, 662.

- fictitious names, 661, 662.

- fraud by partner, 664.

OHIO (STATUTES)—*continued*.

- garnishee proceedings, 663.
- judgment, revivor and new parties to, 662, 663.
- receiver, 664.
- service of process, 663, 664.
- partnership associations*, 703—705.
 - contributions, 705.
 - dissolution and winding-up, 705.
 - formation, 703, 704.
 - liability of members, 704.
 - management, 704, 705.
 - transfer of interest in, 704.
- sales in bulk, 449, 450.

OKLAHOMA (STATUTES):

- conditional sales, 443.
- limited partnerships, 679, 680.
- partnership, 653.

OPTIONS:

- validity of, 102.

P**PAROL EVIDENCE:**

- to vary or explain bill of lading, 486, 487.
- written contract, 80, 87.

PARTICULAR AVERAGE, 578.**PARTNERSHIP:**

- analysis, 584.
- authority of partners to act for firm*, 597—602.
 - acts outside scope of business, 598.
 - admissions, 601.
 - after dissolution, 622.
 - assignment for benefit of creditors, 600.
 - authority to do particular acts, 599—601.
 - bills and notes, 600.
 - confession of judgment, 600.
 - deeds, 599, 600.
 - generally, 597.
 - restrictions on, 599.
 - scope of, 597, 598.
 - surviving partners on death of partner, 622.
- advances by partners, 612, 626.
- acts on the part of the firm, 601, 602.
- agents and servants, 602.
- assets, application of, to liabilities, 607—610.
- actions by and against firms, 610, 611.
- assignment of share of partner, 615, 616.
- admission of new member, 616, 617.
- account, action for, 628, 629.
- bankruptcy of*, 251, 252, 293—295, 301, 319.
 - administration of estate, 294, 295, 301.
 - apportionment of expenses, 295.
 - effect of discharge, 295.
 - individual and partnership debts, 294, 301, 607—609.
 - proof of claims, 294, 301.
 - what Courts have jurisdiction, 293.
- breach of trust by partner, liability of firm for, 601.
- California (statutes), 647—652: *see* CALIFORNIA.
- continuance beyond term fixed, 617.
- creditors of individual partners, rights of, 609.
- continuation in old firm name on death of partner, 605, 606.
- criminal liability, 602.
- construction of articles, 611.
- conversion and conveyance of real property of, 596.
- capacity to become a partner, 588.
- contract of, 587—590.
- classes of, 587.
- definitions, 587, 590, 591.
- dormant partners, 591.
- dissolution*, 616—629.
 - authority of partners after, 622.

PARTNERSHIP—continued.*dissolution—continued.*

- assets, 625.
- action for account, 628, 629.
- arbitration, settlement by, 628.
- by act of the partners, 617, 618.
- by operation of law, 618.
- by judicial decree, 618.
- by bankruptcy of partner, 620.
- contributions for payment of liabilities, 625, 626.
- definition, 616.
- discharge of partner from liability on, 621.
- final settlement by agreement, 627.
- for fraud or misrepresentation, 624.
- grounds for dissolution by Court, 618.
- goodwill, 625.
- liquidation and settlement between the partners, 624—629.
- notice of, when necessary, 619, 620.
- order of payment of liabilities, 626.
- persons entitled to notice of, 620.
- power of partners to dissolve, 617.
- profits accruing after, 624.
- premium, 625.
- right of partners to notify, 620.
 - to take part in liquidation, 622.
 - as to application of partnership property, 623.
- settlement without satisfaction of liabilities, 627.
- when effective, 619, 620.
- winding-up by Court, 625, 627.
- execution against share of partner, 615, 616.
- exoneration of partner from future liability, 606, 607.
- estoppel, partner by, 590, 591, 603—606.
 - rights of partners by, *inter se*, 605, 606.
- firm, the, 591—593.
- firm name, 593—595.
- form of contract, 587, 588.
- Georgia (statutes) 671—674: *see* GEORGIA.
- holding out, 603—606.
- in commendam*, 680, 681: *see* LOUISIANA.
- insolvency, transfer of partnership property pending, 609, 610.
- incoming partner, liability of, 606.
- induced by fraud, 589, 590, 624.
- law of, generally, 15.
- loan in consideration of share of profits, 589.
- legal entity, whether a, 591—593.
- liability on contracts, 602, 603.
- lien on partnership property, 608, 609, 623.
- limitation and laches in action for account, 628, 629.
- limited, 629—639: *see* LIMITED PARTNERSHIP.
 - statutes: California, 677—679: *see* CALIFORNIA.
 - Georgia, 692—694: *see* GEORGIA.
 - Louisiana, 680, 681.
 - Massachusetts, 683, 684.
 - Montana, 679, 680.
 - New York, 675—677: *see* NEW YORK.
 - North Dakota, 679, 680.
 - Oklahoma, 679, 680.
 - Ohio, 681—683.
 - Pennsylvania, 684—691: *see* PENNSYLVANIA.
 - South Dakota, 679, 680.
 - other States, 694, 695.
- Louisiana (statutes), 694—699: *see* LOUISIANA.
- marshalling firm and individual assets, 607, 608.
- Massachusetts (statutes), 665, 666.
- Montana (statutes), 652, 653.
- nature of, 587.
- New York (statutes), 640—647: *see* NEW YORK.
- North Dakota (statutes), 653.
- novation on change in firm, 621.
- notice to partner, when notice to firm, 601.

PARTNERSHIP—continued.

- newspaper proprietors, 594.
- ostensible partner, 591, 603—606.
- Ohio (statutes), 659—664: *see* OHIO.
- Oklahoma (statutes), 653.
- partner *in commendam*, 591.
- partnership property, 595—597.
- partnership acts, 601, 602.
- Pennsylvania (statutes), 666—671: *see* PENNSYLVANIA.
- registered partnerships (Pennsylvania), 708—711.
- relations of partners inter se*, 611—616.
 - duty to account, 613, 614.
 - generally, 611.
 - indemnity, 612.
 - interest, 612, 613.
 - majority, rights of, 613.
 - nature of interest in partnership property, 614, 615.
 - partner's share, 615, 616.
 - partnership books, 613.
 - profits and losses, 611, 612.
 - profits from rival business, 614.
 - rules determining rights and duties, 611—613.
- registration in case of fictitious name, 594, 595.
- relations of partners with third persons, 597—611.
- secret partners, 591.
- service of process, 611.
- sharing profits *prima facie* evidence of partnership, 588, 589.
- subject matter of contract of, 588.
- specific performance of contract of, 590.
- sub-partnerships, 590.
- South Dakota (statutes), 653.
- torts of partner, liability of firm for, 601, 602.
- transactions of partners affecting creditors, 609.

PARTNERSHIP ASSOCIATIONS:

- New Jersey, 706—708.
- Ohio, 703—705: *see* OHIO.
- Pennsylvania, 695—703: *see* PENNSYLVANIA.

PATENT RIGHTS:

- negotiable instruments given for, 221, 222.

PATENTS:

- powers of Federal Government, 8.

PENNSYLVANIA (STATUTES):

- compromises by joint debtors, 668, 669.
- consignees and factors, 475, 476.
- food, implied warranty on sale of, 451.
- foreign limited partnerships and companies, service on, 691.
- limited partnerships*, 684—691.
 - alteration, 687, 691.
 - assignment of interest of partner, 690.
 - certificate, 685—687.
 - contributions of special partners, 685.
 - dissolution, 690, 691.
 - formation, 684—688.
 - increase of capital, 688.
 - insolvency, 690, 691.
 - management, 688—690.
 - name and sign, 688.
 - original capital not to be impaired, 689.
 - publication of terms of partnership, 687.
 - powers of special partners, 689.
 - renewal, 687.
 - service of process, 691.
 - undue preference, 689, 690.
- partnership (general)*, 667—671.
 - action for account, 670, 671.
 - compromises by partners, 668, 669.
 - confession of judgment by partner, 667.
 - death of partner, liability of estate for debts, 667.
 - execution against partners, 668.
 - formation, 666, 667.

PENNSYLVANIA (STATUTES)—*continued*.

- judgment against a partner no bar to proceedings against others, 667.
- loan &c in consideration of share in profits, 669.
- partnership accounts, 668, 670, 671.
- suits between firms with partners in common, 667.
- partnership associations*, 695—703.
 - articles of association, 695, 696.
 - by-laws, 703.
 - capital stock, 695.
 - common seal, 701.
 - contributions to capital in real or personal estate, 701, 702.
 - dividends, 700.
 - dissolution and winding-up, 700, 701.
 - formation, 695, 696.
 - interests in are personal property, 698.
 - liability of members, 696, 697.
 - managers — salaries — debts — liabilities, 699, 703.
 - may hold realty and sue and be sued in association name, 702.
 - renewal, 702, 703.
 - service of process, 702.
 - telegraph and telephone companies, 695.
 - transfer of stock, 698.
 - use of word "limited", 697, 698.
- registered partnerships*, 708—711.
 - dissolution, 710, 711.
 - formation, 708, 709.
 - liability of members, 709.
 - management, 709, 710.
 - name, 709.
 - powers as to real estate, 710.
 - renewal, 711.
 - service of process, 710.
 - transfer of interest of partner, 710.
- sale by sample, implied warranty on, 450.
- sales in bulk, 450.

PERILS OF THE SEA, 488, 573.

PHILIPPINES:

- civil law in, 11.
- Insolvency Law, 1909* . . 324—343.
 - acts of insolvency, 328, 329.
 - amendment of petition, 328.
 - adjudication of insolvency, 329, 330.
 - assignees, 331—335.
 - accounts of assignees, 334—335.
 - appeals, 343.
 - bond of petitioning creditor, 329.
 - of assignee, 332.
 - composition, 339.
 - creditor's petition, 328, 329.
 - classification of creditors, 335, 336.
 - costs, 343.
 - duties of assignee, 333—335.
 - discharge, 339—341.
 - examination of debtor and witnesses, 339.
 - expenses and remuneration of assignees, 334.
 - election of assignee, 331, 332.
 - fraudulent preferences and transfers, 341.
 - involuntary insolvency, 328—331.
 - miscellaneous provisions, 342, 343.
 - penal provisions, 341, 342.
 - powers of assignee, 332, 333.
 - preferential creditors, 336.
 - partnerships and corporations, 336, 337.
 - proof of debts, 337, 338.
 - receiver, 342.
 - resignation of assignee, 330, 331.
 - seizure of property by sheriff, 330, 331.
 - sale of property, 334.
 - set-off, 338.
 - secured creditors, 338.

PHILIPPINES—continued.

suspension of payments, 324—327.
voluntary insolvency, 327, 328.

PLEDGE:

by factor or other commercial agent: *see* FACTOR.
of bill of lading, 485, 486.

PORTO RICO:

civil law in, 11.
national banking laws applicable to, 173.

PREFERENTIAL DEBTS:

in bankruptcy, 278, 279, 315.

PRINCIPAL: see AGENT; FACTOR.**PRIVATE INTERNATIONAL LAW: see** CONFLICT OF LAWS.**PROCEDURE:**

at common law, 56, 57.
bankruptcy, 59, 304—307, 318—324.
contempts, 61.
distinction between common law and equity, 56.
in Admiralty, 58, 59.
in equity, 57, 58.
interstate commerce commission (q. v.), 517.
qualification of jurors, 61, 62.
trial by jury, 57.
writ of habeas corpus, 60, 61.
injunction, 59, 60.
error, 62, 63.

PROMISSORY NOTE: see BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT.

accommodation party, 198.
California, 229.
capacity, 199, 200.
construction, 185.
definition, 180, 220.
delivery, 185.
for patent rights or speculative consideration, 221, 222.
Georgia, 231—235.
liability of parties, 196—198.
must be unconditional, 182.
notice of dishonor, 192—195.
Texas, 235—237.

PROOF OF DEBTS in bankruptcy, 271—275, 312, 313, 321.**PROTEST:**

bill of exchange, 195, 196, 217, 218.
California, 228, 229.
Georgia, 232.

PUBLIC POLICY:

contracts in contravention of, 101.

Q

QUALIFIED ACCEPTANCE, 189.

QUALIFIED INDORSEMENT, 186.

QUASI CONTRACT, 76.

R

RAILROAD: see CARRIER.

REASONABLE FACILITIES:

duty of common carrier to provide, 483, 505, 506.

REDHIBITORY ACTION, 427, 428.

REFEREES: see BANKRUPTCY.

REGISTERED PARTNERSHIPS:

Pennsylvania, 708—711.

RELEASE:

of conditional obligation, 96.

RESCISSION:

of contract, 97, 99, 100.
of sale by buyer, 391, 392.
by seller, 388, 389.
Louisiana, 429—431.
under Uniform Sales Act, 410, 412.

RESERVE:

banks, 157—160.

RESPONDENTIA, 119.

RESTRAINT OF TRADE:

contracts in, 102, 103.

RESTRICTIVE INDORSEMENT, 186.

RHODE ISLAND:

consignees and factors, 476, 477.

S

SALE OF GOODS:

analysis, 346.

acceptance for purposes of Statute of Frauds, 353, 354.

approval, sale on, 360, 361.

appropriation of goods to contract, 361, 362.

anticipatory breach of contract, 390.

acceptance, duty of buyer as to, 377, 378.

effect of, on right to sue for damages, 378—380.

basis of the law as to, 347.

breach of warranty, remedy of buyer for, 391, 392.

California Civil Code, 414—418.

damages for breach, 417, 418.

delivery, 415.

exchange, 417.

form of contract, 415.

rights and obligations of seller, 415, 416.

of buyer, 416.

sale by auction, 416, 417.

sale and agreement for sale, 414.

States which have adopted, 396.

stoppage in transit, 417.

warranty, 415, 416.

capacity of parties, 349—351.

corporations, 351.

contract of manufacture distinguished from sale, 352.

conflict of laws (Statute of Frauds), 356.

caveat emptor, 374, 375.

cash sales, 372.

conditions and warranties, 371—377.

conditional sales, 365—367, 371.

Alabama, 433, 434.

Connecticut, 434, 435.

Columbia, 435.

Georgia, 435.

Illinois, 436.

Indiana, 436.

Massachusetts, 436, 437.

Minnesota, 438.

New Hampshire, 438, 439.

New Jersey, 439.

New York, 439—442.

Ohio, 442.

Oklahoma, 443.

Texas, 443.

Washington, 443, 444.

Wisconsin, 445.

circumstances affecting validity of sales, 392—396.

creditors, fraud on, 394, 395.

damages for non-acceptance, 389.

for non-delivery, 390.

for breach of warranty, 392.

definitions, 348.

distinction between sale and contract to sell, 348.

destruction of subject-matter, 358.

delivery to carrier, 362, 370.

delivery generally, 369—371.

duties of seller, 368—377.

distinction between condition and warranty, 371.

description, sale by, 376.

duties of buyer, 377—382.

delay in acceptance, 378.

earnest, 354.

SALE OF GOODS—*continued.*

- express warranties, 372—374.
- fixtures, 353.
- future goods, 356, 357.
- F. O. B., 362.
- food, warranty on sale of, 376, 451.
- fraud, 393—395.
- Georgia Code, 418—420.
- growing crops, 352, 353.
- goods improperly delivered, duties of buyer as to, 380.
- introduction, 347.
- infants, 349.
- insanity, 350.
- implied warranties, 374—376, 450, 451.
- instalments, contract for delivery in, 370.
- inspection, right of, by buyer, 377, 378.
- insolvency of buyer before delivery, 383, 384.
 - at time of sale, 393, 394.
- illegality, 395, 396.
- jus disponendi, 362—364, 536, 537.
- legal tender, 381.
- lien of unpaid seller, 382—384.
- Louisiana Civil Code*, 421—438.
 - auction sales, 431, 432.
 - capacity to buy and sell, 421, 422.
 - concealed vices in thing sold, 428.
 - delivery, 424, 425.
 - exchange, 433.
 - how contract perfected, 422, 423.
 - judicial sales, 432, 433.
 - lesion, rescission for, 431.
 - nature and form of contract, 421.
 - obligations of seller, 424—428.
 - of buyer, 428, 429.
 - risk of loss, 423, 424.
 - redhibitory action, 427, 428.
 - resolution and rescission of sale, 429—431.
 - right of redemption, 429—431.
 - sales on seizure or execution, 432, 433.
 - sale per aversionem, 425.
 - subject matter of contract, 422.
 - warranty against eviction, 425—427.
 - against vices, 427, 428.
- mutual assent, 349.
- married women, 350.
- "more or less", 370.
- manufacturer, implied warranty by, 375.
- misrepresentation, 393, 394.
- nature and formation of contract, 348 *et seq.*
- "note or memorandum" to satisfy Statute of Frauds, 355, 356.
- notice of rejection by buyer, 380.
- payment of the price, 381, 382.
 - to agent of seller, 382.
- place of payment, 381.
 - of delivery, 369.
- price, the, 358.
- provisions, warranty on sale of, 376.
- risk of loss, 364.
- rejection, right of, 378—381.
- remedies for non-performance, 382—392.
- resale, seller's right of, 388.
- rescission of sale by seller, 388, 389.
 - by buyer, 391, 392.
- remedies of seller against buyer personally, 389, 390.
 - of buyer, 390—392.
- sales in bulk*, 395.
 - California, 445.
 - Connecticut, 446.
 - Georgia, 446, 447.
 - Louisiana, 447.

SALE OF GOODS—continued.

- Massachusetts, 447.
- Michigan, 448.
- New Jersey, 448—449.
- New York, 449.
- Ohio, 449, 450.
- Pennsylvania, 450.
- sale distinguished from similar transactions, 348, 349.
- States in which writing is not necessary, 351.
- Statute of Frauds*, 351—356, 397.
 - acceptance and receipt for purposes of, 353, 354.
 - conflict of laws, 356.
 - contract of manufacture distinguished from sale, 352.
 - earnest and part payment, 354.
 - fixtures, 353.
 - "goods", 352, 353.
 - growing crops, 352, 353.
 - "note or memorandum", 355, 356.
 - signature by agent, 355, 356.
- subject-matter of sale, 356—358.
- "sale or return", 360, 361.
- seller allowed to remain in possession, second purchaser from, 367.
- sale "to arrive", 371.
- sample, sale by, 376, 377, 400.
- specific performance, 390, 391.
- stoppage in transitu*, 384—388.
 - beginning and end of transit, 384, 385.
 - definition, 384.
 - effect of, 386.
 - execution against the goods, 386.
 - exercise of right against third persons, 387, 388.
 - how right exercised, 387.
 - negotiation of bill of lading by buyer, 386—388.
 - partial delivery to buyer, 386.
 - waiver of right of, 386.
- time for delivery, 370.
 - for payment of price, 372, 381.
- title, implied warranty of, 374.
- transfer of document of title to buyer, 383.
- transfer of property in goods*, 358—368.
 - appropriation, 361, 362.
 - bonâ fide* purchasers from buyer under voidable title, 367, 368.
 - conditional purchasers, 365—367.
 - generally, 358, 359.
 - goods to be weighed, measured &c, 360.
 - goods to be delivered at particular place, 362.
 - reservation of *jus disponendi*, 362—364.
 - risk of loss, 364.
 - rules for ascertaining intention, 359—362.
 - sale or return, 360, 361.
 - sale on approval, 360, 361.
 - sale by person not owner, 364—368.
 - second purchasers and creditors of seller in possession, 307.
 - unspecified goods, 361, 362.
- undivided interest in chattels, 357.
- unspecified goods, 359, 361, 362.
- uncertainty, 358.
- "unpaid seller", 382, 383.
- Uniform Sales Act*, 396 *et seq.*
 - auction sales, 402.
 - acceptance, 407.
 - actions for breach of contract, 410—412.
 - breach of warranty, remedies for, 412.
 - capacity of parties, 397.
 - conditions and warranties, 399, 400.
 - definitions, 413, 414.
 - delivery of goods, 405—407.
 - documents of title, 403—405.
 - formation of contract, 396, 397.
 - in what States in force, 396.

SALE OF GOODS—continued.

- instalment deliveries, 406.
- interpretation of terms, 412—414.
- jus disponendi*, 401.
- lien of unpaid seller, 408.
- negotiable documents of title, 403—405.
- performance of contract, 405—407.
- price, the, 398.
- risk of loss, 402.
- right to examine goods, 407.
- refusal by buyer to take delivery, 407.
- rights of unpaid seller against goods, 407—410.
- resale by seller, 409, 410.
- rescission, by seller, 410.
 - by buyer, 412.
- remedies of buyer, 411, 412.
 - of seller, 410, 411.
- sale by sample, 400.
- subject-matter of contract, 397, 398.
- stoppage in transit, 408, 409.
- transfer of property in goods, 400—405.
 - of documents of title, 403—405.
- “unpaid seller”, definition of, 407, 408.
- valuation, sale at, 358.
- voidable title, purchase from person with, 367, 368.
- waiver of lien by seller, 384.
- warranties on sales by sample, 376, 377.
 - generally, 371—377.
- writing, when necessary, 351—356.

SAMPLE, SALE BY, 376, 377, 400.

SAVINGS BANK, 123, 124.

SECRET PROFITS:

- factors, 459, 460.

SECURED CREDITORS, 277, 313.

SERVICE OF PROCESS:

- partnerships, 611.

SET-OFF:

- in bankruptcy, 278, 317.
- of debt due by agent in action by principal, 466.

SHIPMASTER:

- authority to give bottomry bonds, 119.
- to issue bills of lading, 484.

SHIPOWNERS:

- limitation of liability of, 490—493, 526, 527.

SHIP'S HUSBAND, 455.

SOURCES OF LAW, 12—15.

SOUTH DAKOTA (STATUTES):

- limited partnerships, 679, 680.
- partnership (general), 653.

SPECIAL INDORSEMENT, 186.

SPECIAL PARTNERSHIP: see LIMITED PARTNERSHIP.

SPECIALTY, 80, 84.

SPECIFIC PERFORMANCE:

- contracts generally, 98, 99.
- contract of partnership, 590.
- sale of goods, 390, 391.

STATE COURTS, 43, 44.

- concurrent jurisdiction with Federal Courts, 51.
- jurisdiction in bankruptcy, 246, 247, 305.
- removal of causes to Federal Courts, 51—54.
- writs of error to, 62, 63.

STATE GOVERNMENTS:

- powers of generally, 9.
- as to bankruptcy, 7, 244.

STATUTE OF FRAUDS:

- del credere* agent, 463.
- sale of goods, 351—356, 397: *see* SALE OF GOODS.
- signature by broker, 468.

STATUTES OF LIMITATION:

- action by partner for account, 628, 629.

STATUTES OF LIMITATION—*continued*.

- acknowledgment, 85.
- commercial papers, 237, 238.
- discharge of contract by, 97.
- promise to pay debt barred by, 85.

STOCK EXCHANGE SPECULATION, 101, 102.

STOPPAGE IN TRANSIT:

- beginning and end of transit, 384, 385.
- California Civil Code, 417.
- definition, 384.
- effect of, 386.
- execution against the goods, 386.
- exercise of right against third persons, 387, 388.
- Georgia, 544.
- negotiation of bill of lading by buyer, 386—388.
- partial delivery to buyer, 386.
- Uniform Sales Act, 408, 409.
- waiver of right of, 386.

STRAIGHT BILL OF LADING, 485.

SUBROGATION:

- marine insurance, 580.
- surety, 118.

SUE AND LABOR CLAUSE, 580, 581.

SUNDAY CONTRACTS, 103.

SUPERCARGO, 455.

SUPREME COURT, 44.

SURETYSHIP:

- conflict of laws, 116.
- construction, 117.
- creation of guaranty, 116, 117.
- definition, 116.
- special defenses of surety, 117.
- steps necessary on default to fix liability of surety, 118.
- subrogation, 118.

T

TAXATION OF BANKS, 164—166.

TELEGRAPH COMPANIES:

- Pennsylvania, 695.

TENDER:

- bank notes, 136.

TEXAS (STATUTES):

- bills and notes, 235—237.
- conditional sales, 443.

THROUGH TRAFFIC AND RATES, 508, 514, 515.

TIME:

- computation, in bankruptcy, 296, 307.
- for performance of contract, 96.

TRADE MARKS:

- powers of Federal Government, 8.

TREATIES:

- proprietary rights of aliens under, 56.

U

UNDUE INFLUENCE, 107, 108.

UNDUE PREFERENCE:

- by carriers, 483, 506, 507, 523, 524: *see* CARRIER.
- in bankruptcy, 282, 283, 314, 316, 317.
- limited partnerships, 636, 637.
- partnerships generally, 609, 610.

UNIFICATION, 19, 20.

UNIFORM BANKRUPTCY ACT, 298—318: *see* BANKRUPTCY.UNIFORM BILLS OF LADING ACT: *see* BILL OF LADING.UNIFORM NEGOTIABLE INSTRUMENTS LAW, 201—221: *see* BILL OF EXCHANGE;
NEGOTIABLE INSTRUMENT.UNIFORM SALES ACT, 396 *et seq.*: *see* SALE OF GOODS.UNIFORM WAREHOUSE RECEIPTS ACT, 552 *et seq.*: *see* WAREHOUSE RECEIPT.

USURY, 103.

V

VALUATION, SALE AT, 358.

W

WAGERING CONTRACTS, 101, 102.

WAIVER:

- of lien by factor, 465.
- by unpaid seller, 384.
- of notice of dishonor, 195.
- of right of stoppage in transit, 386.

WAREHOUSE RECEIPT:

generally, 502, 503.

Uniform Warehouse Receipts Act:

- altered receipts, 554.
- cancellation of, on delivery, 554.
- definitions, 561.
- duplicates to be so marked, 553.
- delivery of goods, 553, 554.
- duplicate receipts, 554.
- duty to keep goods separate, 555, 556.
- estoppel, by 555.
- execution against the goods, 556.
- form of, 552, 553.
- in what States adopted, 503, 552.
- interpleader by adverse claimants, 555.
- indorser not a guarantor, 559.
- interpretation, 561.
- lost or destroyed receipts, 554.
- liability for non-existence or misdescription of goods, 555.
- lien of warehouseman, 556—558.
- misdelivery, 554.
- negotiation and transfer, 558—560.
- negotiable receipt, definition, 553.
- non-negotiable receipt, definition, 552.
- obligation and rights of warehouseman on, 553—558.
- offenses, 560, 561.
- vendor's lien defeated by negotiation of, 560.
- warranties on sale of, 559.
- who may issue, 552.
- Washington, 561—563.

WAREHOUSEMAN: *see* WAREHOUSE RECEIPT.

- duties, 502.
- in general, 502.
- liability for loss or damage, 502, 555.
- lien, 503, 556—558.
- nature of warehouse receipt, 502, 503.
- satisfaction of lien by sale, 557, 558.

WARRANTY:

- by factor, 456.
- California Civil Code (sale of goods), 415, 416.
- express, on sale of goods, 372—374.
- implied, of title and quality, on sale, 374—376.
- Louisiana Civil Code, against eviction, 425—427.
- against vices, 427, 428.
- marine insurance: *see* MARINE INSURANCE.
- of authority by agent, 465.
- remedy of buyer for breach of, 391, 392.
- sale of goods, 371—377.
- by sample, 376, 377.
- of bill of lading, 535.
- of warehouse receipt, 559.

Uniform Sales Act, 399, 400.

WASHINGTON (STATUTES):

- bills of lading, 546, 547.
- carriers, 546—551.
- conditional sales, 443, 444.
- cruelty to animals in transit, 551.
- delivery of freight, 548.
- demurrage, 548—551.
- discrimination by railroad companies, 550.

WASHINGTON (STATUTES)—*continued*.

- duties and liabilities of transportation companies, 547, 548.
- duplicate bills of lading &c, 563.
- notice of arrival of shipment to consignee, 548.
- railroad commission, 551.
- refusal of consignee to accept freight, 550.
- storage charges, 549.
- warehouse receipts, 561—563.

WAY BILL: *see* BILL OF LADING.**WISCONSIN (STATUTES):**

- conditional sales, 445.
- consignees, factors &c, 477.

WINDING-UP:

- partnerships, 624—629: *see* PARTNERSHIP.

WRIT OF ERROR, 62, 63.

PRINTED BY SPAMERSCHE BUCHDRUCKEREI, LEIPZIG

THE COMMERCIAL LAWS OF THE WORLD

In their original languages, accompanied by an English translation.

In 35 large volumes, handsomely bound in leather.

Price for the set £1.15s, net a volume. Separate volumes £2.2s, net each.

THE ceaseless expansion of the world's trade has made it a necessity for merchants and lawyers to study the commercial, exchange, bankruptcy and maritime laws of the countries with which they, or their clients have dealings. The man of business who has to deal with foreign countries soon finds himself in difficulties unless he is "au courant" with the laws of such countries. The lawyer who advises, the judge who gives decisions, are often at a loss when they come into contact with the laws of other countries. Consequently the time has come when it is necessary to collect the Commercial Laws of the World in an accessible form, to interpret them, and to place them in a reliable and exhaustive work ready to hand. Lawyers, commercial men, export merchants and trading corporations will find in this work convenient and trustworthy information as to the legal obligations arising from operations abroad. In commercial life it will remove that feeling of uncertainty in regard to points of law which has often checked the prosperous development of important international trade relations. From its pages lawyers will be in a position to obtain exhaustive information on points of law on behalf of their clients engaged in commerce with foreign countries. Governments, Consulates and Judges may feel confident of being in a position to refer in this work to a consensus of authoritative opinion on commercial law. In recognition of its significance for the trade and commerce of the world, governments of all nations have placed official material at its disposal.

**THE WORK DOES NOT PRESENT A MERE REPRINT OF
THE CODES OR STATUTES, BUT IN ITS NOTES AND
COMMENTARIES SUMMARISES EVERYTHING NECES-
SARY TO A THOROUGH GRASP OF THE PRINCIPLES
OF COMMERCIAL LAW.**

THE COMMERCIAL LAWS OF THE WORLD

The following list of volumes will show how the laws of the different nations are distributed throughout the work:

SOUTH AMERICA.

Volume

1. Argentine Republic and Uruguay
2. Colombia
3. Venezuela, Ecuador
4. Brazil
5. Peru, Bolivia
6. Chile, Paraguay

NORTH AND CENTRAL AMERICA.

Volume

- 7 and 8. United States of America
9. Mexico, Guatemala, Cuba
10. San Salvador, Dominica, Nicaragua
11. Costa Rica, Honduras, Haiti, Panama.

AFRICA AND ASIA.

Volume

12. Egypt, Morocco, Liberia, Persia, China, Japan, Siam.

NORTH AND NORTH-WEST EUROPE.

Volume

- 13 and 14. Great Britain and Ireland
15. British Dominions and Protectorates in Europe and Africa
16. " " " " in Asia
17. " " " " in America
18. " " " " in Australasia
19. Sweden, Norway
20. Denmark, Scandinavia.

See below for details of these volumes.

CENTRAL EUROPE.

Volume

21. France, Monaco
22. Belgium, Luxemburg.
23. Netherlands and Dutch East Indies
- 24, 25 and 26. German Empire
- 27 and 28. Austria, Hungary, Bosnia, Herzegovina, Croatia and Slavonia
29. Switzerland.

EAST EUROPE.

Volume

30. Russia, Poland
31. Finland, Servia, Montenegro.

SOUTH EUROPE.

Volume

32. Spain
33. Portugal, Greece
34. Bulgaria, Turkey
35. Rumania, Italy, San Marino.

WHAT THE WORK CONTAINS.

The volumes cover the whole ground of Commercial Law, including, inter alia,

Contracts	Sale of Goods	Demurrage
Trade Usages and Customs	Banking	Average
Agency	Stock Exchanges	Lien
Companies	Guarantees	Salvage
Partnerships	Maritime Law, including	Towage
Bills of Exchange	Affreightment	Collision
Promissory Notes	Bills of Lading	Marine Insurance
Cheques	Charter-Parties	Carriage by Land
Negotiable Instruments.	Bottomry	Bankruptcy and Insolvency.

CLASSIFICATION OF THE MATERIALS.

a) THE HISTORICAL DEVELOPMENT OF THE COMMERCIAL LAWS OF ALL COUNTRIES.

A treatise on the historic development and scope of commercial legislation, together with, where requisite, an account of the economic progress of the country in question.

b) THE EXISTING LITERATURE OF THE COMMERCIAL, EXCHANGE, BANKRUPTCY AND MARITIME LAWS OF ALL COUNTRIES.

c) CONSTITUTION OF THE COURTS AND LEGAL PRACTICE.
d) LEGISLATION, CASE LAW AND TRADE USAGES AND CUSTOMS,
including the Legal Provisions concerning the following:

Commercial Dealings in General: Trading Associations (Joint Stock Companies and Partnerships)—
Brokers—Commission Agencies.

Sale of Goods—Exchanges.

Bills of Exchange: (Forms of Bills of Exchange, Duties of Drawers, Indorsement, Presentation, Acceptance, Maturity, Payment, Surety, Protest, &c.). Cheques: Promissory Notes.

Bankruptcy Proceedings: (Liquidation and Compulsory Bankruptcy), Liens, Rights of Married Persons.

Maritime Law: (Ocean Trade, Maritime Enactments, Marine Insurance; Navigation and Friendly Treaties concluded between different States).

Carriage by Land.

DISTRIBUTION OF THE COUNTRIES IN THE BRITISH EMPIRE.

Volume 15. Part I. EUROPE:

Isle of Man, Channel Islands, Gibraltar, Malta, Cyprus.

Part II. AFRICA:

South Africa, Rhodesia, Sierra Leone, Gold Coast, Somaliland, Anglo-Egyptian Sudan, British Central Africa, British East Africa, Northern Nigeria, Southern Nigeria, Zanzibar, Uganda, Mauritius (incl. Rodriguez), Seychelles (incl. Amirantes), St. Helena, Ascension.

Volume 16. ASIA:

Empire of India, Ceylon, Hongkong, Weihaiwei, Johore, North Borneo, Sarawak, Brunei, Straits Settlements including Penang (Prince of Wales Island), Wellesley, Malacca, Singapore, Cocos Islands, Christmas Island, Labuan, Laccadives, Andaman Islands, Nicobar Islands, Federated Malay States, including Perak, Selangor, Negri Sembilan (including Sungei Ujong), Pahang, Kedah, Kelantan, Trengganu.

Volume 17. AMERICA:

Canada, Newfoundland, West Indies, British Honduras, British Guiana, Falkland Islands.

Volume 18. AUSTRALIA AND PACIFIC ISLANDS:

Australia, New Zealand, Fiji, Western Pacific (including Tonga, Ellice, Gilbert, Ocean, Southern Solomon, Santa Cruz, New Hebrides, Union Islands, Pitcairn Island; Miscellaneous Islands: Humphrey, Bahrein, Rierson, Christmas (No. 2), Penrhyn, Suwarrow, Phenix, Jarvis, Fanning, &c.).

NAMES OF CONTRIBUTORS TO VOLUMES 13 AND 14

GREAT BRITAIN AND IRELAND.

Sir Frederick Pollock, Bart., D.C.L., LL.D., of Lincoln's Inn, late Corpus Professor of Jurisprudence in the University of Oxford. (Introduction.)

Thomas Baty, D.C.L., LL.D., of the Inner Temple. (Constitution of the Courts and Procedure.)

Evans Austin, LL.D., M.A., of the Middle Temple; also of the Irish Bar. (Commercial Laws of Ireland.)

J. W. Brodie-Innes, B.A., LL.M., of Lincoln's Inn; also of the Scots Bar. (Commercial Laws of Scotland.)

Aubrey J. Spencer, M.A., of Lincoln's Inn. (Partnership.)

Wyndham A. Bewes, LL.B., of Lincoln's Inn. (Banking, Stock Exchange and Guaranties.)

H. W. Disney, B.A., of Lincoln's Inn. (Carriage by Land.)

J. Gerald Pease, B.A., of the Inner Temple. (Contracts.)

F. G. Underhay, of the Inner Temple. (Trade Marks and Trade Names.)

Arthur B. Langridge, B.A., of the Middle Temple. (Maritime Law.)

N. W. Sibley, B.A., LL.M., of Lincoln's Inn. (Bankruptcy and Insolvency.)

The General Editor. (Agency.)

Walter J. B. Byles, of the Inner Temple. (Bills, Notes, Cheques, and other Negotiable Instruments.)

F. D. Mackinnon, M.A., of the Inner Temple. (Marine Insurance.)

J. Bromley Eames, B.C.L., of the Middle Temple. (Sale of Goods.)

A. F. Topham, LL.M., of Lincoln's Inn. (Companies.)

Barristers-at-Law.

C. E. A. Bedwell, Librarian to the Honourable Society of the Middle Temple. (Bibliography.)

TRADE MARKS.

A Companion volume, dealing with the Laws of all civilised countries relating to Trade Marks, is in preparation, and will appear immediately after the final volume of the Commercial Laws of the World. The price will probably be less than £2 2s.

THE AUTHORS AND EDITORS.

As will be seen from the following list, the work has been compiled by some of the most eminent jurists of the countries concerned, and its accuracy may be relied upon. The work has been greatly promoted by the active assistance given by many foreign governments which have thus recognized the important service it renders to the world's trade.

CONSULTING EDITOR: **The Hon. Sir THOMAS EDWARD SCRUTTON**, Judge of the King's Bench Division of the High Court of Justice.

GENERAL EDITOR: **WILLIAM BOWSTEAD**
Of the Middle Temple, Barrister-at-Law.

AMERICA, UNITED STATES OF. **Charles Henry Huberich**, J. U. D. (Heidelberg), D. C. L. (Yale), LL. D. (Melbourne), Counsellor at Law, Berlin and Paris, Professor of Law in the Law School of the Leland Stanford Junior University; **Frank E. Chipman**, Attorney at Law, Boston; **Joseph Richardson Baker**, A. B., of the Solicitor's Office of the Department of State, Washington. **H. W. Ballantine**, of the San Francisco Bar, Professor of Law in the University of Montana; **Robert Thomas Devlin**, United States Attorney, Northern District of California; **Charles Andrews Huston**, Professor of Law, Stanford University, California; **Donald J. Kiser**, Counsellor at Law, Chicago; **James B. Lichtenberger**, Fellow-in-Law, University of Pennsylvania; Philadelphia; **J. W. Magrath**, Counsellor at Law, New York; **William Underhill Moore**, A. M., LL. B., Professor of Law in the University of Wisconsin (Madison); **Orrin Kip McMurray**, Professor of Law, University of California, Berkeley; **W. R. Vance**, Professor of Law, Yale University, New Haven.

ARGENTINE REPUBLIC. Professor **Dr. Ernesto Quesada**, Buenos-Aires.

AUSTRIA. **Dr. Gertscher**, President of the High Court, Trieste.

BELGIUM. **Léon Hennebicq**, Avocat à la Cour d'Appel, Brussels.

BOLIVIA. **Artur Fernandez Pradel**, Advocate La Paz.
BOSNIA-HERZEGOVINA. **Dr. Gertscher**, President of the High Court, Trieste.

BRAZIL. **Dr. Rodrigo Octavio Langgaard de Menezes**, Advocate, Rio de Janeiro.

BULGARIA. **Dr. M. St. Schischmanow**, first Secretary of Legation to the Agence Diplomatique de Bulgarie; **Dr. Subow**, State Counsellor, High Court of Appeal, Sofia.

CHILE. **Fernandez Pradel**, **Dr. Julio Philippi**, Advocates, Santiago.

CHINA. **Dr. Chung-Hui-Wang**, Shanghai; **Prof. Dr. Forke**, Berlin.

COLOMBIA. **Antonio José Uribe**, Advocate, Bogotá.
COSTA RICA. **Dr. Ramon Zelaya**, Advocate, San José de Costa Rica.

CROATIA AND SLAVONIA. **Prof. Dr. Cupovic**, Prof. Vrbanic, Agram.

CUBA. Professor **Dr. del Cueto**, Dean of the Legal Faculty, Havana.

DENMARK. **Dr. Tybjerg**, Counsellor and Assessor of the Criminal Court, Copenhagen.

DOMINICA. **Dr. R. Kuck**, Advocate, Secretary of Legation, Hamburg.

DUTCH INDIES. **Dr. F. C. Hekmeyer**, Judge-President, s'Gravenhage.

ECUADOR. **Francisco José Urrutia**, Advocate, Quito.

EGYPT. **Dr. Friedrich v. Dumreicher**, Advocate of the Mixed Court of Appeal and Legal Adviser to the Austro-Hungarian Consulate, Cairo.

FINLAND. **Hermann Kilbanski**, Advocate, Berlin.

FRANCE. **Dr. G. Horn**, Avocat à la Cour, Paris.

GERMAN EMPIRE, THE. **Karl Lehmann**, Professor of Jurisprudence, Goettingen.

GREAT BRITAIN AND IRELAND. See List above.

BRITISH DOMINIONS AND PROTECTORATES. **Joseph Baptista**, Barrister-at-Law, Professor of Jurisprudence in the Local Government Law School, Bombay; **Charles Henry Huberich**, J. U. D. (Heidelberg), D. C. L. (Yale), LL. D. (Melbourne), Counsellor at Law, Berlin and Paris, Professor of Law in the Law School of the Leland Stanford Junior University (California); **R. W. Lee**, Professor of Roman-Dutch Law, London; **M. A. Refalo**, LL. D., Assistant Crown Advocate, Professor of Commer-

cial Law, University of Malta, Valletta; **W. P. B. Shephard**, Barrister-at-Law, London; **W. H. Stuart**, Barrister-at-Law, Cape Colony.

GREECE. **Dr. von Streitt**, Advocate, Athens; **Dr. G. Diobounotis**, Advocate, Athens.

GUATEMALA. **José Aspuru**, Advocate and Notary, Guatemala.

HAITI. **Alexandre Poujol**, Judge of the Civil Tribunal, Haiti.

HONDURAS. **Pedro F. Bustillo**, Advoc. Tegucigalpa.

HUNGARY. **Prof. Dr. Béla-Levy**, Advoc., Budapest.

ITALY. **Dr. Alavo Angelo Saffa**, Professor Parma University; **Count Sommati de Mombello**, Dr. jur., Berlin.

JAPAN. **Dr. Lönholm**, Prof. at the University of Tokio.

LIBERIA. **Prof. F. Mc. Cants Stewart**, Monrovia.

LUXEMBURG. **Emile Reuter**, Advocate, Luxemburg.

MEXICO. **Sanchez P. Suarez**, Advocate, Mexico.

MONACO. **Baron de Rolland**, President of the Supreme Court.

MONTENEGRO. **Mitar Djurovitch**, Advoc., Cetinje.

MOROCCO. **Dr. Steinführer**, Dragoman, Tangiers.

NETHERLANDS, THE. **M. van Regteren Altena**, Advocate, Member of the Association for Trade and Commerce, Amsterdam.

NICARAGUA. **Dr. jur. Ramon Zelaya**, Advocate and Consul-General of Costa Rica, Genoa.

NORWAY. **E. Hambro**, K. C., Christiania.

PANAMA. **Heinrich Huss**, Bogota.

PARAGUAY. **A. Schuler**, Advocate, Asuncion.

PERSIA. **James Greenfield**, Dr. rer. pol., Tabriz.

PERU. **Miguel de la Lama**, Judge of the Supreme Military Court, Lima (Peru).

POLAND. **Heinrich Kilbanski**, Advocate, Berlin.

PORTUGAL. **Ed. Alves de Sá**, Advocate, Lisbon.

RUMANIA. **Dr. Flaislen**, Judge of the Court of Appeal, Bucharest.

RUSSIA. **Dr. Zavadskij**, Lecturer at Kasan; **Dr. Pergament**, Advocate, President of the Chamber of Advocates, Odessa; **Mr. Kilbanski**, Advocate, Berlin.

SAN MARINO. Professor **Giannini**, Rome.

SAN SALVADOR. Professor **Dr. Reyes Arrieta Rossi**, Advocate, San Salvador.

SCANDINAVIA. **Dr. Tybjerg**, of the Criminal Court, Copenhagen; **E. Hambro**, K. C., Christiania; **Dr. A. Aström**, Lund.

SERVIA. **Andreas Georgewitsch**, K. C., formerly Professor of Jurisprudence, Belgrade; **Dr. Stanoje Michajlovitsch**, Attaché to the Serbian Embassy, Berlin.

SIAM. **L'Evesque**, Secretary of the Codification Committee of the Ministry of Justice, Bangkok.

SPAIN. **Dr. Lorenzo Benito**, Barcelona.

SWEDEN. **Adolph Aström**, Dr. jur., Lund.

SWITZERLAND. **Dr. Ludwig Rudolf von Salis**, Hon. Prof. at Zurich University; **Dr. Mamelock**, Advocate, Zurich.

TURKEY. **M. Padel**, Consul of the German Empire in Beirut.

URUGUAY. **Dr. Daniel Garcia Acevedo**, Montevideo.

VENEZUELA. **Dr. Angel Cesar Rivas**, Advocate Caracas.

TRANSLATORS:

W. R. Bisschop, LL. D., Barrister-at-Law.
Dr. Ernő Pickler, Advocate of Budapest.
Philip A. Ashworth, LL. D., Barrister-at-Law.
F. J. Collinson, Barrister-at-Law.
Wyndham A. Bewes, LL. B., Barrister-at-Law.
Edw. S. Cox-Sinclair, Barrister-at-Law.
N. W. Sibley, B.A., LL. M., Barrister-at-Law.
Thomas Hynes, LL. B., Barrister-at-Law.
Montague R. Emanuel, M.A., B.C.L., Barrister-at-Law.
G. Stuart Robertson, M.A., Barrister-at-Law.
J. W. Scobell Armstrong, Barrister-at-Law.
W. Butler Lloyd M. A., Barrister-at-Law.
Horace B. Samuel, M.A., Barrister-at-Law.
John Norris Marsden, English Solicitor, Lisbon.
Sidney Leader, English Solicitor, London and Berlin.

Sweet & Maxwell, Ltd., London, 3, Chancery Lane

